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Address to the Victorian Parliamentary Interfaith Community Leaders Briefing 11 August 2016 on the Proposed "Inherent Requirements" Changes to the Equal Opportunity Act 2010

Anti-Discrimination Law, Inherent Requirements Proposal and the Greens Equality for Students Bill

"Inherent requirements" was an election commitment by the State ALP government to wind back the current freedoms for religious bodies and schools in Victoria's anti-discrimination law (the Equal Opportunity Act 2010) regarding employment decisions. (On 31 August 2016, after this paper was delivered, the government introduced the Equal Opportunity Amendment (Religious Exceptions) Bill 2016 to implement inherent requirements.)

There is a related proposal in a Greens Equality for Students Bill[1] (which is now unlikely to proceed) to wind back the same freedoms for religious schools in relation to certain conduct by students at such schools. I will contend that both proposals undermine the freedom of voluntary associations to express and live out different value systems, which is a hallmark of a free and democratic society.

Discrimination and Anti-Discrimination Law – Only Some Discrimination is Objectionable

This discussion is best introduced by some background on what anti-discrimination law seeks to achieve and how the Victorian version of it works. The word "discrimination" when used in the media almost always comes with a negative connotation ("they are discriminating against me" is usually a complaint). But "discrimination" simply means to treat people or circumstances differently. In international law the United Nations Human Rights Committee (UNHRC) has said that under the International Covenant on Civil and Political Rights (ICCPR) not all

[1] The Equal Opportunity (Equality for Students) Bill 2016 is a private member's Bill introduced by Sue Pennicuick MLC – second reading speech 22 June 2016.

differentiation of treatment constitutes unlawful discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the ICCPR.[2] That accords with common experience. Individuals, organizations and society discriminate or differentiate between people every day on rational and unobjectionable grounds in many settings (who is served next, who gets a job interview, who gets chosen for the sports team, who gets a pass on a test). The real issue is whether any act of discrimination or differentiation is based on reasonable criteria and furthers a legitimate goal.

The vital role of "exceptions" in the Equal Opportunity Act as balancing provisions to make an overbroad prohibition on discrimination work in practice

The Equal Opportunity Act starts out by defining discrimination **very broadly** to mean treating a person unfavourably (think about how broad the word "unfavourably" is) because of a protected attribute. It then prohibits such discrimination in a range of activities (e.g. employment, education, accommodation, provision of goods and services, sport, clubs). But there is no equally broad provision in the Act like the UNHRC Comment to say that an act of unfavourable treatment is not unlawful discrimination if the criteria for such treatment are reasonable and objective and if the aim is to achieve a legitimate goal. Instead, the Act has to back-pedal from its very broad definition of "discrimination" by using a large number of exceptions to make lawful the many reasonable and rational instances of unfavorable differentiation. [3] Where an exception applies the conduct is a lawful discrimination or differentiation and **not prohibited discrimination.** The exceptions are the balancing provisions which pull the Act back from prohibiting a very large number of sensible differentiations that fit with community expectations and lived experience. To give an example, the act prohibits discrimination in sport in such broad terms that it would be unlawful discrimination to run a competitive sports meet in Victoria like the Olympics but for several "exceptions" in the Act which allow sporting competitions to discriminate on

[2] Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) para 13.

[3] Section 13 provides that discrimination is not prohibited if it is covered by an exception or exemption in the Act.

the basis of physical abilities like strength and stamina and have single gender competition.[4]

To put this in values terms, the Act seeks to give expression to the broad value of treating people who are in the same position in the same way. ("Equality" is a somewhat inaccurate popular shorthand for this value of treating like cases alike.) This value is an important value in a liberal democracy. But it is only one value and not absolute. It has to fit in with other values prized by liberal democracies which inherently involve discrimination such as:

- multiculturalism and pluralism accommodating and permitting the expression of different cultures and faiths (and people of no faith) with different values,
- giving rewards for greater achievement or effort (competitive sports up to and including the Olympics and academic or other competitions which give such rewards are highly discriminatory),
- giving special assistance to the disadvantaged which are not available to most people
- freedom of conscience and freedom to associate with those we wish to and freedom not to associate with those we don't want to even though that involves a differential treatment (for example Family Planning Victoria should not have to employ advocates for the Right to Life and vice versa).

It is the balancing provisions or exceptions which make the Act workable, which balance the value of equal treatment of like cases with all the other values society

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[4] Section 71 of the Act prohibits one person discriminating against another in sport by refusing or failing to select the other person in a sporting team or by excluding the other person from participating in a sporting activity.

Section 72 creates four "exceptions" to permit discrimination in competitive sporting activities which seem to simply reflect community expectations e.g. they permit restricting participation

- on the grounds of strength stamina or physique where the strength stamina or physique of competitors is relevant;

- to one gender where the event is necessary to progress to national or international elite level competition

- in a competitive sporting activity—
  (a) to people who can effectively compete; or
  (b) to people of a specified age or age group; or
  (c) to people with a general or particular disability.

prizes. Some 42 sections in the Act create different exceptions or balancing provisions *and* the Act also exempts anything authorised by any other Act or regulation or council local law or a court or tribunal order.

Examples of the necessary balancing effect of the "exceptions"

Discrimination can only occur if the unfavourable treatment is based on a protected attribute. The classic protected attributes were race and gender but the categories of protected attributes have been expanded greatly over the years and now include age, disability (impairment), political belief or activity, religious belief or activity, lawful sexual activity, pregnancy, breast feeding, physical appearance, sexual orientation and gender identity. As the categories of protected attribute have expanded, the number of circumstances where an unfavorable differentiation on the grounds of a protected attribute is reasonable also expanded exponentially. For example it is reasonable to bar pregnant women from some carnival rides which might injure them or the child they are carrying, but it is discrimination under the broad definition in the Act. It is reasonable to not let athletes with insufficient stamina because of age, impairment or gender or pregnancy compete against those with the requisite stamina where stamina is a relevant criterion for participation in the athletic event, but it is discrimination under the broad definition in the Act. It is reasonable for one political or religious organisation not to employ people who hold and pursue starkly contrary beliefs to the organisation. But it is discrimination under the broad definition in the Act.

The religion exceptions and the Inherent Requirements Proposal and the Greens Bill

There are political exemptions for political bodies and religion exceptions for religious bodies and schools. Both the inherent requirements proposal and the Greens Equality for Students Amendment Bill are designed to wind back the religion exceptions – to turn permitted differentiations into prohibited discrimination.

The current religion exceptions give religious bodies and religious schools a limited freedom to apply an unfavourable consequence to employees, members and students if their conduct or expressed beliefs in relation to religious belief or activity, sex, sexual orientation, lawful sexual activity, or gender identity do not conform to the beliefs or principles of the religion.[5]

[5] See sections 82 to 84.

The purpose of the exceptions is to allow the religious body or school the freedom to maintain the integrity of and live out its religious values and ethos on those matters. The 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. That is a freedom of internal management and maintaining fidelity to values 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 to accept and retain members or employees who consistently spoke and acted against core party policy. Both the inherent requirements proposal and the Greens Bill limit this freedom but only for religious groups and schools.

A form of the inherent requirements proposal was enacted under the ALP government in 2010 and repealed under the Coalition government in 2011. The 2016 Religious Exceptions Amendment Bill reintroduces inherent requirements so that a religious body[6] or religious school cannot discriminate in relation to employment of a person (whether a manager, counsellor, youth leader, principal, teacher, administrator, accountant, or receptionist) because the person's beliefs or conduct did not conform with the doctrines, beliefs or principles of the religion unless

(a) conformity with the doctrines, beliefs or principles of the religion ***was an inherent requirement of the particular position***; and

(b) the person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity meant that he or she does not meet that inherent requirement.[7]

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[6] Section 82 provides that "religious body" means—

(a) a body established for a religious purpose; or

(b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

[7] Note that the inherent requirements test does not apply to (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice. But it does apply to everyone else employed by a church, mosque, synagogue or other religious assembly and to anyone employed by a charitable entity or an educational institution conducted in accordance with religious doctrines, beliefs or principles.

Problems with Inherent Requirements

The Institute for Civil Society has serious concerns about the inherent requirements proposal (and most of these concerns also apply to the Greens Bill).

1. Both proposals undermine the freedom of association of citizens to establish and maintain voluntary associations which express and promote particular views of what is good and right. Those views may be based on ethnic, cultural, religious or political values. Under both proposals the law would effectively require religious voluntary associations to accept and accommodate the views and conduct of some employees and, in the case of schools, any students whose expressed beliefs and conduct (as to religious beliefs or as to sexual activity or sexual orientation or gender identity) do not conform to the values which the religious association is designed to promote and model. We would not expect the Greens to be required to employ climate change deniers as public spokespeople or call centre operators and put up with their internal and external advocacy against climate change. But under these proposals the expressed values and conduct of many employees and students trump the values and ethos of the religious body or school. It needs to be remembered that often parents or students or both have voluntarily chosen the religious school over the government school system (and paid fees for that choice on top of their taxes to do so) precisely because the school teaches and models the lived out values of the religion while the government school system does not.

2. In many cases, especially with school students, these clashes of values are worked out sensitively in negotiations between the religious school and the student and the parents. But in hard cases where a negotiated outcome cannot be reached, we need to remember that an individual employee or student with non-conforming values or conduct can resolve the dispute by moving to another school. For example they could move to a large number of independent schools or any government school and find that their views or conduct in relation to sexual activity or sexual orientation attracted no objection. But if inherent requirements or the Greens Bill 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 is denied by the State and once compromised cannot be recovered.

3. Both proposals are discriminatory because they are targeted only at religious organisations. Currently the EOA gives similar exceptions to religious bodies

and schools[8], political parties[9], political clubs[10] and to clubs which operate principally to preserve a minority culture[11] 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 or lesbian club to refuse to have a straight person 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?

4. Because the two proposals are targeted at religious associations and schools, they limit freedom of religion and conscience of the adherents of the religion and the religious bodies. Advocates of the two proposals will cite the international human right of equality before the law and non-discrimination (sometimes leaving out the UNHRC's qualifier that not all differentiation is unlawful discrimination). But international human rights law explicitly protects

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[8] 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.

[9] 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.

[10] 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.

[11] 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.

the right of parents to ensure the religious and moral education of their children in conformity with their own convictions (ICCPR article 18(4)). Likewise the UN Declaration on the Elimination of All Forms of Intolerant and of Discrimination Based on Religion or Belief art 5(2) states: 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. Echoing the comments above about the value of equal treatment needing to be balanced with the other values our society prizes, the general human right not to be discriminated against in the ICCPR has to be read subject to the other rights in the ICCPR, in this case the very explicit right to religious and moral education in conformity with the parents' own convictions'.

5. The claimed economic harm to which the inherent requirements proposal is directed is undemonstrated (that is, loss of employment opportunities for persons in religious schools because the person's religious beliefs or sexual practices were opposed to the religious beliefs or practices of the school). No evidence has been presented of any, let alone any significant, problem that such staff (whether teachers, receptionists, gardeners or others) could not readily find equivalent work in a government school or other independent school or other workplace.

6. The inherent requirements proposal has serious conceptual and practical problems in its implementation.
    a. The inherent requirements proposal requires arms of the State in the form of human rights commissions, tribunals and courts to determine what are the doctrines, beliefs or principles of the religion (a task for which secular State institutions are ill-equipped and which should be left to the governing bodies of the religion).
    b. Those arms of the State then have to determine whether conformity to the doctrines, beliefs or principles is an "inherent requirement" of the employment position. The comments of human rights commissioners and some tribunal decisions 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."[12]

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. [13] 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 call on their members 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.[14] Separately 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".[15] 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".[16]

Both inherent requirements and the Greens Bill fail to recognise that we live in a pluralistic and multicultural and multi-faith democracy where there are multiple views of what are appropriate values concerning human sexual identity, orientation and conduct. For example there are different views in our society about the appropriateness of sexual conduct like adultery even though the conduct is lawful.

In a pluralist democracy citizens are free to choose to join with others and express and live out through voluntary associations (including school communities) a shared ethos

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[12] 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

[13] Eureka Street 13 August 2009.

[14] 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

[15] Parkinson, "Christian Concerns about an Australian Charter of Rights" (2101) 15(2) Australian Journal of Human Rights 83, 97.

[16] Lenta, "Taking Diversity Seriously: Religious Associations and the Work-Related Discrimination" (2009) 126 South African Law Journal 827, 853.

of what is right and good – including as regards sexual identity and sexual conduct – with which others may disagree. The State should not try to force a single "right" view of contested matters such as sexual identity, orientation and sexual conduct into voluntary associations of citizens in violation of their values and conscience (whether or not based on religious beliefs). If citizens do not like an association's or school's ethos on sexual identity and sexual conduct, they do not have to participate or continue in the voluntary association or the school. In Australian society we can live and let live with different voluntary associations taking different views on these matters as long as people are free to join or leave voluntary associations as they wish.

Inherent requirements and the Greens Bill will not encourage Victorians to get along with each other. They are more likely to exacerbate division by creating legal weapons for forcing some voluntary associations to host or endorse views with which they deeply disagree. Deep differences of moral vision and the right way to live will not be resolved by trying to legislate one view to supremacy and squashing others. Rather, tolerance in this context means accepting that there are different views, defending each other's rights to hold and live out different views (including through voluntary associations) and committing to respectful communication so we can understand each other and agree how to live together peacefully with our differences.

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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.

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