



Uniting Church in Australia
SYNOD OF VICTORIA AND TASMANIA

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**Submission to the Scrutiny of Acts and Regulation
Committee on
Exceptions and Exemptions in the *Equal Opportunity Act*
1995
by the
Justice and International Mission Unit
Synod of Victoria and Tasmania
Uniting Church in Australia
March 2009**

The Justice and International Mission Unit of the Synod of Victoria and Tasmania, Uniting Church in Australia, would like to make the following submission to the Scrutiny of Acts and Regulations Committee in the Committee's consideration of the Exceptions and Exemptions in the *Equal Opportunity Act 1995*.

The Unit notes that the Committee already has the submission made by the Synod of Victoria and Tasmania to the Department of Justice Review of the Exceptions and Exemptions in the *Equal Opportunity Act 1995*. This submission is supplementary to the previous submission made by the Synod.

As noted in our previous submission, from its foundation in 1977 in which three denominations came together, the Uniting Church in Australia has committed itself to seeking the eradication of negative discrimination in our society and beyond. The Statement to the Nation made by the Inaugural National Assembly of representatives of the Uniting Church from across Australia stated:

We pledge ourselves to seek the correction of injustices wherever they occur. We will work for the eradication of poverty and racism within our society and beyond. We affirm the rights of all people to equal opportunities, adequate health care, freedom of speech, employment or dignity in unemployment if work is not available. We will oppose all forms of discrimination which infringe basic rights and freedoms.

Further, the annual meetings of the representatives of the congregations that make up the Synod of Victoria has actively supported anti-discrimination legislation in Victoria from 1985 onwards. Specifically these meetings have passed resolutions:

- supporting legislation to protect against discrimination on the basis of sexual orientation (1985);

- opposing discrimination against people on the basis of gender, marital status, disability, race or age (1993); and
- asking the Federal Government to enact legislation to enact anti-discrimination legislation prohibiting discrimination against gay men and lesbians in areas of housing, employment, education and the provision of goods and services (1994).

On the issue of exemptions in the *Equal Opportunity Act 1995* the Synod expressed its concern in 1992 at “the perceived inconsistency of the acceptance by the Uniting Church of exemption from equal opportunity and discrimination provisions of state legislation whilst taking an active role in opposing acts of discrimination.”

In 1993 the annual Synod meeting resolved: “To support the maintenance of Clause 38 of the *Equal Opportunity Act 1984*, in order to protect the freedom of religious groups to practise their beliefs.” In the 1984 Act, Section 38 stated:

This Act does not apply to:

- (a) *the ordination or appointment of priests, ministers of religion or members of a religious order;*
- (b) *the training or education of persons seeking ordination or appointment as priests, ministers of religion, or members of a religious order; or*
- (c) *any other practice of a body established to propagate religion or the employment of persons in any school, college or institution under the direction or control of such a body being a practice or employment that conforms with the doctrines of that religion is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.*

Thus Section 38 of the 1984 Act was largely similar to Sections 75 and 76 of the 1995 Act.

However, given the same resolution stated that “To affirm that persons should not be discriminated against on the basis of their gender, marital status, disability, race or age in matters of employment, education, church membership or access to accommodation and other services provided by the Uniting Church in Australia”, by implication, the Synod meeting appears to have supported the removal of some of the other exemptions that exist in the Act.

The purpose of this submission to make the Committee aware of the further consideration that the Synod of Victoria and Tasmania has given to the issue of the religious exceptions in the *Equal Opportunity Act 1995*.

At the September 2008 annual meeting of the representatives of the Synod passed the following resolution:

To request the JIM Unit of the Commission for Mission:

- (a) *continue its work on achieving a balance between religious freedom and our opposition to discrimination;*
- (b) *to prepare a position paper, with examples, on exemptions to the Equal Opportunity Act 1984, Clause 38, including the results of:*
 - *undertaking further biblical and theological reflection;*
 - *seeking additional legal opinion, particularly from the Synod Legal Reference Committee;*
 - *undertaking ecumenical and interfaith consultation; and*
- (c) *to bring a detailed report and recommendations to the next meeting of the Synod.*

Thus, the Synod of Victoria and Tasmania at this time continues to support the maintenance of Sections 75 and 76 of *Equal Opportunity Act 1995*, but has no position on Section 77 of the Act.

As an example of what the Synod's position means consider the case of a Uniting Church member in Victoria who is a maths teacher at a school and is a lesbian and is then sacked solely for the reason she is a lesbian.

- If this happened at a Uniting Church school it would breach the existing Synod position and the school would be asked to reinstate the teacher.
- If this happened at a secular private school, then under the existing position of the Synod (especially the 1994 Resolution listed above), the Synod would oppose the sacking and would support the teacher in getting reinstated or being paid compensation if the teacher did not wish to return to the school.
- If this happened at a religious school of a faith group that believed that homosexuality was contrary to the genuinely held religious beliefs of the faith in question, then under the current Synod position the Synod would support the legal right of the school to sack the teacher, based on the 1993 Resolution. The Synod would be free to try to persuade the school to reinstate the teacher, while upholding the school's legal right to sack the teacher. However, the Synod would also be free to support the sacking of the teacher.

Position of the Justice and International Mission Unit

Within the Uniting Church, bodies within the church may take positions on issues where such positions do not conflict with resolutions of the Councils of the church (in this case the relevant Council is the Synod). It is from this position that the Justice and International Mission Unit makes the following points.

The Justice and International Mission Unit rejects two extreme views. The first is that religious groups need no exemption under law from equal opportunity legislation. The Unit accepts that religious groups need protection under law from those who would attempt to use equal opportunity law to mount vexatious and malicious claims in an attempt to undermine the religious group.

On the other hand, the Unit rejects the idea that the right to religious freedom is absolute and that the State has no role in legally restraining the activities of religious groups. In fact there are few religious groups that would genuinely take such a position. For example, in Victoria it is illegal to carry out female genital mutilation. Few, if any, Victorian religious groups oppose this law, even though there would be people who argue that the practice is an essential part of the practice of their faith.

The Unit notes that the right to freedom of religion is not absolute in UN human rights standards. Article 18 of the *International Covenant on Civil and Political Rights*, states:

(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.

The Convention takes the position that the right to freedom of religion is not absolute and may be limited by law in order to protect the fundamental rights and freedoms of others who would be otherwise impacted by the exercise of freedom of religion.

This balance is reflected in the Victorian *Charter of Human Rights and Responsibilities Act 2006* which contains the following relevant clauses:

Part 2 – Human Rights

7. Human rights – what they are and when they may be limited

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, 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.

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.

In practice, the Synod of Victoria and Tasmania appears to have little reliance on the religious exceptions to anti-discrimination legislation in both states. It relies on the religious exceptions with regards to ordination to ensure that a person seeking ordination in the Uniting Church holds a faith consistent with the Uniting Church's broad understanding of the Christian faith. Thus, the Synod needs to be able to carry out discrimination on religious grounds for the appointment to certain positions, especially ordained positions. However, even in the absence of the religious exceptions in the anti-discrimination legislation, the Synod would still be free to select the best candidates for the inherent requirements of a position. It would be difficult for someone who did not hold a Christian faith to argue that they could fulfil the inherent requirements of ordained ministers or other positions involved in teaching the faith or carrying out the mission of the faith.

The Synod also has recourse to use the religious exemptions to allow Presbyteries the ability to choose to exclude people of same sex sexual orientation from ordained ministry within the Uniting Church. Presbyteries are the bodies that make the decision if a candidate is suitable for ordination. The Synod has stated that it will not discriminate against the employing of people of same-sex sexual orientation in positions that are outside of ordained ministry.

Finally, the Synod may be able to rely on the religious exemptions to exclude people from certain positions within the Synod on the basis of lawful sexual activity.

It would be our understanding that legal advice to religious bodies about what serves their interests in being able to carry out discrimination would argue that the religious body should support the widest possible legal right for religious groups to carry out discrimination regardless of the harm it may cause to those who are being discriminated against. In this way the religious organisation is likely to have legal protection for the forms of discrimination that it needs to be able to operate and protect itself from those that would use anti-discrimination laws in a vexatious or malicious way in an attempt to attack the religious body.

However, assuming such a position also means that the legal rights of members and employees of the religious body to protection against discrimination within the religious body are restricted. It also means that the religious body will defend the legal right of other religious groups to discriminate against its own members and other members of the community that the religious body would in practice find unacceptable if carried out by one of its own bodies.

The Justice and International Mission Unit recognises that in order to claim exemption from equal opportunity legislation the Synod needs to be able to argue that the form of discrimination it wishes to carry out is in keeping with its genuine understanding of the Christian faith. Statements made by the Synod meetings and within the operations of the Synod that state opposition to certain forms of discrimination are likely to erode the ability of the Synod to claim legal exemption from those forms of discrimination the Synod has stated that it opposed to.

In the Synod *Lay Staff Collective Employment Agreement 2008* the Synod has committed itself to the:

Intention to achieve the principal object in paragraph 3(i) of the Workplace Relations Act 1996, which is to respect and value the diversity of the workplace by helping to prevent and eliminate discrimination at their enterprise on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Nothing in these provisions allows any treatment that would otherwise be prohibited by anti-discrimination provisions as applicable in Commonwealth, State or Territory legislation.

Nothing in these provisions prohibits any discriminatory conduct (or conduct having a discriminatory effect) that is based on the inherent requirements of a particular position.

Agencies and bodies within the Synod have similarly made statements about inclusion and opposing discrimination. For example, the 2008 Annual Report of Uniting Aged Care Victoria and Tasmania states "We focus on care and support for the disadvantaged, in all our services, irrespective of age, gender, sexual orientation, ability, class, colour, creed or cultural origins."

The Justice and International Mission Unit notes that submissions by churches and most other religious bodies to the review of exceptions and exemptions to the Victorian *Equal Opportunity Act 1995* argued for the maintenance of the existing religious exceptions contained in Sections 75, 76 and 77, or in some cases asked that they be expanded. Freedom of religion was seen to override any consideration of the impact of discrimination on those subject to the discrimination. The submissions gave no consideration to members of each religion that may be subject to discrimination at the hands of another religious body or person who claims the form of discrimination they carry out is consistent with their genuine religious beliefs. For example, these submissions in effect argue that people should have a legal right to racially discriminate against other people provided such discrimination "is necessary for the first person to comply with the persons' genuine religious beliefs or principles." In effect mainstream religious groups are arguing for legal protection for forms of discrimination that only extremist religious groups or individuals would seek to carry out.

At the same time the Unit notes that many of the submissions from secular bodies urged the Victorian Government to abrogate its international human rights obligations and completely disregard the right to freedom of religion as it might impact on issues of discrimination. Such

submissions appear to disregard that religious communities have an internationally recognized human right to publicly practice their religious beliefs in worship and teaching.

The Unit does not believe that either of these polarized positions best serve the state of Victoria in fulfilling its international human rights obligations.

Cases of Discrimination on Religious Grounds in Victoria

There have been a limited number of cases that have been considered in a tribunal or judicial type process where the religious exceptions to the *Equal Opportunity Act 1995* have been tested. This in itself cannot be taken as evidence that religious based discrimination is rare. It is highly likely that those experiencing religious based discrimination will be aware of the exceptions extended to religious bodies in matters of discrimination, or will be made aware of such exceptions if they attempt to pursue any action in the matter. Thus, many people will quickly give up on seeking to pursue a complaint or action as they realise that the discrimination that they have experienced is legally permitted under the religious exceptions to the equal opportunity legislation. Further, many will simply choose not to put themselves into the situation where they can be lawfully discriminated against. For example, many teachers of same-sex sexual orientation would simply not seek to apply for positions at many Christian or Islamic schools.

In terms of cases that have gone all the way to the Victorian Civil and Administrative Tribunal in which the religious exemptions have been used are:

- *Hazan v Victorian Jewish Board of Deputies 1990* used section 38 of the *Equal Opportunity Act 1984* to exclude a non-Jew from the North Eastern Jewish War Memorial Centre.
- *Jubber v Revival Centres International 1998* where the existing religious exemptions to the *Equal Opportunity Act* were used to exclude a boy from attending a church because he wore an earring. The forbidding of wearing of earrings by males in the church was part of a Code of Conduct of Revival Centres International which also included exclusion of those who attended discos, watched R rated movies, men who did not wear a shirt to church and women that wore clothes with low necklines or short skirts.
- *Tassone v Hickey 2001* where Monsignor Hickey was able to use section 75 of the *Equal Opportunity Act* to prevent his parishioners from using St Mels Catholic Church, where he was the parish priest, to celebrate a festival for St Joseph.

A legal advice service specialising in the employment area provided the following cases they had dealt with in which the exemptions to the Victorian *Equal Opportunity Act* would be relevant:

- Joseph had been working as a priest for a number of years but was forced to resign when he admitted that he was gay. The Church wanted him to sign a document that stated that he was mentally ill because of his homosexuality, which Joseph refused to do. Joseph had not been allowed to work as a priest in four years even though in church law he is still a priest. He had tried to go through the Church hierarchy to verify his status but they have told him they are not employing him because he's not up to it.
- Anita had been employed for over 10 years as a teacher on a permanent full time basis at a religiously operated school. During her absence on long service leave she remarried and was told by the school on her return not to change her surname, or wear a wedding ring, or tell her co-workers that she had remarried. Anita kept her second marriage secret for over 12 months and then informed her co-workers about it. Subsequently she suffered a demotion of her job duties and was excluded from accessing the information that she required to do her job. The stress caused by situation affected Anita's health and she had to take sick leave.
- Pam worked on a permanent part time basis as teacher for seven years in a religiously run school and resigned when she became pregnant. After being away from the workplace for

12 months she rang the school and asked about job opportunities. The Principal at the time said she would need to ask the teachers who were currently employed whether they would like the position first before Pam or any one else would be considered. A few months later Pam spoke to a new Principal who commenced at the school and asked whether she could replace a teacher who was resigning. The Principal told Pam she could never reemploy her as she had children out of wedlock. Pam went to the Victorian Equal Opportunity Commission and put in a claim for discrimination. The matter went to conciliation, which was unsuccessful, and was referred to a hearing at VCAT. The employer's defence is that an exemption for schools exists in the *Equal Opportunity Act* which allows them to discriminate against Pam on the basis that she is living in sin.

- Josie works as a clerk on a full time basis for a Christian organization. The organization use to only employ Christians but now anyone can be employed. Staff meetings at the organization consist of devotional time (first part of meeting) and policy (second part of meeting). Josie and some of the other staff do not want to attend the religious session but have been told they have to do so.

Recommendations of the Justice and International Mission Unit

In the interests of maintaining an appropriate balance between the right to freedom of religion and the right not to be discriminated against in Victoria, the Justice and International Mission Unit recommends:

- That Sections 75 and 76 be maintained as they stand in the *Equal Opportunity Act 1995*.
- That the application of Section 77 be highly restricted. Section 77 should not apply to the following attributes:
 - Age
 - impairment
 - marital status
 - physical features
 - sex
 - Breastfeeding
 - industrial activity
 - parental status
 - political belief or activity
 - personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes
 - gender identity
 - race
 - status as a carer
 - pregnancy

This would mean that Section 77 would only apply to the attributes of lawful sexual activity, religious belief or activity and sexual orientation. In reality these are the attributes that many mainstream religious groups wish to be able to discriminate against.

The Justice and International Mission Unit does not believe that the State of Victoria should be providing legal protection to extremist religious beliefs held by individuals or groups that would result in discrimination on grounds such as race, impairment, gender, pregnancy and industrial activity. The Unit believes that such limitations would be consistent with Article 18(3) of the *International Covenant on Civil and Political Rights*, which states:

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.

This position does not indicate that the Unit supports discrimination on the grounds of lawful sexual activity, religious belief or activity or sexual orientation. In fact, the Unit would not be opposed to repeal of Section 77 altogether. The Unit serves Uniting Church members in both Victoria and Tasmania. The Unit notes that there is no equivalent exception to Section 77 of the Victorian *Equal Opportunity Act 1995* in the Tasmanian *Anti-Discrimination Act 1998*.

Consultation with the representatives of the Tasmanian Presbytery failed to identify any problems that had been experienced by religious individuals or groups in Tasmania as a result of not having an equivalent exception to Section 77 in the Tasmanian legislation. The Unit also met with the Anti-Discrimination Commissioner in Tasmania and she was unable to identify any cases that had come up where the inclusion of the equivalent of Section 77 would have made any difference to the case in question. It would appear, based on the Tasmanian experience, that the removal of Section 77 from the Victorian legislation would have no noticeable detrimental impact on the right to freedom of religion in Victoria.

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