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Time to Act

The Senate Economics Legislation Committee Report into the *Tax Laws Amendment (Public Benefit Test) Bill 2010* recently quoted the following plaintive cry from a sector participant:

"There comes a point where a government ... has to make a decision either to do something or to stop saying that it is going to intend to do something, because this matter has been on the agenda for many, many years. "

The Committee Report went on to say:

"The Committee believes it is time for action. It expects legislation establishing a commission to be referred to it in due course."

These comments are encouraging as they suggest reform is imminent. We look forward to the establishment of a national commission for Not for Profits.

Meanwhile this Not for Profit briefing points to some rays of light in the reform journey to help players understand which way the wind is blowing and how hard. Recent announcements by the Gillard Government provide hope that reform will not be delayed by a divided Parliament.

Finally we feature the recent case of *Cobaw Community Health Services v Christian Youth Camps Ltd and Anor (Anti-Discrimination)* [2010] VCAT 1613 (8 October 2010) which knocks around the exemptions for discriminatory conduct for religious organisations.

Murray Baird
Principal
Not for Profit Group

After the Election: the new playing field

Office for the Non-Profit Sector in the Department of Prime Minister & Cabinet

The Government has announced that it will establish a new Office for the Non-Profit Sector in the Department of Prime Minister and Cabinet. The Office will drive and coordinate sector reform within Government. The Office will report directly to the Minister for Social Inclusion, the Hon Tanya Plibersek, MP.

Non-Profit Sector Reform Council

On Friday 15 October 2010, the acting Minister for Social Inclusion, the Hon Chris Bowen, MP announced that the Commonwealth Government will establish a Non-Profit Sector Reform Council.

Its role will be to advise the Office for the Non-Profit Sector on:

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- the role, feasibility and design options for a national 'one-stop-shop' regulator for the sector;
- streamlining Commonwealth Government tendering and contracting processes for government funded non-profit organisations, including the development of a common form contract;
- harmonisation of fundraising and other State and Territory legislation;
- additional recommendations contained in the [Productivity Commission's Research Report on the Contribution of the Not-for-Profit Sector](#) (a summary of key recommendations is available in our [February 2010 Not for Profit Briefing](#));
- Non-profit reform generally, including implementation of the [National Compact: working together](#).

The Government is calling for expressions of interest for members of the Council. See the [Department of Prime Minister and Cabinet website](#) for more information. Nominations close 31 October 2010.

Elizabeth Turnour
Lawyer

The Public Benefit Test

To have the valuable status of a Charity (whether in the Welfare, Education, or Religious category) there is an assumption that you are good for the community. This is called the Public Benefit Presumption.

Earlier this year, Senator Xenophon (South Australia, Independent) introduced the *Tax Laws Amendment (Public Benefit Test) Bill 2010* into the Commonwealth Parliament. It would have required religious and charitable institutions seeking tax concessions to prove that their aims and activities contributed to the public benefit - rather than an assumption that this is the case.

It was a sledgehammer to crack open the nut of tax concessions to the Church of Scientology that was frustrating Senator Xenophon.

The Bill lapsed on 19 July 2010 when the Parliament rose for the 2010 election. However, a public benefit test of some sort is likely to reappear in the future.

The Senate Economics Legislation Committee [Report](#) into the *Tax Laws Amendment (Public Benefit Test) Bill 2010* was published on 7 September 2010. It recommended the introduction of a public benefit test, but said that it should be adopted in the context of broader reform and not as a stand-alone reform.

Elizabeth Turnour
Lawyer

Senate Economics Legislation Committee

Senate Economics Legislation Committee [Report](#) into the *Tax Laws Amendment (Public Benefit Test) Bill 2010* went well beyond its brief to look at Public Benefit. It recommended the establishment of a single independent national commission for Not-for-Profit organisations and that the Government establish a working group, or use the COAG Business Regulation and Competition Working Group to get things moving.

Elizabeth Turnour
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What a Charities Commission would look like in Australia

The Senate Committee made the following recommendations about a National Commission for Not for Profits - generally referred to as a Charities Commission:

- The functions of the national commission should be determined by a working group after extensive consultation with the sector;
- The functions of the commission should include:
 - Promote public trust and confidence in the charitable sector;
 - Encourage and promote the effective use of charitable resources;
 - Develop and maintain a register of all not-for-profit organisations in Australia using a unique identifying number (for example an ABN) as the identifier;
 - Develop and maintain an accessible, searchable public interface;
 - Undertake either an annual descriptive analysis of the organisations that it regulates or provide the required information annually to the ABS for collation and analysis;
 - Educate and assist charities in relation to matters of good governance and management;
 - Facilitate, consider and process applications for registration as charitable entities;
 - Process annual returns submitted by charitable entities;
 - Supply information and documents in appropriate circumstances for the purposes of the Tax Acts;
 - Monitor charitable entities and their activities to ensure that registered entities continue to be qualified;
 - Inquire into charitable entities and persons engaging in serious wrongdoing in connection with a charitable entity;
 - Monitor and promote compliance with legislation;
 - Consider, report and make recommendations in relation to any matter relating to charities; and
 - Stimulate and promote research into any matter relating to charities.
- It should apply to Not-for-Profits generally, and not just Charities;
- It should not be named the "Not-for-Profit Commission" because it was "negative" and suggested organisations were defined by what they are not;
- It should replace "a complex array of state and territory regulatory bodies, streamlining processes for charities and reducing their compliance costs".

Elizabeth Turnour
Lawyer

Exceptions to discrimination law: the CYC case - a casenote

The recent decision in [Cobaw Community Health Services v Christian Youth Camps Ltd and Anor \(Anti-Discrimination\) \[2010\] VCAT 1613 \(8 October 2010\)](#) has generated much discussion.

We set out below a brief summary of the issues canvassed in this case.

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Policy context

In 2006, the Victorian Parliament enacted the [Charter of Human Rights and Responsibilities Act 2006](#) ("the Charter"). It contains a list of more than 19 rights that Parliament seeks to protect and promote. It includes a right to enjoy human rights without discrimination, and to have equal and effective protection against discrimination (s 8). It also includes a right to freedom of thought, conscience, religion and belief (s 14).

How does the community prioritise these values when they conflict?

The facts

Cobaw Community Health Services ("Cobaw") managed "WayOut" - a youth suicide prevention project targeting same sex attracted young people in rural areas.

Christian Youth Camps Ltd ("CYC") owned the Phillip Island Adventure Resort ("Adventure Resort") which provided accommodation and conference facilities at Phillip Island in Victoria. CYC was established by the Christian Brethren Trust.

Cobaw wished to book the Adventure Resort for a weekend forum for the WayOut project. CYC indicated that the booking would be a problem because of the Christian Brethren's views of the promotion of homosexuality.

Cobaw claimed discrimination on the basis of the sexual orientation of the participants.

Was there unlawful discrimination?

The [Equal Opportunity Act 1995](#) (Vic) ("EO Act 1995") prohibits discrimination against a person on the basis of their sexual orientation in the provision of goods and services or accommodation. Judge Hampel found that CYC had breached these prohibitions. However, the discrimination would not be unlawful if CYC could prove that it was protected by one of the exemptions contained in the EO Act 1995.

The religious belief exceptions

Section 75 of the EO Act 1995 provided an exemption for anything done by a body established for religious purposes that:

- conforms to the doctrines of the religion; or
- is necessary to avoid injury to the religious sensitivities of people of the religion.

Section 77 provided an exemption for discrimination necessary for a person to comply with the person's genuine religious beliefs or principles.

General principles for interpreting the religious exceptions

The Judge found that the following principles apply to the interpretation of the religious exceptions:

- They should be applied narrowly so as to advance the purposes or objects of the EO Act 1995 to prohibit discrimination. In contrast, the right to equality and freedom from discrimination should be afforded a broad interpretation.
- The protection of religious freedoms must be interpreted as far as possible in a manner which is compatible with the rights to equality and freedom from discrimination.

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Was CYC a body established for religious purposes?

The Judge was not satisfied that CYC was a religious body for the purposes of the exceptions. She found that there was little reference to the religious connections of CYC in any of its marketing or general publicity, and CYC did not provide religious input to the significant number of secular groups that booked the Adventure Resort.

Curiously the Judge relied on the case of [Roman Catholic Archbishop of Melbourne v Lawlor \[1934\] HCA 14; \(1934\) 51 CLR 1](#) where the Judges of the High Court were tied on the question whether a Catholic newspaper was established for a religious purpose or was merely beneficial to religion. The Judge did not refer to the relatively recent case of [Commissioner of Taxation v Word Investments \[2008\] HCA 55 \(3 December 2008\)](#) in which the High Court placed substantial emphasis on the **purpose** rather than the **activities** of an organisation to establish whether an organisation was established for advancement of religion. A query may also be raised over the manner in which the Judge applied the recent decision in New South Wales in [OV & OW v Members of the Board of The Wesley Mission Council \[2010\] NSWCA 155 \(6 July 2010\)](#).

Did the conduct conform to the doctrines of the Christian Brethren?

The Judge interpreted the word "doctrine" to refer to the core architectural statements of faith such as creeds rather than generally to teachings. She noted that matters of sexual relationships or homosexuality generally do not occur in the creeds or declarations of faith of branches of the Christian religion and are not doctrines but merely "beliefs".

In our view this is a narrow view of the word "doctrine". The word "doctrine" is generally used to refer to teachings of religion rather than only the core architectural statements of faith. We doubt whether Parliament intended such a narrow reading.

The Judge also pointed out the word "conforms" should be interpreted not as "requires obliges or dictates certain conduct" rather than "consistent with". On this strict interpretation of "conform", the doctrines of the Christian Brethren did not dictate the refusal of the booking.

Injury to sensibilities

Was the refusal of the booking necessary to avoid injury to the religious sensitivities of adherents to the Christian Brethren religion? The Judge said that "injury" was not just causing offence but a harm that was real and significant. The Judge pointed out that because the Adventure Resort did not enquire as to whether other applicants for bookings were same-sex attracted people or unmarried couples who engaged in sexual activity, that it was not necessary to avoid injury to the religious sensitivities of the Christian Brethren to refuse bookings for such classes of people.

The Judge appeared to connect the behaviour of CYC with concern about the sexual orientation of the people attending the forum. However, it appears to us that CYC's concern was principally about the purpose and activities of the forum, which CYC perceived was to promote homosexuality by teaching young people that it was acceptable. CYC believed that to allow such teachings would be inconsistent with the doctrine of the Christian Brethren, and would injure the religious sensitivities of its adherents.

This difference may be explained by analogy. Take for instance a religious body whose adherents believe in pacifism. They may welcome a soldier who wishes to worship with them. However, they might object to renting their property to the Australian Defence Force for the purpose of training Army Cadets. It is the organisation, and its purpose, that the adherents objected to. This distinction was not clearly identified in the judgment.

The result

The Judge found that there was unlawful discrimination and none of the religious exceptions were made out. Damages were awarded in a "modest amount" of \$5,000.00.

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As the Law stands

We summarise the legal situation after the decision as follows:

1. Where there is provision of goods and services to the public, care must be taken to avoid discrimination.
2. Interpretation of prohibitions on discrimination are to be read as widely as possible to achieve the elimination of discrimination.
3. Exceptions must be read as narrowly as possible to ensure that the right to freedom from discrimination is given the least interference.
4. In this context "religious purposes" will only apply to direct and overt purposes, and indeed actual practice, rather than principles and motivations.
5. To discriminate where such discrimination conforms with genuine religious beliefs is not enough. It must conform with fundamental doctrines.
6. To discriminate where it is necessary to avoid injury to religious sensitivities requires unavoidable and substantial injury rather than mere offence.

Conclusion

Bodies with religious purposes who previously thought that discrimination in the provision of goods and services was permissible if made on the basis of genuinely held beliefs will need to rethink their position. The exceptions are now read so narrowly as to give limited protection.

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The Moores Legal Not for Profit Team

We have a range of practitioners who are able to assist with any minor queries or major issues you may have. If you require further information, please contact a member of our Team

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Moores Legal is a law firm servicing companies and businesses, Not for Profit organisations and individuals across Melbourne in the areas of Commercial Law, Workplace Relations, Property Law, Not for Profit Law, Aged Care, Elder Law, Estate Planning, Superannuation & Structuring, Dispute Resolution, Family Law and Personal Injury Law.

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