Anti-discrimination legislation differs from State to State but most include various exemptions that exempt religious bodies. The exemptions that of most interest to CVA are those that are collectively known as the “religious exemptions” which exempt various religious bodies from the provisions of the anti-discrimination legislation.

While these exemptions have been in the legislation since its inception they have not received close judicial scrutiny until the recent decision of VCAT in Cobaw Community Health Services Limited v Christian Youth Camps Limited. While the Court made a number of findings that were not favourable to CYC it is the interpretation of the exemption provisions which is likely to have the most lasting and significant consequences. It is to be remembered that this is a decision of a lower Court ie not the Supreme Court of one particular State only and in relation to the particular wording of the exemptions in that State. However, as the wording is similar in several other State and Territories, the reasoning is relevant as it may well be followed in other States. Certainly it will provide some optimism to groups who wish to test the limitations of the exemptions.

This decision is on appeal and the appellate court may form a different view.

The fact as her Honour found them are set out in the decision and not reproduced here. This case note focuses on Her Honours reasoning in relation to the exemptions is found in paragraphs 211 to 362 of the judgment.

The wording of the exceptions in Victoria are set out below:

The respondents rely on s 75(2) and s 77, exceptions contained in Part 4 of the Act. Section 75 provides:

(1) Nothing in Part 3 applies to -
(a) the ordination or appointment of priests, ministers of religion or members of a religious order;
(b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order;
(c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.
(2) Nothing in Part 3 applies to anything done by a body established for religious purposes that –
(a) conforms with the doctrines of the religion; or
(b) is necessary to avoid injury to the religious sensitivities of people of the religion.

(3) Without limiting the generality of its application, subsection (2) includes anything done in relation to the employment of people in any educational institution under the direction, control or administration of a body established for religious purposes.

Section 77 is in the following terms:

Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person’s genuine religious beliefs or principles.

Her Honour comes from a background as a human rights lawyer and served as president of Liberty Victoria. Victoria is also unusual in that it has passed a charter of Human Rights in the form of the Charter of Human Rights and Responsibilities Act 2006 (“the Charter”) which provides an overriding structure for the interpretation of all other legislation in that State. The Charter requires in section 32(1) that all other legislation be interpreted “so far as is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights;”. The Interpretation of Legislation Act 1984 (Vic) (equivalents of which exist in other jurisdictions) requires that “beneficial and remedial legislation… is to be given a liberal constructions” [17]. It is to be given a “fair large and liberal” interpretation rather than one which is “literal or technical”.

Cobaw generally argued for a literal and technical interpretation of the legislation. The importance of the framework for interpretation is this - her Honour found that the provisions regarding prohibiting discrimination in the Act were to be given a broad and generous interpretation as they were remedial – ie to stop discrimination against people on the grounds of sexual preference. The exemption in the Act ie section 75 and 77 were to be interpreted narrowly ie in a literal or technical manner. CYC tried to argue that the Charter provisions relating to religious freedom (s.14) provide a basis for interpreting the exemptions broadly as they sought to give effect to the human right of religious freedom.

Adopting this literal/technical approach her Honour in interpreting the exemption in s.75(2) focused on the meaning of the following words/phrases in asking the following questions:

1. Is CYC a “body established for religious purposes”?
2. Was the discriminatory act of refusing a booking to Cobaw in conformity to a doctrine of the religion? Which religion was the relevant one – Christianity or Brethren Christianity?
3. Was the refusal to accept the booking “necessary” to “avoid injury” of the “religious sensibilities” of Brethren?

In relation to the exemption in section 77 the question was:

4. Was the discrimination necessary to avoid “harm” or comply with the genuine religious beliefs or principles of Mr Rowe and CYC?

It is useful to examine her Honour’s answer to each of the questions.

A. Is CYC a “body established for religious purposes”?
   i) Her Honour found that CYC was not a body established for religious purposes. In examining this question her Honour considered it relevant to look not only at the constituent documents of CYC but also its activities and its strategic planning document from 1999. In making her finding she found the following relevant:
   (1) the website did not mention religion or Brethren etc
   (2) the strategic plan did not identify religion as one of the ten factors that gave CYC a strategic edge;
   (3) the pages on the website related to Church camps did not mention Christian Brethren.
   (4) Brochures make no reference to the Christian Brethren religion.
   (5) The adventure resort is run as a commercial venture remitting 1.5M to the Christian Brethren Trustees annually.
   (6) no religious input was provided even to religious/Christian camps conducted at the resort.

Her Honour concludes at [253] as follows:

“Nor having regard to those matters am I satisfied that the purposes themselves of CYC in the conduct of the adventure resort are religious. The camping activities offered by the adventure resort are themselves secular. Although the constitution of CYC declares that the establishment of CYC is actuated or inspired by a religious motive, the activities of CYC conducted at the adventure resort do not involve the spread or strengthening of spiritual teaching, the maintenance of the doctrines of the Christian Brethren religion or of the observances that promote or manifest it. The purposes of CYC, are not directly and immediately religious. They relate to the conduct of camping for both secular and religious groups. The religious groups are not confined to those who identify themselves as Christian Brethren. Although CYC has a relevant connection with a faith, church or denomination and the constitution of CYC declares that its establishment is considered to have a tendency beneficial to religion, or to a particular form of religion, that is clearly not sufficient:

A relevant question on any appeal will be whether in fact her Honour has applied the correct tests in determining whether CYC is a religious body. The writer’s
view is that it is not and the law in Australia is reflected in the High Court
decision in Word Investment Case. An application of that decision would find
that CYC was a religious body.

B. Was the discriminatory act of refusing a booking to Cobaw in conformity to a
doctrine of the religion? Which religion was the relevant one – Christianity or
Brethren Christianity?

Her Honour did accept that it was the Brethren brand of Christianity that was the relevant
religion and not Christianity generally. Much of the discussion of this issue related to the
question of what is a “doctrine”. Expert evidence was provided in the case as to what a
doctrine was.

The definition her Honour accepted the definition “A creed or body of
teachings..proclaimed by ecclesiastical bodies as true” [265].

Her Honour accepted the evidence of Dr Black to the effect that:

“For a body of teachings to be regarded as containing the doctrines of a religion, they
had to describe the fundamental shape of that form of religious belief. And, like creed,
body of teachings had to be qualified by the phrase which came after it, that is,
proclaimed by ecclesiastical authorities as true.”

CYC argued for a broader definition of any body of teachings effectively endorsed by the
Brethren. Which being a Congregationalist denomination could mean endorsed by any
church or body identifying itself as Brethren.

There was an attempt by CYC to argue that the doctrine of plenary inspiration of
scripture was offended by same sex relationships and the promotion of same sex sexual
relationships [282]. Her Honour rejected this in part because not all that is said in
Scripture is doctrine [305] and therefore not accepting part of scripture as doctrine did not
mean that you did not believe in a plenary view of scripture. Her Honour found that it
was not the doctrine of plenary inspiration of scripture but “its interpretation and
application to homosexuality or homosexual practices which was the reason why Mr
Rowe refused the booking”[319]

The expert evidence of Dr Peter Adams was rejected and that of Dr Black preferred as
Dr Adams was found not to be an independent expert witness [253].

Her honour did find that the major creeds of the Church and the statement of faith of the
Brethren were silent on the issue of same sex relationships [305]. Therefore there was no
doctrine of the religion that the conduct of discriminating against same sex relationships
was in conformity with.
Her honour then gave consideration as to what is meant by conformity. She concluded

“conforms imports a sense that the doctrine requires, obliges or dictates that the
person act in a particular way when confronted by the circumstances which resulted
in their acting in the way they did. “

For her honour conforms carries the sense of requirement or obligation and not just in
harmony or consistent with. Her honour then found that even if she found that the belief
of the Brethren that sexual activity should only be expressed between a man and women
in marriage was a doctrine then she was not satisfied that the refusal to accept the
booking was in conformity with it. She found that conformity required Brethren to so
restrict their sexual activity but did not require them to require others to do so. She
further found that:

“There was no evidence that Mr Rowe’s beliefs, or CYS’s practices, based on
Christian Brethren beliefs about God’s will in respect of sex and marriage, played
any part in deciding who would be permitted to make bookings at, or stay at the
adventure resort.”

Her honour found that there was no questioning of groups at the time of booking about
the marital status or sexual orientation of attendees – or whether they engaged in sex
outside marriage. Nor was there evidence that attendees had to conform to other beliefs
of the Brethren.

**Was the refusal to accept the booking “necessary” to “avoid injury” of the
“religious sensibilities” of Brethren?**

Her Honour interpreted this exemption in the following terms:

It follows that, in order for it to be necessary to engage in discriminatory conduct to
avoid injury to the religious sensitivities of members of a religion, the injury which
would be caused if the discriminatory conduct were not permitted must be
significant, and unavoidable. The persons engaging in the discriminatory conduct
must have been required or compelled by the doctrines of their religion or their
religious beliefs to act in the way they did, or had no option other than to act in the
way they did to avoid injuring, or causing real harm to the religious sensitivities of
people of the religion. The religious sensitivities of people of the religion would be
injured if matters intimately or closely connected with, or of real significance to the
doctrines, beliefs or practices of the adherents of the religion are not respected, or
are treated with disrespect.
Her Honour went on to consider the evidence of the various Brethren who gave evidence regarding their attitude to allowing a group such as Cobaw to use the resort. This was complicated because she had previously found that there was a misunderstanding (and misrepresentation) by CYC as to what Cobaw promoted.

The following two paragraphs summarise her Honour’s finding on the application of this exemption in the context of this case [343-344]:

These responses highlight the difference between what an adherent of a religion chooses, or agrees to do in conformity with their own religious beliefs and the manner in which they deal with others who do not share their beliefs or adhere to the same religion. It is not part of the doctrines, beliefs or practices of the Christian Brethren that they avoid contact with people who do not share their religious beliefs, Nor is it part of their doctrines or beliefs that they must avoid contact with same sex attracted people who do not share their religious beliefs. Nor is it a doctrine or belief of their religion that they are required to openly express their disapproval of same sex attraction when in contact with same sex attracted people. This is borne out in practice by the evidence about CYC’s general booking policies, namely that Christian Brethren beliefs about God’s will in respect of sex and marriage played no part in deciding who would be permitted to make bookings at, or stay at, the adventure resort.

However strongly Mr Rowe, Ms Mustafa, Mr Buchanan and Mr Keep expressed themselves about their views of accepting same sex attracted people, about sex and marriage, and about whether they would accept same sex attracted people, celibate or not, into their congregations, it was abundantly clear the religious sensitivities of the Christian Brethren had not been injured by CYC’s conduct in permitting same sex attracted people other than the WayOut group to stay at the adventure resort. They had not sought to prevent injury to their religious sensitivities by taking any steps to prevent people other than married couples who engaged in sexual activity from staying at the adventure resort, or engaging in sexual activity at the adventure resort. Their conduct consistently demonstrated that it was not necessary to avoid injury to the religious sensitivities of the Christian Brethren in respect of sex and marriage to refuse bookings to same sex attracted people, or people who engaged in sexual activity outside marriage. If it was not necessary to exclude other same sex attracted people, or people who had, or might, while at the adventure resort, engage in sex outside marriage to avoid injury to the religious sensitivities of the Christian Brethren, then it was not necessary to exclude the WayOut group on that ground.

The respondents have not made out their claim for excuse under s 75(2)(b).

Section 77 - Was the discrimination necessary to comply with the genuine religious beliefs or principles of Mr Rowe and CYC?
Referring to her previous reasoning her Honour took the view that comply carried with it the same sense as conform which meant that the question now became do the religious beliefs “require or oblige a person to act in a particular way or that their religious beliefs dictate that they act in a particular way”.

Her honour then found that [356]:

I am not satisfied, having regard to the evidence I have canvassed at length, and the findings I have already made concerning the conduct of Mr Rowe, and CYC in respect of the manner in which the adventure resort is operated, that it was necessary to refuse the WayOut booking in order to comply with Mr Rowe’s or CYC’s genuine religious beliefs. The respondents have not made out their claim for excuse under s 77.

In summary her honour concluded at the end of her judgment:

The conduct of the respondents in refusing the booking was clearly based on their objection to homosexuality. They are entitled to their personal and religious beliefs. They are not entitled to impose their beliefs on others in a manner that denies them the enjoyment of their right to equality and freedom from discrimination in respect of a fundamental aspect of their being. Having done so, and in a manner that understandably caused hurt and offence, compensation is appropriate.

This conclusion picked up the comment made earlier regarding “imposition” of belief [328]

In our secular and pluralistic society, freedom of religious belief and expression carries with it acceptance of the right of others to hold different beliefs, and for those who hold different beliefs to be able to live in accordance with them. This is the essence of the difference between the freedom to hold one’s own beliefs, and the right to impose those beliefs on others.

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