
legislative provisions should take. The ALRC has kept the ball rolling with its proposals in its discussion paper: *Multiculturalism: Criminal Law*. There are precedents in two States (as well as overseas) on

which to build or from which to learn, and a report is expected shortly from Victoria's Committee to advise the Attorney General on Racial Vilification. The challenge for the federal Government will be

to initiate the necessary reforms at Commonwealth level before the momentum for change dissipates; the challenge for the community will be to maintain the momentum. □

Discrimination and the church

Kirsty Magarey questions the exemptions from equal opportunity legislation enjoyed by the church.

The principle of equality

The objects of equal opportunity legislation — 'to promote recognition and acceptance within the community of the principles of the equality of men and women' — have not yet been achieved. In the paid work force women earn 65¢ for every dollar earned by men. Australia has a more sex segregated work force than nearly all OECD countries. Women perform approximately 75% of housework and 67% of unpaid work. While women comprise 50–60% of law students, only 9% of women lawyers are partners in law firms compared with 41% of men. (These statistics are taken from the NSW Women's Advisory Council's series on Women and Work).

Equal opportunity legislation imposes legal sanctions for engag-

ing in certain discriminatory behaviour regarded as harmful to others. The fact that sexual divisions and inequality are still entrenched after years of legislative intervention raises questions about why this discrimination is proving so intransigent.

The sources of sexism

A major limitation of equal opportunity legislation is that it confines itself to the 'public' arena — it steers clear of areas regarded as 'private'. Sex discrimination has its roots in the power structures of the patriarchal family — mirrored in so many public institutions. The profound and endemic nature of society's sexism indicates that its causes are deep-seated, and likely to be largely determined by what happens in the private sphere

where people spend their formative years. Since the legislature rigorously avoids the so-called 'private areas' the aims of equal opportunity legislation are harder to achieve. To the extent that legislative measures fail to combat discrimination in the private sphere, it fails to deal with the source of the problem. Such measures attempt to close the gates after the horse has bolted.

Religion and the private sphere

Religion is treated by legislators as part of the private sphere. Every Australian jurisdiction with sex discrimination legislation provides exemptions for religious institutions. (Sex Discrimination Act, 1985 (Cth) s 37 and s 38, Equal Opportunity Act 1984 (Vic) s 38,

Equal Opportunity Act (SA) s 50, Equal Opportunity Act 1984 (WA) s 72, Anti-discrimination Act 1977 (NSW) s 31A and s 56). These exemptions are very broad — they cover any 'act or practice of a body established for religious purposes which conforms to the doctrines, tenets or beliefs of that religion, or is necessary to avoid injury to the religious susceptibilities of adherents of that religion'. The difficulties of defining religious susceptibilities, or whose religious susceptibilities should be given priority in case of conflict, are considerable.

Discrimination in the private sphere

Australia has signed and ratified the United Nations Convention to Eliminate All Forms of Discrimination Against Women. This Convention forms the Schedule to the Sex Discrimination Act. Article 5 is particularly relevant to this debate, calling on party states to do everything in their power to combat sex discrimination within the private sphere — in the areas of sex stereotyping etc. The Convention says that social and cultural patterns need to be modified to eliminate sex-role stereotypes and notions of the inferiority or superiority of either sex. This article has particular relevance for religious bodies.

Reviews of EEO legislation

There has been remarkably little public debate about the wisdom of giving religious bodies such broad exemptions, and this vacuum does not seem about to be filled, despite the fact that a number of different bodies have recently been evaluating Australia's equal opportunity legislation. The House of Representatives Standing Committee on Legal and Constitutional Affairs is examining the Sex Discrimination Act (1985) (Cth) as part of its reference on equal opportunity and

equal status for Australian women. The VLRC has recently issued its Review of the Equal Opportunities Act, and the Human Rights and Equal Opportunity Commission (HREOC) is reviewing some of the permanent exemptions in the Sex Discrimination Act.

Justifying discrimination

An interesting aspect of the VLRC's Review of the Equal Opportunity Act was that it made no attempt to grapple with the issue whether the exemptions given to the discrimination practiced by religious bodies was justified. This is despite the fact that they were assessing the Act with respect to its effectiveness and with a view to ensuring that there should be no significant gaps or anomalies.

The VLRC was advised that, in order to avoid inconsistency with the Commonwealth legislation, the Victorian exemptions should mirror Commonwealth exemptions. This would make it difficult for the Victorian Act to be modified when the Commonwealth Act provides such broad exemptions. The constitutional complexities involved in dealing with the area are considerable.

Pragmatism and injustice

There are also pragmatic reasons for the retention of the exemptions. While some would see them as resulting in injustice, many would see them as a political necessity. Most sex discrimination legislation has enjoyed bipartisan support. Widespread political support has presumably been important in encouraging the acceptance of such legislation in the wider community. However it may also indicate that the legislative agenda which has been adopted is staying within overly cautious parameters.

EEO legislation and religion

While the terms of review of permanent exemptions being con-

ducted by the HREOC do not include the section giving broad, general exemptions for religious institutions (s 37), it will touch on the relationship between religion and equal opportunity legislation when it considers whether the permanent exemption given to educational institutions established for religious purposes should be continued (s 28). The House of Representatives enquiry into the Sex Discrimination Act should also address the issue.

Freedom to discriminate

In a recent speech ALRC President, Justice Elizabeth Evatt, a member of the UN Committee to Eliminate Discrimination Against Women (CEDAW), challenged the unquestioning acceptance of the permanent exemptions given to religious organisations. She raised this question in her speech to a recent Australian theological conference, 'Women Authoring Theology':

The frequent resort to religious belief to oppose reform, and the impact of religious institutions on gender equality, cause me to ask whether the principles of individual freedom of religion and the doctrine of the separation of church and state really require that religious institutions be free to discriminate on the grounds of sex.

She went on to point out that while

[f]reedom of belief and freedom to manifest religious belief in worship, observance, practice and teaching are rights protected by the International Covenant on Civil and Political Rights ... [t]hey may ... be subject to limits prescribed by law as necessary to protect the rights and freedoms of others.

This is also reflected in the VLRC's recognition that 'The [Equal Opportunity Act] does not impose

legal sanctions on people for what they believe, but only acts that harm others'.

It would be difficult to mount an argument that legislative enactments can never take precedence over freedom of religion. Since nearly any action could be justified in the name of some religion the state must determine the limits it will give to freedom of religion. Chief Justice Latham pointed out that freedom of religion is not an absolute 'to be exercised independently of other cherished privileges' (*Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116).

Instances where laws forbidding certain behaviour override freedom of religion in Australia include polygamy and child abuse. There is rarely any suggestion that believers should be exempt from the general legal framework governing these matters. Race discrimination is another area which is uniformly illegal. There are no exemptions for religious institutions in the Race Discrimination Act. The absolute nature of the prohibition indicates that racial discrimination is viewed more seriously than sexual discrimination. There is an ambiguity in the legislative approach to sex discrimination. To avoid further equivocation the legislature needs to decide whether the prevention of sex discrimination is an imperative or whether it should be a matter for discretion. If women do have a right to be free from discrimination then the exemptions are hard to justify.

The arguments in favour of the exemptions centre around the need to preserve freedom of religion. Those in favour of the exemptions would presumably point out that women are free to leave sexist religious organisations and that if a voluntary organisation



wishes to give expression to its deeply held beliefs this should be of no concern to the state; as long as religious institutions which wish to discriminate on the grounds of sex do so within a 'religious' province the secular state should not interfere.

Sexism and children

These arguments ignore the fact that it is not only adult women who are affected by sex discrimination in the church. Children are often not given a choice about adherence to a particular religion. By allowing such broad exemptions the state allows sexist attitudes to be taught to children. This violates Article V of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981, which states that:

Practices of a religion or beliefs in which a child is brought up must not be injurious to his [or her] physical or mental health or to his [or her] full development...

The church is public

Another factor which weighs against the exemptions is that, in practice, the activity of the church is not private but public. The church has a strong influence on society. Over two thirds of the Australian population identify as Christian so the sexism of the churches is likely to have a significant impact on Australian society. This is true not only in numerical terms but also because the impact of religion on humanity's psyche is deep and lasting. As the NSW AntiDiscrimination Board has said: 'religion penetrates the very texture of existence' (p 2 Discrimination and Religious Conviction, 1984).

Justice Evatt makes a similar point when she says:

In considering whether religion should be exempt from equality laws, it can be argued that the issue goes beyond a matter of personal spiritual belief. Many religions provide guidance, direction or control of the roles of men and women... These practices, traditions and attitudes can

have a strong effect on the perceptions and experience of adults and children ... In this way they can undermine the equality of women in the social structure, an equality which is a basic human right and which the law upholds.

Experiencing exclusion

The experience of exclusion that women face in their churches is likely to create psychological scarring of a long-term nature. The weekly reinforcement that only men

are worthy enough to perform a range of functions — from preaching a sermon to invoking a blessing — has profound effects, not only on participants in the religious structures, but also on society's ability to fulfil the aims of the Sex Discrimination Act — ie to promote equality.

Human Rights Commission review

The HREOC has recently extended its deadline for submissions to the

review of permanent exemptions to 30 September and the House of Representatives Standing Committee will soon be publishing their discussion paper on the Sex Discrimination Act. The thorny issues surrounding the appropriate balance between freedom of religion and the state's promotion of equal opportunity should be further illuminated through these processes. □