

10 April 2018

Ms Elise Vandermaat
Religious Freedom Review Secretariat
Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

By email: religiousfreedom@pmc.gov.au

Dear Ms Vandermaat

Religious Freedom Review

Thank you for inviting the Victorian Equal Opportunity and Human Rights Commission (the **Commission**) to respond to the following questions from the Expert Panel following our consultation meeting with the Expert Panel on 21 February 2018.

1. Does Victoria have a proactive education program on freedom of religion? If this educational programme exists, can it be provided to the Panel?
2. Given the changes to the Marriage Act, what is VEOHRC's position on the transitional provision allowing celebrants to register as religious? Noting that the final form of the marriage amendments differed from the Exposure Draft, has VEOHRC's position changed from the view expressed in its submission to the Select Committee?

The Panel also expressed interest in whether the Commission is aware of and able to provide any further information on:

3. cases that would fall into the scope of the Review. In particular, the Panel would be interested to hear about cases that involve discrimination against a person on the basis of their religion, or people who have been discriminated against by a religious institution on the basis of a protected characteristic under anti-discrimination laws; and
4. any test cases or related material that would indicate whether Victorian law would make it unlawful for governments to discriminate on the basis of religion in making funding decisions.

Our responses below are further to our letter submitted to the Expert Panel dated 14 February 2018, in which we expressed our support for the Australian Human Rights Commission's submission to which we contributed data.

humanrightscommission.vic.gov.au
Enquiry Line 1300 292 153 or (03) 9032 3583

Level 3, 204 Lygon Street, Carlton, Vic 3053
Telephone 1300 891 848 Fax 1300 891 858 TTY 1300 289 621 Interpreters 1300 152 494
Email information@veohrc.vic.gov.au

1. Does Victoria have a proactive education program on freedom of religion? If this educational programme exists, can it be provided to the Panel?

1.1 Under the *Charter of Human Rights and Responsibilities 2006 (Charter)*, the Commission's functions include to provide education about human rights and the Charter (s 41(d)). Under the *Equal Opportunity Act 2010 (EOA)*, the Commission has educative functions to disseminate information and educate the public with respect to the EOA, the Charter and the *Racial and Religious Tolerance Act 2001 (RRTA)* (s 156).

1.2 Education on the right to freedom of religion, as with other Charter rights, is included in our general Charter education sessions, which are tailored to audiences to provide a more in-depth focus on rights relevant to the audience and context. Similarly, programs the Commission undertakes to disseminate information and educate the public with respect to the objectives and provisions of the EOA and the RRTA are tailored to audiences to provide relevant information.

1.3 From 1 July 2017 to 1 January 2018, the Commission provided 70 Charter education sessions to local and state government agencies and other public authorities, 78 equal opportunity education sessions (which included education on the EOA and RRTA) for state and local government and the private sector, and a further 17 sessions to these audiences which included content on all three laws. These sessions reached 2,641 participants.

1.4 In alignment with the Commission's current priority focus on reducing racism, the Commission has been working in partnership with local government and community organisations to identify and deliver education and engagement interventions with people from multicultural and multi-faith backgrounds. This education and engagement aims to increase community awareness of human rights and anti-discrimination protections and to encourage reporting of discrimination, vilification and racism.

1.5 Providing education on protections against race discrimination frequently goes hand in hand with education on the protection of cultural and religious freedoms and protection from religious belief or activity discrimination.

1.6 A recent example is the 'We Stand Together' anti-vilification project. The Commission worked with the City of Yarra, Victoria Police, and the Neighbourhood Justice Centre to look at how to address the rise in racial and religious motivated attacks on people in migrant and newly arrived communities residing or working within the municipality of Yarra. The Project resulted in public information resources on rights, where to seek support and how to make complaints. It also resulted in the recruitment and training of community facilitators to deliver rights information sessions with stories, case studies and films. The sessions included a focus on freedom of religion and protections against religious discrimination and vilification.

2. **Given the changes to the Marriage Act, what is the Commission's position on the transitional provision allowing celebrants to register as religious? Noting that the final form of the marriage amendments differed from the Exposure Draft, has the Commission's position changed from the view expressed in its submission to the Select Committee?**
- 2.1 The Commission strongly supported changes to the *Marriage Act 1961* to provide for marriage equality and to allow same-sex couples to marry.¹
- 2.2 The *Marriage Amendment (Definitions and Religious Freedoms) Act 2017*, which commenced on 9 December 2017, redefined marriage as 'the union of 2 people to the exclusion of all others, voluntarily entered into for life' so that sex or gender no longer affects the right to marry under Australian law.
- 2.3 Under the Marriage Act, Ministers of religion (including celebrants who are Ministers of religion) can refuse to solemnise a marriage because of their religious beliefs.
- 2.4 The changes extended this discretion to religious marriage celebrants, a new subcategory of celebrants who wish to be celebrants on the basis of their religious beliefs (as opposed to 'civil' marriage celebrants).
- 2.5 The changes mean that new celebrants registered after 9 December 2017 will not be a religious marriage celebrant unless they are a minister of religion. This recognises that civil marriage celebrants are authorised to perform a function on behalf of the state and should be required to uphold Commonwealth law. In solemnising a marriage, celebrants are performing the secular role of the State, not of a religious group.
- 2.6 The transitional provision for existing marriage celebrants provided that ministers of religion would automatically be identified as religious marriage celebrants, and provided a pathway for existing marriage celebrants the choice to register as religious marriage celebrants by notifying the Registrar in writing by 9 March 2018 and advertising their services as a religious marriage celebrant.
- 2.7 The Commission's position has not changed from the view expressed in our [submission to the Select Committee](#) that extending a discretion to *all* marriage celebrants to refuse to solemnise same-sex marriages because of their conscientious or religious beliefs could not be justified as a reasonable limit on the right to equality and non-discrimination, and would be incompatible with that right.
- 2.8 While the Commission considered that the exposure draft provision was incompatible with the right to equality and non-discrimination and should as

¹ See further here, 'Why the Commission supports marriage equality', 15 September 2017, at <https://www.humanrightscommission.vic.gov.au/home/news-and-events/commission-news/item/1625-why-the-commission-supports-marriage-equality>.

such be removed from the bill, the transitional provision enacted did not raise the same level of concern.

- 2.9 While the transitional provision extends significant protection to the freedom of religion or belief for individuals ‘who may have made a decision to become civil celebrants on the basis that the current law only allows opposite-sex couples to marry’,² the limit on the right to equality and non-discrimination is less restrictive than the exposure draft provision and more rationally connected to the purpose of protecting the freedom of belief and religion of the individuals in that group.
- 2.10 It was also time limited in its application to celebrants registered prior to the marriage equality changes, provides for a transparent register, and requires religious marriage celebrants to advertise their services as a religious marriage celebrant. This public advertising can help to avoid potential harm to same-sex couples that could flow from a refusal to a request for a celebrant’s services made without knowledge that the services were religious.
- 2.11 As is succinctly outlined in the [Australian Human Rights Commission’s submission to this Review](#), the drafters of the Marriage Act amendments sought to take into account the differing views and interests from an extensive reform process and to reach a practical compromise to accommodate a number of human rights (see at [173]-[180]).
- 2.12 We agree with this outline and consider that the transitional provision is an example of this.
- 3. The Panel is interested in receiving further detail on cases that the Commission has seen that would fall into the scope of the Review. In particular, the Panel would be interested to hear about cases that involve discrimination against a person on the basis of their religion, or people who have been discriminated against by a religious institution on the basis of a protected characteristic under anti-discrimination laws.**
- 3.1 At the consultation meeting on 21 February, we referred to Victorian cases that would fall within the scope of the review, namely [Christian Youth Camps Limited v Cobaw Community Health Services](#) [2014] VSCA 75, in relation to which the panel said that its secretariat had provided detail.
- 3.2 We also referred to planning decisions where the Victorian Civil and Administrative Tribunal (**VCAT**) has given consideration to the right to religious freedom, where decisions had the potential to impact on religious freedom, in particular the ability of a person to practice their religion. By way of further detail, these cases are: [Rutherford & Ors v Hume CC](#) (includes Summary) (Red Dot) [2014] VCAT 786; [Hoskin v Greater Bendigo CC and Anor](#) [2015] VCAT 1124;

² Parliamentary Joint Committee on Human Rights, Human Rights Scrutiny Report 13 of 2017, p 31.

- 3.3 Another case we referred to involving discrimination against a person on the basis of religion was the case of Ms Ziarata Zia, which settled prior to hearing. We have included some further detail here.
- 3.4 Ms Zia attended an antenatal appointment at Monash Health and requested an examination from a female doctor. Ms Zia is of the Muslim faith and wears a niqab which reveals only her eyes, hands and feet. She explained that her religious beliefs made it a sin to be seen without it or touched by a male other than her husband or family members unless emergency care was provided.
- 3.5 Ms Zia lodged a complaint of discrimination under the *Equal Opportunity Act 2010*, including allegations of discrimination on the basis of her religious beliefs and religious activity. The complaint also raised a question of whether the health provider had acted incompatibly with human rights in the Charter to equal and effective protection against discrimination on the grounds of religious belief (section 8(3)), the freedom to demonstrate religion or belief in worship, observance, practice and teaching (section 14), and the right of persons with a particular cultural, religious, racial or linguistic background to enjoy their culture and to declare, and practice their religion and use their language (section 19).
- 3.6 The parties resolved the complaint prior to hearing. The resolution of the complaint led to Monash Health requesting the Commission to review its policies regarding requests for female only care.
- 3.7 In its review the Commission considered that a blanket policy to refuse same-gendered care without regard to the circumstances could lead to unlawful discrimination by a health service provider and an unreasonable limitation on the rights of a person to equal and effective protection against discrimination and the freedom of a person to demonstrate their religion in observance or practice.
- 3.8 Following this review Monash Health said that it would make the choices available to patients clearer and prioritise patients request for same gender care where possible for people with specific religious or cultural belief requirements. It subsequently updated its policies accordingly.
- 3.9 The Commission would further like to draw the Expert Panel's attention to Victorian cases where an exemption from the *Equal Opportunity Act 2010* is sought for reasons that relate to religious freedom.
- 3.10 In exemption applications VCAT is required to consider whether the proposed exemption from the EOA is a justified limit on the Charter's right to equality. In this consideration VCAT is required to take into account all relevant case circumstances, which may include competing rights and freedoms.
- 3.11 These cases demonstrate how a decision-maker can consider on a case-by-case basis where the exercise of other rights, such as the right to religious freedom, may or may not be a reasonable limit on the right to equality.

- 3.12 Pursuant to the EOA, in deciding whether to grant an exemption, VCAT is required to consider the factors in section 7(2) of the Charter, including whether there is an available option less restrictive on the equality right than the proposed exemption.
- 3.13 Under the EOA VCAT may grant an exemption from EOA provisions in certain circumstances after considering: (a) whether the proposed exemption is unnecessary because it would not amount to discrimination (for example, it might amount to a special measure that the EOA would permit); (b) whether the proposed exemption is a reasonable limit on the Charter's right to equality; and (c) all the relevant case circumstances (sections 89 and 90). Further, the effect of section 38 of the Charter is to make it unlawful for VCAT to act incompatibly with human rights in the Charter or to fail to give proper consideration to them. Thus in deciding whether to grant an exemption, VCAT has to consider all rights affected and balance them so that no human right is limited unjustifiably.
- 3.14 An example of a case where an exemption has been granted following an assessment of whether the exemption is a reasonable limit of Charter rights is [Hobsons Bay City Council & Anor](#) (Anti-Discrimination Exemption) [2009] VCAT 1198.
- 3.15 This was an application for an exemption to enable the use of a pool area at a Council leisure centre by women only, mostly out of normal public opening hours of the centre, and to employ only women to provide that service.
- 3.16 The purpose was to accommodate Muslim women and women from some cultures who cannot swim or be in a state of undress in the presence of men who are not family members because they are not permitted to do so by their religion or culture; women who have been subject to sexual abuse or assault who are more comfortable swimming if men are not present; and other women who for other reasons may feel more comfortable swimming where men are not present.
- 3.17 The municipality presented evidence which included (among other things) census figures of residents and their religious nominations, that the proportion of males participating in sport and recreation was higher than women, that cultural constraints were one of the reasons for lack of participation by women, and that swimming was one of the most popular sport and recreation activity particularly in the Muslim community. The Council pointed to a report that had recommended it improve access for migrant and other culturally and linguistically diverse groups who, for cultural or religious reasons, were currently disadvantaged in accessing sport and recreation facilities provided by the Council.
- 3.18 Because there was potentially sex discrimination involved in the proposal, by excluding men from the facilities at a certain time and from being employed for this service, VCAT considered whether the exemption was a reasonable limit on the Charter's right to equal and effective protection from discrimination.

3.19 VCAT granted the exemption after concluding that the interests served by the exemption served to justify overriding the prohibitions against sex discrimination in the EOA. In reaching this conclusion, VCAT considered that shortening open hours for the pool area to men by half an hour was a minimal restriction and weighed it against the advantages: that women who for religious, cultural or other reasons could not swim in the pool while men were present would have that opportunity.

4. The Panel is interested in any test cases or related material that would indicate whether Victorian law would make it unlawful for governments to discriminate on the basis of religion in making funding decisions.

4.1 We are not aware of any cases in which a funding decision has been challenged on the basis that it is unlawful because it discriminates on the basis of religious belief or activity or because it failed to consider or was incompatible with the right to equal and effective protection against discrimination or the right to religious freedom. However we consider that it would potentially be possible to bring such a challenge under Victorian law.

4.2 Section 38 of the Charter requires government and other public authorities to give proper consideration to human rights in making decisions and to act compatibly with human rights.

4.3 Pursuant to section 38 it is unlawful for the Victorian Government in decision-making not to give proper consideration to the right to equality, which includes the right to protection from discrimination on the basis of religious belief or activity; the right to freedom of religion; and the right to declare and practice religion, where these rights are relevant to a decision. It is also unlawful to act in a way that is incompatible with these rights, that is where the act is not justified as a reasonable limit on a human right pursuant to section 7(2) of the Charter.

4.4 Under the Charter's remedies provision (section 39), it would be open for a person to seek judicial review of a government decision on the basis that the decision failed to give proper consideration to such rights (if they were relevant to the decision) or that in making the decision the government acted incompatibly with these rights. Unless otherwise precluded by law, this could include a challenge to a government funding decision.

4.5 Section 39 does not create a standalone cause of action. Pursuant to section 39 where a person can seek review of a decision on another basis (for example, a non-Charter ground of judicial review or other ground of unlawfulness) they may also seek review of the decision on the ground that the decision was unlawful under the Charter. The challenge may succeed on the Charter-ground alone (see *Goode v Common Equity Housing* [2014] VSC 585). This means that even if the non-Charter ground is not successful, the person may still be entitled to a remedy (excluding damages) where there is a determination that the decision was unlawful for being in breach of section 38 of the Charter.

- 4.6 The Commission is aware of decisions in international law where government funding decisions have been challenged on the basis that, to comply with the right to equal and effective protection against discrimination in Article 26 of the *International Covenant on Civil and Political Rights*, funding should be provided without discrimination on religious grounds. The right to equal and effective protection against discrimination in section 8(3) of the Charter is modelled on Article 26 of the ICCPR.
- 4.7 One of these cases, *Waldman v Canada* (UN Human Rights Committee *Communication No 694/1996*, 67th sess, UN Doc CCPR/C/67/D/694/1996 (1999)), is referred to in the Federal Court decision of *Wotton v State of Queensland* (No 5) [2016] FCA 1457.
- 4.8 *Waldman v Canada* involved a claim by a Jewish parent about what was said to be the preferential funding of Roman Catholic schools in Canada over other faith-based schools. The issue was whether public funding for Roman Catholic schools but not schools of the complainant's religion, which resulted in him having to meet the full cost of education in a religious school, amounted to a violation of the right to equal and effective protection against discrimination on the basis of religion. The Human Rights Committee reasoned that providing funding for schools of one religious group and not for another must be based on reasonable and objective criteria. Because the material before the Committee did not show that the differential treatment between the Roman Catholic faith and the complainant's religious denomination was based on such criteria, the Committee concluded that there had been a violation of the complainant's right in Article 26.
- 4.9 We note that the Federal Court in the *Wotton* case said that this decision ultimately had no domestic effect in Canada because the Ontario Government refused to implement it because of the alleged effect on its budget.

We hope that our response to the questions of the Expert Panel is of assistance.

Please do not hesitate to contact Gudrun Dewey, Strategic Adviser, on (03) 9032 3414 should you wish to discuss.

The Commission consents to this further submission being a public document.

Yours sincerely



Catherine Dixon
Executive Director
Victorian Equal Opportunity and Human Rights Commission