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Queensland Baptists Webinar Series

Responding to Contemporary Sexuality – The Discrimination Dilemma

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Introduction

Corney & Lind Lawyers Pty Ltd

➤ Mid size law firm – 18 lawyers + 30 staff

➤ Our focus areas

Schools & Education

Not for Profit & Charity

Commercial

Employment & Discrimination

Personal Injury

Commercial & Construction Litigation

Migration & Visas

Family Law

Criminal & Traffic

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➤ Our lawyers travel to you if needed

➤ Specialist lawyers committed to delivering “*just redemptive outcomes®*” with care and integrity

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1. Introduction

- The Faith Based Charity (FBC):
 - Churches, Schools, PBI's, Other Ministry or Mission Endeavours
 - Ministry of the Faith group
 - Mission, Vision and Values which drives its relationships and service delivery
 - Challenge – maintaining the Christian distinctive in a secular environment
- The legislative hurdles – Anti-Discrimination Act (Qld) (ADA), Sex Discrimination Act (Cth) (SDA); Fair Work Act (Cth)
- Exemptions – not uniform with the onus on the charity
- Judicial interpretation: Walsh v St Vincent de Paul; OW & OV v Wesley Mission Council; Christian Youth Camps v Cobaw Community Health Service
- Tension between protection of individual rights and freedom of religion
- Public Policy and Legal Arguments for and against the exemptions
- The Path Forward



2. Discrimination at law

- **Anti Discrimination Act (QLD) (ADA)**
 - Discrimination on the basis of an Attribute
 - Sex, Relationship Status, Lawful Sexual Activity (Lawful Prostitution), Sexuality (heterosexual, homosexual, bi-sexual), Gender Identity (including indeterminate sex)
 - Areas: Work (including voluntary work), Education (by Educational Authority), Goods and Services, Accommodation
 - Remedy = Anti Discrimination Commission Qld, Queensland Civil and Administrative Tribunal
- **Sex Discrimination Act (Cth) (SDA)**
 - Discrimination on the basis of Sexual Orientation, Gender Identity, Intersex Status
 - Areas: Employment, Education, Goods, Services and Facilities, Accommodation
 - Remedy = Australian Human Rights Commission, Federal Circuit Court
- **Fair Work Act (Cth) (FWA)**
 - Adverse Action against employee or prospective employee
 - Because of sex, sexual orientation, political opinion etc.
 - Does not include Gender Identity
 - Remedy = Fair Work Commission, Federal Circuit Court



2. Discrimination at law

- Direct Discrimination – ADA and SDA
 - Less favourable treatment because of the attribute
 - What is the real reason/ true basis of the decision? Purvis v NSW Department of Education
 - There can be more than 1 reason (ADA – must be the Dominant Reason; SDA – A Reason)
 - Motivation is not necessarily relevant – Central question is “*why was the aggrieved treated as he/she was ... Motive, purpose and effect may all bear on that question*” (Purvis)
 - Applying the comparator – Comparison with how the person without the attribute would be treated



2. Discrimination at law

- Indirect Discrimination – ADA and SDA

- ADA

- Imposing a Requirement/Condition
- Person with attribute unable to comply
- Persons without the attribute are able to comply

- SDA

- Imposing a condition, requirement or practice
- Has or is likely to cause disadvantage

- Not about being incapable of complying - Would compliance impact upon dignity or well-being (Mandla v Dowell Lee)

- Requirement/ Condition is not reasonable in the circumstances? (JM v QFG; CEO v Clarke)

- objective test – weighing nature and extent of discriminatory effect against the reasons in favour of the requirement/condition;
- Less than necessary but more than convenience
- All relevant circumstances must be considered – reasons, effect, financial burdens



2. Discrimination at law

- Adverse Action (FWA) – Employees and Prospective Employees (not Volunteers)

- Adverse Action

- Dismissal
- Causing injury
- Altering Position
- Discriminating when compared to other employees
- Refusing to employ an applicant

- “Because of”

- Must be a substantive reason, but need not be the sole or dominant reason
- What is the actual reason (dependant on the evidence of the decision maker)
- Onus on the employer to disprove

- Listed attributes – race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction, social origin.



3. Exemptions for FBC

- Inherent Requirements/Genuine Occupational Requirement (ADA, SDA, FWA)
 - Work discrimination (employee, volunteer under ADA)
 - Under the SDA – exemption is limited to “sex”, not gender identity, intersex status or sexual orientation.
 - Broader application under the *Fair Work Act 2009* for employees (Complainant chooses jurisdiction)
 - Necessary, Essential and Indispensable to the position (*Qantas v Christie*)
 - Objective assessment (is it really necessary) and Subjective Assessment (would this particular employee be otherwise suitable for the position)
 - What are the relevant factual circumstances
 - *Walsh v St Vincent de Paul (2008 QADT)*
 - President of a St Vincent de Paul Chapter
 - Not inherent requirement that she be a Catholic, despite the role carrying spiritual duties
 - The rules were unclear and inconsistently applied
 - Effect: Demonstrate that sexuality etc is essential to the position, understood at outset, and consistently applied



3. Exemptions for FBC

- Additional Genuine Occupational Requirement - ADA
 - Work discrimination (employee, volunteer etc)
 - Work for an educational institution under direction or control of a body established for religious purposes
 - Work for a body established for religious purposes and the work genuinely involves adhering to and communicating the body's religious beliefs
 - Person openly acts in a way they know, or ought reasonably to know, is contrary to the religious beliefs
 - It must be a genuine occupational requirement that person act consistently with employer's religious beliefs
 - Discrimination must not be unreasonable, having regard to all circumstances.
 - Harsh, unjust or disproportionate
 - What are the consequences
 - Don't Ask, Don't Tell provision



4. Exemptions for FBC

- Religious Functions (SDA and ADA)
 - Appointment of Priests, Ministers of Religions, Members of Religious Order
 - Training or education of those persons
 - Selecting persons to perform functions or participate in religious observance or practice
 - Broader application than “Inherent Requirements”
 - Query: What is a religious observance or practice?
 - Sacraments/Ordinances – i.e. Worship, administering communion, baptism, teaching, preaching.
 - What about collecting the offering? Welcoming people at the Church door?
Technology/Power point operators?
 - Further removed from religious observance/practice, the more difficult to apply the exemption



4. Exemptions for FBC

- Causing Offence to Religious Sensitivities
 - Excluded in Qld (ADA) for Work (inc Volunteer) and Education areas
 - Rely on Genuine Occupational Requirements or Openly Acting exemptions for work area
 - School mainly for students of a particular religion for Education Area
 - Significant limiting factor (remember that volunteers are “workers”)
 - In Qld (ADA) – Body must be established for “religious purposes”
 - Contrast with Victoria and Commonwealth
 - Victoria – religious body includes any entity that establishes, directs, controls or administers a charity or educational institution conducted in accordance with religious doctrines, beliefs or principles
 - Commonwealth – Similar exemption for Educational Institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed
 - FWA – any institution conducted in accordance with doctrines, tenets, beliefs or teaching of particular religion or creed



4. Exemptions for FBC

- Causing Offence to Religious Sensitivities of Adherents
 - SDA - Act or practice of a Religious Body that conforms to the doctrines, tenets or beliefs or teachings of that religion OR is necessary to avoid injury to the religious susceptibilities of adherents of that religion
 - FWA - Action taken in accordance with the doctrines, tenets, beliefs, or teachings of that religion AND is necessary to avoid injury to the religious susceptibilities of adherents of that religion
 - Discriminating action must be taken in good faith
 - Not actuated by malice
 - Also applies to educational institutions under SDA
 - ADA – Act by religious body in accordance with the doctrine of the body AND necessary to avoid offending religious sensitivities
 - SDA – Exemption does not apply to government funded Aged Care (excluding employment of persons to provide the care)



4. Exemptions for FBC

- Wesley Mission Case (2010 NSW Court of Appeal (NSW Legislation))
 - Same Sex Couple that sought to become foster carers through Wesley Mission
 - Application was rejected by the Wesley Mission
 - Legislation in NSW – any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion OR is necessary to avoid injury to the religious susceptibilities of the adherents of that religion
 - At first instance
 - Religion was “Christianity” – not Wesley Mission. Broad view regarding sexuality
 - Doctrine – principle taught by the religion, in relation to an issue of real significance to the faithful. It must have a source in significant religious texts or oral traditions regarded as authority
 - “Monogamous heterosexual partnership within marriage is both the norm and ideal of the family” is not a “doctrine” of the Christian religion
 - Avoid injury to adherents (all of a significant majority of the adherents) – Christian religion with a diversity of view regarding sexuality.
 - On appeal to Appeal Panel
 - Definition of religion was too narrow – it should be Wesleyanism
 - What is “religion”? Broader interpretation accepted (religion was Wesleyan)
 - On Appeal to Court of Appeal
 - Doctrine – not uncontroversial to use definition “creed or body of teachings proclaimed by ecclesiastical authorities to be true
 - Religion – Wesleyan – focus on their doctrine and adherents
 - Remitted for re-hearing,
 - Doctrine – “particular moral or religious principles taught or advocated” (can include sexuality if so propagated by the Wesley Mission)
 - No need to then consider if there might be injury to adherents (two limbs to the defence, and the first limb was made out)
 - Complaint dismissed



5. Exemptions for FBC

- CYC Case (2014 Victorian Court of Appeal)
 - Complainant ran a project for suicide prevention (same sex youths)
 - Sought to book the CYC (Brethren Movement) campsite on Phillip Island
 - Was CYC a “religious body”
 - Majority (2 of 3) said No, it did not exist for religious purposes
 - Secular resort
 - No explicit religious connection (aspirational only to manage the facilities in a Christian spirit and make attendees aware of this)
 - Had a “doctrine” been breached?
 - Difference between “doctrine” and “beliefs”
 - Doctrine – set out in Trust Deed – CYC relied on Plenary inspiration
 - Subsequently (during the appeal) sought to argue that sexuality and sexual activity were also doctrine, but this was rejected.
 - View on homosexuality was not a doctrine – but was an application of the doctrine – more akin to a belief
 - Importantly, Christianity does not impose beliefs on non-Christians – the action taken did not conform with the doctrine



5. Exemptions for FBC

- CYC Case (2014 Victorian Court of Appeal) (continued)
 - Injury to adherents?
 - Affront to reasonable expectations of church members?
 - Premises were not church premises
 - Insufficient connection between CYC and Church
 - “Wholly unsurprising that not steps have ever been taken by CYC to prevent its camps being attended by persons in same sex relationships”
 - Leave to Appeal to High Court
 - Not persuaded that the interests of the administration of justice, either generally or in this particular case, require a grant of special leave to appeal. Special leave to appeal refused with costs
 - Does “Beliefs” really help?
 - Queensland Legislation – Doctrine only (not include beliefs) – but Wesley Mission suggests broader meaning
 - SDA – Extends to Doctrines, Tenets and Beliefs
 - But is the discrimination “necessary” to avoid offending religious sensitivities (both limbs in QLD and FWA)
 - Maxwell P - The belief was a rule of “private morality only, and only applied to the sexual practices of adherents – therefore is was not “necessary” to avoid causing offence



6. Marriage Equality

- Exposure Draft Legislation released October 2016
- Public Comment closed 15 February 2017 (submissions available on-line)
- Minister of Religion Exemption
 - Refusal to solemnise marriage that is not the union of a man and woman
 - Refusal conforms to the doctrines, tenets of beliefs of the Minister's religious body or religious organisation; or
 - Refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion; or
 - Minister's conscientious or religious beliefs do not allow the Minister to solemnise the marriage
- Wedding Celebrant's Exemption
 - Wedding Celebrant's conscientious or religious beliefs do not allow the Celebrant to solemnise the marriage
- Religious Bodies/Religious Organisations Exemption
 - Provision of facilities, goods or services
 - For purpose of solemnising marriage, or any purpose reasonably incidental
 - Refusal conforms to doctrines, tenets or beliefs of the religious body or religious organisation;
 - Necessary to avoid injury to the religious susceptibilities of adherents of that religion
- Problems
 - No exemption for individuals/ businesses involved in ancillary wedding services (photography, etc)
 - No exemption for Faith Based Charities generally (i.e. Schools that might have a Chapel, PBI's providing pre-marriage counselling, etc)



7. Public Policy arguments

- Limiting the Exemptions further?

- Need for Tolerance

- Freedom of religion urges intolerance
 - Freedom of religion should be subordinate to other rights
 - AHRC – “exemptions exist at the intersection of two fundamental human rights; namely the right to practice a religion and belief, and the right not to be discriminated against on the basis of sex, marital status, pregnancy ... The existing permanent exemption provides little incentive for religious bodies to re-examine their beliefs about the role of women ... the permanent exemption does not provide support for women of faith who are promoting gender equality within their religious body.”
 - Senator Wright – Greens “equality involves affording dignity and respect to everyone and not treating them unfavourably because of their ... personal characteristics” and that “the exemptions fly in the face of the idea that people should be treated equally, with dignity and respect.” She concluded that “systemic discrimination sanctioned by the State makes it much harder for a tolerant, rights oriented culture to flourish in Australia”

- Should Corporations enjoy exemptions?

- Reverse piercing of the Corporate Veil
 - Corporations have no soul, body or conscious state of mind – they are not natural persons – therefore have no beliefs
 - Reverse piercing in unfair and inequitable

- Receipt of Public Funds

- The Greens – “make sure blanket exemptions for religious organisations do not apply when the organisation is using public money to provide public services”



7. Public Policy arguments

- Extending the Exemptions?
 - Freedom of Religion
 - Human rights are founded on human dignity. Should not rank human rights in order of priority. Implies that religious individuals or organisations are not of equal value (Harrison and Parkinson)
 - FBC's make a valuable contribution
 - Allow them to make this contribution without interference (Parkinson)
 - Restraints on Religious Freedom must be limited
 - Foster – limit rights where the other right is a “strong right” (such as freedom from racial discrimination) and genuine harm is caused
 - Limit the exemption where the charity is acting as agent for government or delivering specific services in a small community (Harrison and Parkinson)



8. Way forward?

- Work on your doctrines, tenets and beliefs now
- Consider whether you can express sexuality (within monogamous, heterosexual relationships) to be a doctrine
- Identify what is acceptable/not acceptable, to ensure consistent application
- Employment/ Volunteers – Should preserve the right to choose (inherent requirements). But consider to what extent this is required, justify it, and apply it consistently?
- Link your charities/ministries closely to your church (ministry, mission and beliefs)
 - Note the CYC Decision where CYC was not closely associated with the Church and carrying out secular activities
 - Check your public communications, websites etc
 - How will injury be caused to adherents by the activities of associated entities
- May need to closely examine constituent documents and employment/volunteer practices to evidence these requirements/desires



8. Way forward?

- Delivery of services/ church attendees – may be more difficult to rely on an exemption
 - Maxwell P – For Christianity – belief is a rule of “private morality” and only applied to the sexual practices of adherents
 - Implications – Gender Identity
 - Sporting Activities – until 12 years – no discrimination. From 12 years – can have regard to strength, stamina and physique requirements
 - Dress and Attire – markers of gender – may not be able to discriminate
 - Toileting/Change Facilities – using disabled toilets may cause undue attention to the individual. Could consider renaming to “Unisex” if ever raised by an individual.
 - Camps and Sleeping Arrangements – separate room?
 - Group Segregation (Boys/Girls Groups) – may need to allocate based on preferred gender
- Churches need to advocate for individual and corporate religious freedom
 - Be aware of the public policy debate
 - Marriage Equality Debate – Religious Freedom should be broader than contemplated in draft legislation

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