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Liberty Victoria
Submission to the
Scrutiny of Acts and Regulations Committee Inquiry
On Exceptions and Exemptions to the
Equal Opportunity Act 1995

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1. Introduction

- 1.1 The Victorian Council for Civil Liberties Inc—Liberty Victoria—is an independent non-government organization which traces its history back to the first civil liberties body established in Melbourne in 1936. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia’s compliance with the rights and freedoms recognised by international law. Liberty’s contribution is well known to the Committee, as well as to Federal Senate and House committees, and we have campaigned extensively in the past on issues concerning human rights and freedoms, democratic processes, government accountability, transparency in decision-making and open government.
- 1.2 Liberty Victoria welcomes the opportunity to contribute to the inquiry but will not be commenting on every aspect of the Options Paper of May 2009. Rather than repeat other organisations’ words we wish to state at the outset that Liberty Victoria endorses the Victorian Equal Opportunity and Human Rights Commission’s *Submission to The Exceptions Review: Consultation Paper 2008*, as updated by the Commission’s further submission to the inquiry refining its original position in the light of the Options Paper and the Gardner report *An Equality Act for a Fairer Victoria*. The VEOHRC submissions deal extensively with the fundamental Charter framework which should form the basis of the Committee’s report and the Government’s response.
- 1.3 Liberty commends this systematic Charter-based approach, noting however that it is in some senses rather timid or “pragmatic”. In Liberty’s submission the more far-reaching approach taken by the HRLRC/PILCH submission to the present inquiry has much to recommend it.
- 1.4 That is, the ultimate reform of the *Equal Opportunity Act 1995* should revamp the exemption-granting power in s.83 to explicitly reflect the reasonable limitations analysis of s.7(2) of the Charter, move all the “special measures” provisions from their inappropriate location as exceptions into a new Part which reflects the Charter’s special

measures provision (s.8(4)) and clarifies that special measures are not discrimination, and repeal all the other exceptions and exemptions.

- 1.5 In this submission, however, Liberty Victoria addresses principally the issue of religious exemptions and the impact of such exemptions on the equality of all citizens.
- 1.6 Liberty Victoria recognises that religious belief and membership of religious groupings have a long history of being the focus for discrimination and conflict. It is also the case that many religious bodies also have a long history of prejudice against and persecution of those of other, or of no, religion, and many cruelties have been inflicted on these grounds. Indeed Mr Justice Sean Ryan's recent report from a nine year investigation into abuse in the Roman Catholic Church in Ireland found that abuse, primarily sexual, was endemic and systemic in its institutions.¹
- 1.7 Such abuse flourishes in a society where inappropriate deference is given to religion over and above the rights of others, and where laws are applied in an asymmetrical fashion, that is where religious bodies are able to claim an exemption based on belief in a supernatural being. Liberty submits that exemptions from the laws that govern us effectively give religious groups an organisational licence to discriminate. This causes disharmony, alienation, self-loathing, and great distress for some members of the Victorian community. This licence to harm must be reconsidered.
- 1.8 Ours is a democratic, pluralist society which recognises the autonomy and responsibility of the individual. It is based on systemic-rational principles, and takes as its premise the authority of the state as created by its citizens through elections. Such a society must not leave individuals vulnerable to unrestrained discrimination by religious bodies or people claiming subjective religious belief as a trump card.
- 1.9 Freedom of thought, conscience, religion and belief is an important human right: ICCPR article 18, *Charter* s.14. It is subject, however, like most human rights, to the limitations inherent in that framework. In Victoria every human right may be limited, but only within "such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom:" *Charter* s.7(2). The strictures of religion should not be given automatic preference over the human right to equality: to do so is clearly incompatible with the *Charter*.
- 1.10 Religious bodies and individuals must be subject to the general law. They must not infringe to any greater extent than authorized by s.7(2) the human rights of those who do not share their beliefs. In relation to

¹ See Mr Justice Sean Ryan, *Summary of Commission to Inquire into Child Abuse*, (2009) http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/20_05_09_abuse.pdf

their own internal practices, and involving their own members who are adult and competent, religious bodies may be able to establish that s.7(2) permits some limitations on the equality rights protected under s.8 of the *Charter* and specified in the *Equal Opportunity Act* 1995. The scope of religious exemptions must be viewed within that broader context.

2. **Religion and the “right” to discriminate**

While the preceding comments set out the general principles, and lead to the simple conclusion that the religious exemptions fail to meet the *Charter* test and should be repealed, the anomalous privileges accorded religion, and the vehement pleading of special status made on its behalf, make it worthwhile to examine the question of the claimed religious licence to discriminate in more detail.

- 2.1 Religious exemptions to equal opportunity laws impact most heavily on women, and lesbians and gay men, bisexual and transgendered (LGBT) people.
- 2.2 There is a perception amongst many commentators – and it is shared by Liberty Victoria – that religious freedom is too often prioritised over gender equality. Hilary and Sara Charlesworth, noting Australia’s obligations under CEDAW, write that the *Sex Discrimination Act* 1984 (*Cth*), grants an extraordinarily “broad ambit for discrimination on the basis of sex in relation to any act or practice of a body established for religious purposes”.² They state that:

The clash between the norm of non-discrimination on the basis of sex and the practice of most religious traditions in excluding women from significant spiritual roles is usually in favour of religious tenets.³
- 2.3 They further highlight that under the *Sex Discrimination Act* 1984 “religious institutions are free to discriminate on the basis of marital status and pregnancy in employment of staff” if that discrimination is “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed”.⁴ The argument relating to sex applies equally to discrimination against lesbians and gay men. In both cases the latitude afforded to discrimination by religious institutions is an affront to human dignity. It is a historical anomaly, and must be ended.
- 2.4 Charlesworth *et al.* point out that if religious groups sought exemption from laws preventing racial discrimination there would be public consternation.⁵ Substituting the word “black” for women and

² Hilary Charlesworth and Sara Charlesworth, “The Sex Discrimination Act and International Law”, (2004) *University of NSW Law Journal* 27, 2.

³ *Ibid*, 2

⁴ *Ibid*.

⁵ *Ibid*.

homosexuals illustrates the point: modern Australia would find such discrimination unacceptable.

- 2.5 This example is not fanciful, moreover. An instance is provided by the case of the Dutch Reformed Church in South Africa and its absolute support of *apartheid*. The Church insisted on the total separation and segregation of the races, holding strong views on miscegenation and prohibiting inter-racial marriage.⁶ The Church Congress stated that “only carrying out the policy of apartheid in the light of God’s Word and with God’s blessing would provide deliverance from the dark danger of colour mixing and bastardisation”.⁷
- 2.6 If a Church wished to teach such views in its schools to its believers’ own children, surely the state should intervene to stop the teaching of these views. Or should the state refrain because of freedom of religion and belief? In this example we would expect the state to intervene and apply anti-discrimination laws and ensure that religious schools are not facilitating prejudice towards particular groups, just as the state now requires teachers in such schools to be subject to the criminal law and their employers not to conceal or condone the abuses they have till recently been allowed to get away with.⁸
- 2.7 It is a disgrace that when religious groups assert that to treat lesbians and gay men without discrimination would violate their religious beliefs the state still supinely allows them exemption from the law. The indoctrination of children in homophobia, or sexual prejudice,⁹ is as pernicious as the teaching of racial prejudice in *apartheid* South Africa was.
- 2.8 We need to remember that the burning of old women alleged to be witches was also a religious custom¹⁰ fully sanctioned by the church fathers: what was once taken to be a religious prerogative we now rightly view as repugnant, indeed criminal.
- 2.9 Another example of religious views supporting outdated prejudice can be found in the 1967 American miscegenation case, *Loving v Virginia*¹¹. This concerned the marriage of a white man and a black woman in 1958 which violated Virginia’s laws on interracial marriage. They pleaded guilty and each received a one year jail sentence which was suspended provided they leave the state of Virginia for a period of 25 years. In sentencing the couple the Judge in the Virginia Court said:

⁶ Susan Rennie Ritner, ‘The Dutch Reformed Church and Apartheid,’ *Journal of Contemporary History*, (1967) 2:17, 24

⁷ Ibid.

⁸ See, for example, the report of Mr Justice Sean Ryan, cited above.

⁹ Gregory M. Herek, ‘Beyond “Homophobia”: Thinking About Sexual Prejudice and Stigma in the Twenty-First Century,’ *Sexuality Research & Social Policy (Journal of NSRC)*, <http://nsrc.sfsu.edu>

¹⁰ Exodus 22:18, “Thou shalt not suffer a witch to live”

¹¹ 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967)

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.¹²

2.10 In *Loving* the US Supreme Court finally struck down both the Virginia miscegenation statute and the analogous statutes in 15 other US states. Here too a discriminatory tradition based upon religious belief was finally discredited.

2.11 The distinguished American legal commentator Cass R Sunstein also highlights the tension between religious belief and equality and criticizes the anomaly of society's predilection for favouring religious belief over equality.¹³ He specifically focuses on the relativisation of non-discrimination laws in relation to the exercise of religious belief. He observes that 'interference with religious autonomy is pervasive under the ordinary criminal and civil law' but is absent 'if sex discrimination is the problem that the government is seeking to address'.¹⁴ This unequal application of different laws is problematic: why does a particular religious group deserve a simple exemption from neutral laws when other groups (not anchored in belief in a supernatural being but at least as moral or charitable) are required to comply with the law? Why is the harm done to the victim of discrimination not recognised in the first instance but recognised in the second? Sunstein points out that there is

good reason to believe that some of the most pernicious forms of sex discrimination are a result of the practices of religious institutions, which can produce internalized norms. Those internalized norms might undermine equality of opportunity itself, as when women scale back their aspirations to conform to those internalized norms. People's preferences, especially in the domain of sex equality, should not be taken as a given, or as coming from the sky; discriminatory beliefs and role based choices are often produced by a discriminatory society.¹⁵

2.12 Former US President Jimmy Carter, writing for The Elders, an independent group of eminent global leaders brought together by former South African president Nelson Mandela, makes this point firmly, from his own deeply religious background, when he says, "Women and girls have been discriminated against for too long in a

¹² As quoted in *Loving v Virginia* (1967), where the US Supreme Court struck down the miscegenation statute of Virginia (and so too of the other 15 US states which similarly privileged religious belief over racial equality); see <http://www.ameasite.org/loving.asp>

¹³ Cass R Sunstein, *On the Tension Between Sex Equality and Religious Freedom*, Public Law and Legal Theory Working Paper No 167, The Law School, The University of Chicago (2007)

¹⁴ *Ibid* 2

¹⁵ *Ibid* 4.

twisted interpretation of the word of God.”¹⁶ The Elders, he writes, have recently declared: “The justification of discrimination against women and girls on grounds of religion or tradition, as if it were prescribed by a Higher Authority, is unacceptable.”¹⁷

- 2.13 Liberty Victoria heartily endorses the declaration of The Elders and urges the Committee to take heed of it, and ensure that the Committee’s report recommends to Parliament that the special pleading of religious bodies for a continued licence to discriminate be rejected as unacceptable in Victoria too. If that licence cannot be justified on religious grounds, it certainly cannot even begin to “be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.”

3. Human Rights culture and the secular state

- 3.1 The historian Yehoshua Arieli points out that:

The secular character of the normative system embodied in human rights doctrine is essential to its comprehension. All its premises, values, concepts and purposes relate to the homocentric world and to ways of thought freed from transcendentalist premises and from the jurisdiction of religious authority. And so, the development of the doctrine of human rights is inseparably connected to the process of secularisation of Western society...¹⁸

- 3.2 Indeed it is the move away from the religious paradigm and a move towards secularisation that witnessed the recognition of the equal dignity of people irrespective of their race, colour, sex or sexual orientation that is the hallmark of the democratic state. By allowing religious exemptions for those sexually different the state imposes a law on those individuals or groups that subjects them to the will of “God” and a transcendental morality that they themselves have not freely chosen. Indeed, as Skjeie points out, systematically allowing the maltreatment of certain categories of people, namely women generally, lesbians in particular and gay men, effectively annuls their citizenship status.¹⁹
- 3.3 In considering the plea for a continued licence to discriminate by certain religious groups, the Committee should consider, and be appalled by, the implications. If such a group runs a school, should that school be permitted to sack a single woman who becomes pregnant? Or who has an abortion? Does it make a difference if the woman is a teacher, a cleaner, a gardener, an accountant? What about a

¹⁶ Jimmy Carter, “Losing my religion for equality,” *The Age*, 15 July 2009 (reprinted from *The Observer*)

¹⁷ Ibid.

¹⁸ Quoted in Frances Raday, ‘Culture, religion and gender’, (2003) <http://icon.oxfordjournals.org/cgi/reprint/1/4/663.pdf>

¹⁹ Hege Skjeie, ‘Religious Exemptions to Equality’, *Critical Review of International Social and Political Philosophy*, (2007) 10:4, 472.

woman who works at such a school who gets divorced and remarries, which is clearly contrary to the beliefs of some religious groups who seek this continued licence to discriminate? What about a woman who, after a long struggle with the narrow beliefs of her religious upbringing, finally finds love with another woman? And who is to determine what religious beliefs the school can enforce in policing its employees' lives for adherence to its dogma? How should the law distinguish between the religious prohibition on wearing clothes of two different threads, in particular a linen and wool mix,²⁰ and the belief based on the same ancient text that is used to justify discrimination against homosexual people?²¹

- 3.4 It is conceivable that some of these matters could perhaps justify an exemption for a religious or religious-controlled body under a revamped EOA s.83/Charter s.7(2) analysis in relation to core religious functionalities. That would depend on the facts and arguments put to the Tribunal, including the bizarre argument – ambit claim rather – of some religious lobbyists that there is no difference between core and non-core religious activities. But they must be put to the test in that systematic, principled way, otherwise they are unconscionable in a free and democratic society. And if the body is granted an exemption the legislation should require it to make public its intention to use it, and advise any applicant expressly, so that people are adequately warned of their practices.
- 3.5 Liberty notes, however, that an exception for a religious body to require its employees who conduct its central rituals to be members of the body would be covered by the *bona fide* occupational qualifications exception, if that method is retained, or alternatively by guidelines on routine exemption applications.
- 3.6 The EOA covers more than employment, of course. In considering the inappropriateness of the religious exemptions in ss.75–77 we must also assess them in relation to education, the provision of goods and services (including health services) and accommodation, for example. We confine ourselves in this submission to education, though obviously many similar issues arise in relation to the other areas.
- 3.7 In relation to education there are two issues: what is taught, and to whom. The current Act permits a religious school to discriminate against pupils or prospective pupils on any attribute, even race.²² Discrimination against pupils could be refusal of admission, inferior treatment or quality of teaching, or other detriment.

²⁰ “Thou shalt not let thy cattle gender with a diverse kind: thou shalt not sow thy field with mingled seed: neither shall a garment mingled of linen and woollen come upon thee,” King James Bible, Leviticus 19:19

²¹ “Thou shalt not lie with mankind, as with womankind,” King James Bible, Leviticus 18:22

²² The apparent permission to discriminate on race is presumably unconstitutional, as it would violate the *Racial Discrimination Act 1975* (Cth).

- 3.8 The latter could overlap with what is taught. Can a school run by a religious body like the Dutch Reformed Church of South Africa mentioned above subject children to the detriment of being taught racism? What if, unbeknownst to the school, that racist teaching distressed a child who realized they were being taught to despise someone close to them, even a parent, and hence themselves, where the school had failed to detect the relevant racial background? That would be an undoubted “other detriment” which could be complained of, if the school were not, as now, exempted.
- 3.9 Exactly the same analysis applies to a same-sex attracted student who is taught that homosexuality is evil, or should be “changed”, except that that child may not yet know that the poison being fed to them applies to them, and anyway they are quite likely not to have their parents’ support to resist the school’s odious teaching if they do. Such teaching of prejudice may be by express words or by the school’s failure to represent lesbians and gay men equally in its syllabus and staff. The absence of any openly gay staff in a staffroom of more than about ten begins to send the misleading message that same-sex attraction is wrong or shameful, even if that message is not being sent expressly, and same-sex attracted children who have no other support cannot fail to be harmfully influenced.
- 3.10 Perhaps the commonest way that the anti-gay message is conveyed is by a school’s failure to prevent homophobic bullying, whether subtle or blatant.²³ Subjecting school children to this detriment should be unlawful for all schools. It leads to physical harm, and to psychological harm (including depression and self-harming behaviours including smoking and drug and alcohol use and increased suicide risk). The licence to discriminate claimed by religious bodies must be revoked.
- 3.11 The teaching of discriminatory doctrines to children, whether racist, homophobic, anti-Semitic, misogynist or whatever does not harm only those children who identify as the targets of the prejudice. It also harms the other children by teaching, or authorizing, or not deterring anti-social attitudes and behaviours. It is one thing for freedom of expression and freedom of thought, conscience, religion and belief to permit competent adults to hold and express harmful opinions – what limitations should apply there is perhaps a matter for a different inquiry – but it must be unacceptable in a free and democratic society to teach them to children, even if the parents hold those views. The licence to discriminate claimed by religious bodies must be revoked.
- 3.12 Liberty Victoria invites the Committee to consider the wisdom embodied in an old lyric from the musical *South Pacific*, where Lt Cable

²³ See, for example, Hillier, L. Turner, A. & Mitchell, A. (2004), *Writing Themselves in Again – 6 years on* and the discussion in the Options paper around p123.

reminds us that prejudice persists because it is “carefully taught.” It’s time to heed that message.

You've Got To Be Carefully Taught²⁴

You've got to be taught
 To hate and fear,
 You've got to be taught
 From year to year,
 It's got to be drummed
 In your dear little ear
 You've got to be carefully taught.

You've got to be taught to be afraid
 Of people whose eyes are oddly made,
 And people whose skin is a diff'rent shade,
 You've got to be carefully taught.

You've got to be taught before it's too late,
 Before you are six or seven or eight,
 To hate all the people your relatives hate,
 You've got to be carefully taught!

4. Public Funding

- 4.1 In addressing the issue of exemptions the Committee must consider community expectations particularly when organisations, be they religious or secular, receive public funding. Organisations that receive public funding have an obligation to service all the public, not just those they deem worthy based on preferential religious or racial belief. The granting of public funding presupposes that the receiver will comply with all legal obligations incumbent upon other citizens. It is unethical to accept public funding and then refuse to submit to laws implemented via our democratic parliaments to ensure the full equality and participation of all citizens. While some exemption may be applicable to ‘core’ religious activities ‘non-core’ activities should not be exempted from equal opportunity and anti-discrimination laws. Governments should always err towards equality rather than exclusivity and discrimination and governments should ensure that all organisations and clubs receiving public funding do likewise.

²⁴ Rodgers and Hammerstein, *South Pacific* (1949)

5. Conclusion

- 5.1 In conclusion, once again we wish to endorse the submissions of the VEOHRC and PILCH/HRLRC. Liberty supports all the Recommendations in the latter submission and wishes to reiterate a number of them. First, we firmly believe that reforms must be consistent with Australia's obligations under the international human rights instruments and the Victorian Charter. Secondly, Liberty Victoria believes, as with the other organisations mentioned above, that s 77 of the EOA should be repealed it cannot be justified under s7 of the Charter. Thirdly, all permanent exemptions must be repealed and only granted on a case-by-case basis. The notion that organisations because of their belief in supernatural beings can have a blanket right to discriminate is incompatible with a modern democratic pluralist society. Parliament should ensure that prejudice and discrimination are limited to ensure the full participation and life opportunities for all Victorian citizens.