

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

Melbourne — 4 August 2009

Members

Mr C. Brooks	Mr E. O'Donohue
Mr C. Carli	Mrs I. Peulich
Mr K. Eideh	Ms J. Pulford
Mr K. Jasper	Mr R. Smith
Mr T. Languiller	

Chair: Mr C. Carli  
Deputy Chair: Mr K. Jasper

Staff

Executive Officer: Mr A. Homer  
Business Support Officer: Mr S. Dinsbergs

Witnesses

Ms D. Saunders, director, and  
Mr J. Gardiner, chair, charter of human rights committee, Law Institute of Victoria.

**The CHAIR** — The next witnesses are Dominique Saunders and Jamie Gardiner from the Law Institute of Victoria. Thank you for attending the 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 in the Equal Opportunity Act 1995. 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 this room is not so protected. I invite you now to make a brief statement to the committee on the relevant issues that you consider important to your organisation concerning the inquiry. After that we will ask a series of questions.

**Ms SAUNDERS** — Good morning, and thank you very much. I thank the committee for the opportunity to speak to our submission. As no doubt you know, the LIV is Victoria's peak body for lawyers. We represent 15 000 members. Our submission to the committee draws on the points raised in our submission to the Department of Justice earlier, many of which we gratefully acknowledge have been incorporated into the options paper of this committee.

I will speak to a few points rather than reading a lengthy statement. Essentially it is our view that equality before the law is paramount, and this is reflected in state, national and international law. In our view there is great benefit in a cohesive legal framework. This supports the intention of Parliament and is reflected in the broad legislative framework. I will be speaking to the charter. The task before the legislature is one of balancing competing rights and interests, so we are seeking to find the balance in the protection of rights and not the incursion of rights that might be on the other side. The balancing test is correctly contained in section 7 of the charter. It is our view that section 7 should be the mechanism by which other legislative frameworks — other pieces of legislation — should in fact balance those rights.

Further, I would say that the prohibition against discrimination which is protected in the charter should only be subject to reasonable limits as can be demonstratively justified, as the committee will be aware. The view of the LIV is that the task is to seek that balance. The comments I make today, and obviously I think they are reflected in the submission, will assist the committee to understand our views about how that balance should be sought.

We recommend that there should be a repeal of several of the exemptions and amendments to some of their exceptions in the current Equal Opportunity Act when we are moving to a new equality framework for Victoria. We also recommend amendments to the section 83 exemptions process at VCAT. The committee will be aware that the Victorian Equal Opportunity and Human Rights Commission has new responsibilities in association with the charter, and in a new equality law framework those responsibilities can be added to.

I will quickly run through the sorts of exemptions we are keen to speak to. They are section 21 in relation to small business; section 27B in relation to employers' ability to discriminate; sections 75 and 76 in relation to religious bodies of schools; section 82 in relation to welfare measures and special needs; sport in relation to section 66, and indeed to private clubs.

In relation to the small business, perhaps briefly — —

**Mrs PEULICH** — Sorry. What was the one in relation to private clubs?

**Ms SAUNDERS** — Small business? I am going back to my first in the list.

**The CHAIR** — Section 78 is the private clubs.

**Ms SAUNDERS** — I am sorry, I missed your question as well; I apologise. There are particulars in relation to how the exemptions are currently described, and small business is one of those. If we took away the issue in relation to numbers of employees and looked at hardship and wove that through new equality legislation, it would be consistent. It would develop the jurisprudence in relation to how issues around hardship might be interpreted. Also, I noticed the earlier discussion with the committee in relation to guidelines. I think the jurisprudence and the interpretation by VCAT of law has really brought us very many areas of law, and antidiscrimination is one of those. That leads to certainty for the community.

In relation to the religious bodies and schools, it is our submission that there is a fundamental right to freedom of religious belief and expression of that belief, and I think that needs to be protected. But rather than the blanket protection that we now have, the limitation needs to be reasonable and justified and for the purpose — so if it is around the doctrines or the sensitivities of the religion, then it is our view that that is appropriate. But

what does need to be further looked at is the extension where it now applies beyond that. In relation to the options that the committee has raised in the options paper, the LIV supports the exemption where it is reasonably necessary to conform with religious doctrines, and in the context of employment where it is about the activities of the employer in relation to those doctrines. We say that the blanket exemption beyond that does require some further consideration. In looking at that, one of the things that we have considered is what we know in the law about a sole or dominant purpose test. If the employee is engaged for the teaching of the religion, then the exemption should apply. But if it is outside that — the one that has been used is the maths teacher — then perhaps that could be considered in quite a different way.

Adding to those comments, that analysis needs to be considered in relation to the charter — so is it a reasonable limitation; is it justified in a free and democratic society? I guess the other question in my mind is about how purposeful is the limitation in relation to the religious doctrines or sensitivities.

Before I stop I would just like to briefly mention the welfare measures and special needs. This again is a blanket exemption. I have personal experience through family of a person accessing disability services and also legal experience in working in law reform in the disability sector. The way the measure is worded and interpreted now it is a blanket measure, so people who are accessing disability services — using my example — are unable to complain about discrimination in relation to the delivery of that service because there is an exemption that is so wide around the provision of that service. Our submission speaks about that quite extensively, as do other submissions that I know the committee has received.

If you do not mind, I will invite Jamie to perhaps add something in a preliminary way.

**Mr GARDINER** — Members of the committee, I do thank you for the opportunity to speak to you today. Dominique has covered the various major points that we wanted to mention in addition to the things you have already read in our submission. Our submission includes, as a portion of it, our 2008 submission to the department's inquiry, so it is all there.

I think the most important thing to emphasise yet again is that the Law Institute of Victoria does not believe there should be any blanket exemptions. Blanket exemptions are inherently unjustifiable restrictions on the right to equality, and therefore blanket exemptions simply cannot pass the section 7 charter test — the charter compatibility. That is not to say there are not plenty of exceptions within the Equal Opportunity Act — I am getting myself muddled with too many negatives. Plenty of the exceptions within the Equal Opportunity Act do have the ability to be tested under the charter and can be interpreted as charter compliant. That is to say that when anyone is assessing the meaning of a particular exception they have to read that statute consistently with the charter, and most of them can be, although often it is not obvious. Many submissions, and our submission, say they should be adjusted so that the charter compliance is clear and no-one has to steer a club path saying, 'This exception is charter compliant at this end of it and not at this end'. It should be made clear.

But blanket exemptions, such as the section 69 exemption — the religious exceptions that have been talked about at great length, as have the section 82 special needs exemptions — are blanket exemptions. They take the limitation on the right to equality out of the debate and do not expose it to a section 7 charter analysis, and therefore they are inconsistent. So the law institute's position is very clear: blanket exemptions are not charter compliant and ought not to be there.

In terms of a couple of ones that we were going to mention specifically, I think Dominique has already mentioned the small business exemption, and we take the same view that the Victorian Equal Opportunity and Human Rights Commission took when Michael Gorton pointed out the historical analysis of how it got there — it is yet another blanket exemption.

The one that has also been mentioned already today that the law institute highlighted in its submission is the section 27B exception in relation to gender identity, and the law institute submission quite clearly expresses the very particular historical origin of that section. To the best of our knowledge it has never been used except perhaps in forming a guideline for employers on the necessity of educating their workforces, but that is reading it backwards. The question is: why on earth should people who are transsexual be discriminated against in that particular way? And there is no justifiable reason. It clearly would not pass the section 7 charter test and so we say that that should go.

I would just like to add — and it is not expressly raised in our submission but since everyone else has talked about it I think we should too — the role of sections 75, 76 and 77. Along with many other submissions, the law institute submits that section 77 — the general exemption for anything granted to anyone's subjective religious beliefs — should go. It is clearly not charter compliant because it is a blanket exemption, and to the extent that there are legitimate reasons why an individual should wish to discriminate on the basis of a religious belief or related things in their home, for example, there are other exceptions which would survive one way or the other because they provide for competing human rights, not only religious but also the right to home and family, for example, which already cover the things that one can conceive of under section 77. But as a blanket exemption it is wrong anyway, and even if it were subject to assessment, it simply would not pass muster, so section 77 should go.

In terms of sections 75 and 76, as you will see in our submission, we essentially support options 2 and 3 in the options paper and, having listened to some of the other submissions before you this morning, it is important to realise that those exemptions as they currently stand do not only apply to employment, they apply to anything, including, for example, denial of safe environment to schoolchildren on the basis of religious belief.

I have been invited in the past, wearing other hats, to talk to conferences of teachers, including Catholic teachers, about bullying in schools, and one of the examples I have used is homophobic bullying, which is clearly an expression of some religious beliefs — although obviously not all — and that denying a child an equal, safe, fair education is clearly a bad thing.

I was talking about the problem of circumscribing children's' education — maybe they are gay, maybe they do not yet know they are gay; maybe their mother or their father is gay — but giving them an education which amounts to an atmosphere of bullying is clearly a bad thing. To the extent that it is founded on a religious belief, which it might be, it is currently permitted under the law. At one such talk one of the Catholic teachers asked me, 'Does the religious exemption not prevent us doing anything about it?'. And I said that even there I do not know of any religious belief that authorises the bullying of children, and there was a chorus of nods and agreement.

We need to recognise that the role of blanket exemptions leads to counterintuitive examples and is again something that should not happen; so we come back to the view on this, as on every other, that exemptions should be subject to the charter tests of reasonableness, proportionality, connection with purpose and legitimate means.

**The CHAIR** — Thank you. First of all, section 78 concerning private clubs, I have a bit of a problem with this one: if a bunch of toffs who want to smoke and tell bad jokes want to create a private club, how do you apply a charter test or an exemptions test of any sort to that? I am just wondering, if we got rid of the exemption for private clubs, what criteria would we have in place for groups that are clearly not disadvantaged, particularly male-only clubs that want to do certain things? On what basis do they then try to seek an exemption?

**Mr GARDINER** — In a way that is up to them, and the problem is in the definition. The way that private clubs are exempted is in a way partly by not being defined as clubs for the purposes of the act, so it is a complicated bit. But as associations there are competitions between rights. The freedom of association, as I think Mrs Peulich mentioned, is an important human right and is protected in the charter. Obviously equality is an important human right; in fact it is one of the higher because it is mentioned at the beginning of every human rights instrument at the international level as an important human right.

And questions arise as to size. The current act regulates only clubs that have specific assistance from government at any level. It has always struck me as odd that the enormous assistance provided by a liquor licence has never been enough to bring the clubs within the purview of the act, but the question is there may be a justification that at the moment is not able to be tested. It may be that clubs for some groups amount to special measures, it could be argued, that is to say, for the relief of disadvantage.

If we look over my shoulder, not very far, as you all know there are two clubs across that little lane. In one, only men can be members; in the other, only women can be members: the Melbourne and Lyceum clubs. It may well be that they could mount an argument. I think it would probably be more easy for the Lyceum Club to mount an argument that historic discrimination against women might justify membership of a woman's only club. I am not entirely sure that I can see how the Melbourne Club can mount such an argument, but there are lots of clever

lawyers in that club and I am sure they could think it through and there may even be reasons. It is not as though it excludes women from its premises. I can assure you I dined there with my mother and women are not excluded. In fact, I dined at the Lyceum Club with my late mother too, so men are not excluded from there.

But as to membership, these things should be subject to a charter analysis. If a club is big enough to merit notice, especially, of course, like any other organisation, if it receives public funds or public advantages like licences, and it wants to discriminate on any particular attribute, it should have to justify it in the way that section 7 of the charter sets out; a justification which probably should be more precisely defined in the Equal Opportunity Act to increase the guidance. The charter is properly a very broad framework. The Equal Opportunity Act, pertaining to the commission as Michael Gorton pointed out, could and should be more precise about the criteria for exemption applications, but that is how they can go. If they can make the argument, fine; if they cannot, they cannot.

**The CHAIR** — The other question I ask is about freedom of religious beliefs. The argument was put that exemptions should not be blanket, they should be reasonable and justified. Reasonable and justified, but who makes the assessment — VCAT or the Victorian Equal Opportunity and Human Rights Commission? Who makes that determination?

**Ms SAUNDERS** — We were discussing that earlier in relation to variations and organisations, and I am not speaking only about religious bodies or schools. It is about them being purposeful, so it is about being open and accountable. There might be a statement that is lodged with the human rights and equal opportunity commission, then it has some review rights. There would be a system where that would be lodged with the human rights and equal opportunity commission, be on the website, be reviewable, probably at VCAT in relation to whether the limitation is justifiable and whether it is proportionate in relation to affecting the purposes.

A previous speaker did talk about religious schools being on a continuum, and there are some for whom that item would impose greater restrictions and limitations — greater protection — for an exemption and others that are closer to the secular end. That is the context for the Victorian community. If the law can actually address that those various needs, then I think that the legislature is moving correctly forward.

**Mr GARDINER** — Can I add to that? The decider on the framework set out in the act and the charter will ultimately be VCAT, but of course the law institute does not believe in sending people off to tribunals and courts at every opportunity and it is much better if there are processes well before a tribunal. The tribunal is the ultimate decider — or I suppose the Supreme Court is the ultimate decider — but things like guidelines and clear notice of what the organisation's policies and principles are enable matters to be sorted out well before the expense and stress of a tribunal appearance.

The charter sets out a broad framework, the legislation should set out within that framework a more precisely specified framework and that is the framework that everyone should be tested on. In many cases there will be no issue, but in some there will and the tribunal will decide that.

**Mrs PEULICH** — A couple of clarifications: you obviously believe that that needs to be changed — the Equal Opportunity Act?

**Mr GARDINER** — Yes.

**Mrs PEULICH** — Is it your view that the charter is a perfect document? Is it a signatory to all of the major covenants?

**Mr GARDINER** — Perfection is seldom attained, not even in the Victorian Parliament. The charter contains within itself a requirement for a four-year and an eight-year review precisely to assess whether the Victorian public think it can be improved. The first review contains express guidance as to what the public might wish to be considering for further development of the charter.

The law institute was very strongly in favour of that review provision. The law institute in its submissions to the consultation process argued that the matters referred to in the four-year review should have been part of the charter to start with. The law institute will no doubt continue to argue that in its submissions to the four-year review of the charter — having reminded myself — and section 44 sets that out. That first review should look at

whether additional human rights should be included, including economic, social and cultural rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, the right to self-determination and other matters. The law institute is certainly in favour of that review, and we will be putting in submissions consistent with its existing position in favour of those extensions.

The charter could be more expensive but the charter is a very fine and valuable start to a long project of creating a human rights culture in Victoria, which the law institute was very keen to support the consultation on and to see in operation.

**Mrs PEULICH** — There is, if I may, a strong view that the charter is an imperfect document because it relegates the interests of children, because of the exclusion of the second covenant to which you referred. Do you believe that that review should, first of all, be undertaken and concluded, and that perhaps changes to the charter of human rights would be helpful before considering how it aligns with, for example, the Equal Opportunity Act?

**Mr GARDINER** — I suppose those are questions ultimately for the Parliament in terms of what legislation it enacts and how it interacts with them, obviously presenting those as questions to the government in the sequence of process. We, the law institute, understand the enormous complexity of some of these issues. Having set up a process for reviewing the charter, it would be quite surprising if government and Parliament were to think it appropriate to change the charter in any significant way without that review before then.

It is inevitable that enacting changes to any act, including the Equal Opportunity Act, will mean having to deal with the rest of the legal framework as it is. This review of exceptions and exemptions of course, as you well know, is overlapping with the government's consideration of the report of the Gardner review — no relation — which recommended very substantial changes to the Equal Opportunity Act, ones which the law institute supported and the Equal Opportunity and Human Rights Commission supported. Those changes, I presume, are being considered by government at the moment. I know in its statement of intentions at the beginning of the year the government said it would introduce legislation to implement whatever it decided on that review before the end of this year, which of course is getting closer and closer. So this review that you are doing now may well feed into that — I do not understand entirely how that is going to work. I very much doubt that anyone has the capacity to do a premature review of the charter at the same time. So while perfection is always to be pursued, I fear it is never to be gained.

**Mrs PEULICH** — In relation to your comments about how children may be denied a safe environment by certain religious schools which may tolerate or encourage — I am not sure which you inferred — a culture of bullying, is it your view that schools routinely are in breach of our criminal code by turning a blind eye to bullying?

**Mr GARDINER** — That is not within my direct knowledge.

**Mrs PEULICH** — I was just trying to clarify some comments you had made.

**Mr GARDINER** — The comment particularly arose out of talks I have given to groups of teachers about the role of discrimination as a basis for bullying, and anti-gay discrimination — homophobic discrimination — is a major one. Racist discrimination is another one. Epithets, rumours and the like and bashing on the basis of someone's race or someone sexual orientation imputed — because it is usually not known — at that level of —

But there are a whole range of, you know, attacking sissy boys or butch girls for example; it comes out of a climate of homophobia. Those things certainly do happen. The teachers have talked about them, but that is stepping us further away from the law institute's specific knowledge. But it is certainly within my specific knowledge of those sorts of things. They do derive from cultures of racism and homophobia in particular.

**Mr SMITH** — If the media is to be believed, it seems the Attorney-General has private men's clubs particularly in his sights. I guess if you take the comments made to describe the membership of those clubs from our Chair, there would be an indication of some bias towards them. There are probably a lot more clubs that limit membership according to ethnicity. Do you think those clubs should be under the same level of scrutiny with regards to their membership as private men's clubs and private women's clubs?

**Ms SAUNDERS** — If we separated special welfare measures from special needs, if we actually changed that definition slightly, then it is the law institute's view that yes, they should be. So it is really how, in a similar way, VCAT now looks at exemptions in terms of Muslim women's access to swimming pools and women-only occasions. It is our view that yes, it should have the same scrutiny.

**Mr SMITH** — The same level of scrutiny?

**Ms SAUNDERS** — Yes.

**Mr O'DONOHUE** — I just wanted to pick up your earlier comment about VCAT and the development of jurisprudence. I think you said words to the effect of 'VCAT delivers certainty', which is not an accusation often made about VCAT. Without being critical, VCAT is not a court per se so I suppose therefore VCAT is not bound by the same rules of precedent. One of the things that I think concerns some people and concerns me is the lack of certainty that may come from the changes that are being proposed by yourselves and others. The example you gave of small business was a good one — potentially replacing a number of employees with a hardship test. Do you want to make some comments about that certainty issue?

**Ms SAUNDERS** — Yes. I stand corrected. You are exactly rightly; VCAT is not bound by precedent at all. As a legal adviser working with people who access the jurisdiction a great deal in many of their lists, it does give me a sense of advising clients and people who are trying to access justice, which is about, 'Yes, on these facts this is how the tribunal has dealt with it before. These are the sorts of things the tribunal would want to know'. In the discrimination area, the jurisprudence there is well respected.

Of course you are absolutely right in terms of principles and precedent, but on the principles of the community's access to justice it is very helpful. I know that Justice Bell's decision recently handed down in relation to Mr Kracke in relation to the Mental Health Review Board and the operation of the Mental Health Act is a fantastic opportunity.

People are critical about aesthetics and the committee talked with earlier witnesses about guidelines. It is a work in progress, so that is not really certain at this point, but it is a very valuable tool. So I do think that VCAT's role, as much as it is maligned, is an important mechanism for the community to access justice and for a person in the community to say, 'I've got this problem. It can't be right. I want it sorted'. VCAT has a big role in that regard.

**The CHAIR** — I have to conclude it there. Dominique and Jamie, thanks a lot for contributing to the work of the committee and putting your time and effort into your submission.

**Witnesses withdrew.**