

Ms Lizzie Blandthorn MP
Chair
Scrutiny of Acts and Regulations Committee
Parliament of Victoria
Spring Street
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By email: Nathan.bunt@parliament.vic.gov.au

Dear Ms Blandthorn

Equal Opportunity Amendment (Religious Exceptions) Bill 2016

This Bill limits the current exceptions to prohibited discrimination for religious bodies and schools in sections 82(2) and 83(2) of the Act (“current exceptions”).

Under the current exceptions religious bodies (including charities and educational institutions) and religious schools are not prohibited from doing an act in relation to employment of persons if the act conforms with the doctrines, beliefs or principles of the religion, or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

The current exceptions (in the context of employment decision) appropriately balances the right of persons not to be discriminated against in employment decisions because of protected attributes with the right of religious bodies (including charities) and schools to maintain the integrity of the religious body’s or school’s ability to express and live out the religion’s beliefs, practices and ethos by choosing to employ people whose beliefs, expression and lifestyles conform to and model the doctrines beliefs or principles of the religion.

Summary

The effect of the Bill will be to limit the current exceptions so that they will only apply to an act done in relation to the employment of a person in a position by a religious body or school where conformity with the body or school's religious doctrines, beliefs or principles is "an inherent requirement" of the particular position and the person does not meet that inherent requirement because of the person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

No evidence has been provided that the balance struck in the current exceptions in relation to employment decisions is causing problems or is unreasonable and needs to be changed.

The inherent requirements amendment in the Bill trespasses on several human rights and freedoms, discussed below, only one of which (freedom of religion) is discussed in the Statement of Compatibility. It also requires an arm of the State such as a human rights commission or tribunal or court to make a judgment as to whether conformity with the body or school's religious doctrines, beliefs or principles is "an inherent requirement" of an employment position. Thus an arm of the State will need to determine whether a maths teacher or front office administrator at a Muslim (or Catholic) school needs to be a Muslim (or Catholic) or celibate if not married or faithful if married. Determining how important it is that a person in a particular position conforms to the religious doctrines, beliefs or principles involves judgments as to the culture and mission and self-definition of the religious organisation and its fidelity to its own religious precepts - a task which is not appropriate for secular institutions and for which they are ill-equipped.

In addition, the amendment is discriminatory in effect against religious persons and organisations. The Equal Opportunity Act currently permits a range of organizations like political parties, political clubs, clubs for minority cultures and

religious bodies to discriminate either in employment or membership on the basis of a person's compatibility with the organisation's ethos and values. But this Bill removes that freedom only for religious bodies and hence is discriminatory against religious bodies and schools and members of the religion. The Bill not require an arm of the State to determine whether it is an inherent requirement of employment with the ALP or the Liberal Party or the Greens to agree and act in accordance with party policy before those parties can discriminate in employment on the grounds of political belief or activity.

Relevant Rights Unjustifiably Limited

The Institute for Civil Society considers that the Bill:

- (1) trespasses unduly upon several rights and freedoms including some of Australis's international human rights obligations (whether or not those rights are included in the Charter);¹ and
- (2) contains unjustified limitations on several human rights in the Charter including some not addressed in the Statement of Compatibility.

1. Right of parents to ensure their children have religious and moral education in accordance with their convictions

The International Covenant on Civil and Political Rights article 18(4) obliges Australia to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

ICCPR Article 26 contains a protection against discrimination but that must be read subject to the other rights in the ICCPR including Article 18(4).

¹ Under section 17, *Parliamentary Committees Act 2003* SARC is to report not just on compatibility of the Bill with human rights under the Charter but also on whether the Bill directly or indirectly trespasses unduly upon rights or freedoms.

The UN Declaration on the Elimination of All Forms of Intolerant and of Discrimination Based on Religion or Belief art 5(2) provides that: “Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his or her parents.”

Although the Charter is based on the ICCPR, it did not implement article 18(4) on religious and moral education. Although it is not a Charter right, SARC should consider whether the Bill limits this right which Australia has an international obligation to uphold under the ICCPR and UN Declaration.

The current exceptions protect a religious body or school from being forced to accept the promotion of views and examples of conduct by staff or members or students which are opposed to its religious values and ethos. The effect of the Bill is that religious schools will be forced to employ persons whose beliefs or actions and lifestyles in relevant respects do not conform to the doctrines, beliefs or practices of the religion if the State does not agree that such conformity is an inherent requirement of the position. This will limit the ability of those schools to ensure that staff are ambassadors for and models of the values of the religion. If religious schools are forced to employ staff who contradict the values of the religion by word or example, that will limit the ability of religious schools to provide a religious and moral education in accordance with the convictions of parents who voluntarily choose the value system of that school, contrary to the ICCPR and UN Declaration provisions cited above.

The comments of human rights commissioners suggest religious schools should have little confidence that these arms of the State will give weight to the reality that some religious bodies and schools seek not just to provide instruction in areas of knowledge but to create and maintain a community culture of lived values of the religion, which every member of staff (maths teacher, receptionist and the gardener) is expected to contribute to and live out. Former Victorian Human Rights Commissioner Dr Helen Szoke commented about having to be satisfied concerning the inherent requirements test for religious school positions:

“In the case of religious education teachers or chaplains, this will be clear. However, in the case of office staff or the maths teacher it will need to be made explicit how religion is relevant to the job.”²

Moira Rayner, another former Commissioner, said it was difficult to see the relevance of the beliefs or lifestyles of a cleaner, gardener or clerk in a religious school.³ On this reasoning the only staff in a religious school who clearly have an inherent requirement to agree with and conform to the beliefs and practices of the religion would be the religious studies teacher or chaplain.

But as Harrison and Parkinson have pointed out, religious associations (and schools) call on all their members (and students) to (for example) “be a Catholic” or “be a Muslim” and this goes beyond doctrinal propositions to include a holistic set of behaviours and attitudes for virtuous living including sexual behaviours and attitudes.⁴ In similar vein Patrick Lenta wrote: “moral virtue is not simply taught, but is acquired by pupils through their association with teachers who are themselves virtuous, with the corollary that it is wrong to place pupils with teachers who are not virtuous... teachers teach moral values not didactically, as in the case of arithmetic, but through example”.⁵

2. Freedom of Association and Freedom of Expression through voluntary associations and Cultural Rights

One purpose of the current exceptions is to allow the religious body or school the freedom to express its beliefs and values both in teaching and in living them out in the shared life of its community of members and employees and to maintain the

² Herald Sun 27 September 2009 <http://www.heraldsun.com.au/news/victoria/gay-rights-groups-angry-at-victorian-equal-opportunity-laws-allowing-discrimination/story-e6frf7kx-1225780078806>

³ Eureka Street 13 August 2009.

⁴ See Harrison and Parkinson, “Freedom beyond the Commons: Managing the Tension Between Faith and Equality in A Multicultural Society” (2014) 40 Monash University Law Review 413, 444

⁵ Lenta, “Taking Diversity Seriously: Religious Associations and the Work-Related Discrimination” (2009) 126 South African Law Journal 827, 853.

integrity of its expressed values and ethos. As Parkinson has stated: “modelling [the religion] within a faith community is as important as teaching [the religion] within a classroom or from a pulpit. Indeed it may well be more important and have more impact on people’s lives”.⁶

The current exceptions protect the religious body or school from being forced to accept the promotion of views and examples of conduct by staff or members or students which are opposed to its religious values and ethos. These freedoms are not peculiar to religious bodies. They provide a freedom of internal management and ability to maintain fidelity to the expressed values and mission of the association which our society would value for any voluntary association formed to express and model a set of values whether cultural, ethnic, political or religious. Our society would not expect the ALP or the Liberal Party or the Greens (also voluntary associations) to have to employ and retain persons who consistently spoke or acted against core party policy. So why would a law force a Muslim school to justify to a human rights commission or a tribunal why it should not have to hire a Jewish maths teacher or vice versa?

In the USA, the Supreme Court has held that the First Amendment rights to free speech and assembly (association) and to petition include a constitutional freedom of people to gather in voluntary associations to express ideas – a right of expressive association. This is not based on the freedom of religion clause of the First Amendment but applies to all expressive associations whether or not religious. The Supreme Court has held that the right of expressive association can override non-discrimination laws and government policies if the effect of non-discrimination laws or policies would be to force associations to include persons (as employees or members) and that would interfere with the ability of the association to consistently express its values.⁷

⁶ Parkinson, “Christian Concerns about an Australian Charter of Rights” (2101) 15(2) Australian Journal of Human Rights 83, 97.

⁷ Boy Scouts of America v Dale (2000) 530 US 640, Hurley v Irish-American Gay Lesbian and Bisexual Group (1995) 515 US 557. See also Rumsfeld v FAIR 126 S.Ct 1297.

The ICCPR and the Charter protect freedom of expression (Charter s.15) and of association (Charter s. 16). Charter section 16 (2) provides that every person has the right to freedom of association with others, including the right to form and join trade unions. Implicit in this is the freedom of members of a voluntary association not to be forced to join with or accept as other members or employees of voluntary associations those whose views and practices are antithetical to the values of the voluntary association.

Section 19(1) of the Charter (cultural rights) also contains some elements of this freedom. It provides that “all persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.” Being forced by law to accept within a religious body or school persons who do not accept and practice the religion and who speak and act inconsistently with the religion is a limitation on the right of persons in community with others of the same religious background to declare and practice that religion.

The Bill limits the Charter right to freedom of association and the cultural rights of people with a shared religious background. It also limits the international analogues of these rights under the ICCPR and other instruments.

3. Freedom of Religion and Belief

Religious freedom of individuals and bodies is well established in international human rights law. Some of the relevant provisions appear at the end of this submission.

Charter s.14 provides:

14. Freedom of thought, conscience, religion and belief

(1) Every person has the right to freedom of thought, conscience, religion and belief, including –

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Under the Bill, if an arm of the State decided that it is *not* an inherent requirement that a counsellor or teacher or a youth worker or the pastoral care worker in a religious body or school had to conform to the beliefs and practices of the religion, the freedom of a person to demonstrate his or her religion or belief in worship, observance, practice and teaching, *as part of a community in that body or school* (and even individually in that body or school) is impaired. The culture of the organisation is radically changed from one where the person knew that all employees upheld the person's religion in belief and practice to one where only some do and some can freely oppose it under protection of anti-discrimination law.

4. Discrimination Against Religious Persons and Organisations

The Bill is discriminatory because it is targeted only at religious organisations and individuals.

Section 8 of the Charter provides:

- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

The Charter conceives that only individuals can have human rights so this is a limitation of Charter s.8 for members, staff, parents and students in religious bodies

or schools who would be forced to accept as employees persons whose beliefs and activities are antithetical to the religion.

But in international law, religious bodies and schools also have freedom of religion rights so SARC should consider whether the Bill trespasses on the rights and freedoms of such bodies regardless of the Charter, including under Article 18 of the ICCPR. Carolyn Evans has written:

“While individuals choose to exercise their religion within an organised religious group, the state must respect the autonomy of this group with respect to decisions such as the freedom to choose their religious leader, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications”.⁸

Currently the Act gives similar exceptions to religious bodies and schools⁹, political parties¹⁰, political clubs¹¹ and to clubs which operate principally to preserve a

⁸ Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (2012) p.35. Evans acknowledges that group religion rights like all rights are subject to limitation but such limitations need to be reasonable and justified. See also Nicholas Aroney “Freedom of Religion as an Associational Right” (2014) 33 *University of Queensland Law Journal* 153 at 178ff.

⁹ Sections 82 and 83: The key relevant provisions can be paraphrased as follows: The prohibitions on unlawful discrimination in Part 4 do not apply to anything done by a religious body or an educational institution that is conducted in accordance with religious doctrines, beliefs or principles (in the course of conducting the religious body or educational institution) in respect of a person on the basis of the person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the thing done –

(a) conforms with the doctrines, beliefs or principles of the religion; or
(b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

¹⁰ Section 27: 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 political party, member of the electorate staff of any person or any similar employment.

¹¹ Section 66A: A club, or a member of the committee of management or other governing body of a club, may exclude a person from membership on the basis of political belief or activity if the club was established principally for a political purpose.

minority culture¹² such as clubs for ethnic groups and GLBTI people. All of those groups enjoy statutory exceptions to discriminate either in relation to employment or membership in order to preserve and protect their values, activity and culture – be it religious beliefs and activity, political beliefs and activity or their minority culture. So the Act allows the Greens political party to refuse to employ climate change deniers as policy spokespersons or call centre operators or accountants or in any other position. The Act allows the Sex Party to sack an employee who supports the Right to Life in their own time. There is no inherent requirements test for such political employment discrimination and none is proposed by the government. The Act allows a gay men’s club which operates primarily to preserve gay male culture to refuse to have people other than gay men as a member without requiring any justification to a human rights commissioner, court or tribunal as to why sexual orientation should be a necessary condition of membership. Why are the inherent requirements Bill and the Greens Bill targeted only at the freedoms of religious voluntary associations and leave untouched the freedoms of cultural and political voluntary associations?

The Bill is therefore discriminatory in applying the inherent requirements test only to religious bodies and schools and not to political organisations or clubs or clubs for minority cultures. It is discriminatory in limiting the freedoms of association and expression of those bodies and schools and of members and staff of religious bodies, and of staff and parents and students of religious schools while not affecting those freedoms of members and staff of political organisations and clubs for promoting minority cultures.

¹² Section 66: A club, or a member of the committee of management or other governing body of a club, may exclude from membership a person who is not a member of the group of people with an attribute for whom the club was established if the club operates principally to preserve a minority culture.

Limitations on the Above Rights by the Bill are not Demonstrably Justifiable or Proportionate

Section 7 of the Charter provides that all Charter rights 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.

The current religion exceptions in the Equal Opportunity Act already limit the freedoms of association, expression, religion and cultural rights of religious persons and the right to choose the moral and religious education of a child in order to enhance the right not to be discriminated against in employment.

The Bill adds to the limitation on these rights purportedly to “better balance” the right of non-discrimination in employment with the freedom of belief and conscience. But there is no evidence that there is in fact any significant discrimination in employment under the religion exceptions. Even if there were such evidence, a weighing of the respective harms to the rights involved leads to the conclusion that the current exceptions should not be restricted further. An individual applicant or employee whose beliefs or conduct contradict the doctrines, beliefs or practices of the religion of the religious employer will in almost all cases be able to find alternative employers where there is no such conflict. For example a person whose application for a teaching position in a religious school is refused because the person contradicts the doctrines, beliefs or practices of the religion could move to a large number of independent schools or any government school and find that their religious beliefs or conduct in relation to sexual activity or sexual orientation raised no concerns at all.

But if the inherent requirements test is adopted, the religious body or school cannot go elsewhere. Its ability to maintain its ethos and values for its other members, students and parents in these matters has to be justified to the State and, if denied by the State, once compromised cannot be recovered. For the same reasons if the inherent requirements test is adopted, the current option of individuals to attend or use or send their children to a religious body or school, all of the staff of which express and live out the values of the religion, can be foreclosed by the State.

There is a less restrictive means than the Bill which is reasonably available to achieve the purpose of protecting the right of non-discrimination in employment while upholding the freedoms of expression, association, cultural rights and right to choose the moral and religious education of a child. It is the current exceptions in ss.82 and 83 which should not be amended by adding the inherent requirements test.

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About the Institute for Civil Society

The Institute for Civil Society is a new think tank which

1. Promotes recognition and respect for the institutions of civil society which sit between the individual and the State such as clubs and associations, schools, religious bodies, charities and NGOs.
2. Promotes recognition and protection of traditional rights and freedoms such as freedom of association, freedom of speech and freedom of conscience and a sensible and civil discussion about how to balance competing rights and freedoms.

Some Relevant International Declarations and Conventions on Religious Freedom

Relevant provisions of the applicable international declarations and conventions include the following.

Universal Declaration of Human Rights 1948 (UDHR)

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

International Covenant on Civil and Political Rights (ICCPR)

Article 4 No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The ICCPR was ratified by Australia on 13 August 1980. Australia acceded to the First Optional Protocol to the ICCPR with effect from 25 December 1991.

Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief (Religion Declaration)

Articles 2 & 3

These provisions prohibit any act or practice of intolerance or discrimination on the grounds of religion or belief by any person in any capacity whatsoever.

Articles 4 & 7

These place obligations on States to take positive measures to counter intolerance and discrimination on the ground of religion and belief.

Article 5

Freedom to impart religion or belief to one's children - children have a right of access to a religious education that is consistent with the wishes of their parents.

Article 6

Religion and belief in practice - provides a list of minimum freedoms, including freedom to teach religion and belief and freedom to establish and maintain appropriate charitable institutions and freedom to assemble and worship.

This Declaration has been declared to be a 'relevant international instrument' for the purposes of the Australian Human Rights Act 1986 (Cth).

Convention on the Rights of the Child

Article 28

Provides for education to develop the child to his or her fullest potential, but this article is not to be construed so as to "interfere with the liberty of individuals and bodies to establish and direct educational institutions..."

Convention against Discrimination in Education

Article 5(b)

"it is essential to respect the liberty of parents ... firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as ... approved by the competent authorities and secondly, to ensure ... the religious and moral education of the children in conformity with their own convictions..."