

Plunkett Centre for Ethics

A joint centre of Australian Catholic University, St Vincent's Health Network Sydney and
Calvary Healthcare

Bernadette Tobin's answers to questions on notice

Question 1 I said in my submission that: '...the relevant wording of the Bill needs to be such as to protect an organization from having what is in accordance with its 'doctrines, tenets, beliefs or teachings' being determined by a judge. The Bill should be written in such a way that a NSW judge would not and could not hold herself out as a theological authority. For this reason I recommend that the Bill define a religious ethos organization as one that is 'conducted in accordance with, or for the furthering /furtherance/ development of, the doctrines, tenets, beliefs or teachings of a particular religion'. In reply to a question about how this would overcome the issue of a judge defining a religious doctrine, I said that "it is more likely that a judge will think that he or she knows what is the teaching of a religious tradition if he or she is referring back to something that is commonly thought to be the teaching of that tradition. At least some religious traditions have built into them the capacity for their doctrines and tenets and beliefs to be developed in such a way that they reflect and respond to current circumstances. This is why my wording, which I think others have adopted as well, gives a desirable flexibility for the teachers in a tradition to teach that tradition reasonably, respectfully and sometimes counter culturally.'

Reply: The definition in 22K of 'religious ethos organization' includes the words [a] 'a private educational authority...' [b] a charity... [c] any other body...'which – in each case – **'is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion'**. The words in bold are the operative part of the definition requiring the minister,

board, president, tribunal or court to make a determination as to whether the challenged conduct is in fact in accordance with those doctrines, tenets, beliefs or teachings.

I suggested that the words 'or for the furtherance of' be inserted after the words 'conducted in accordance with' in (a), (b) and (c). I explained that these additional words would add a degree of flexibility to the definition which would reflect the fact that, in some religions at least, the doctrines, tenets, beliefs or teachings are such as to be capable of being developed to reflect contemporary circumstances. It is undesirable that a tribunal or court should be called upon to determine whether an organization is being conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. (This is all the more so if the court or tribunal were minded to interpret the present words narrowly.)

This added flexibility is consistent with the test expressed in 22KA for determining when a belief is held: 22KA makes it clear that what is up to the tribunal or court is the *bona fides* of the holding of the belief, that is, the determination of whether or not the person who holds a religious belief 'genuinely believes the belief'. This means that the tribunal or court has regard to the genuineness of the belief and does not attempt to stand in the shoes of the cleric or theologian.

Question 2 *Won't the Bill (at point 3.2) provide special status to the protection of discrimination on the basis of religious belief or activity, over and above the protection the Act gives against other forms of discrimination?*

Reply: There are no grounds for saying that the proposed Amendment to the Act would give religious freedoms special rights or privileges:

3.1 expressly requires that fundamental regard should be had to the International Convention on Civil and Political Rights (sc in its entirety), and the ICCPR says that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit **any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex,**

language, religion, political or other opinion, national or social origin, property, birth or other status (Article 26). [Emphasis added]

3.2 expresses the internationally-recognized scope of and legitimate limits to the specific protection which the Amendment seeks to **add** to the Anti-Discrimination Act, that is, that limitations on a person's right to manifest their religion or belief must be made where **only** such are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, and specifically in accordance with the Siracusa principles. This does not give religious freedoms special rights or privileges. In fact, by referring to a reasoned process for adjudicating rights which conflict in a particular circumstance, it attests to the fact that, on occasion, a person's right to freedom of religion **may have to give way** to another's conflicting right.

Question 3: *Would the Bill enable a religious organization to take action against a government/department/individual on the basis that the criteria for government funding of an organization requires accessibility to the public broadly?*

Reply: There is nothing in the Bill which 'enables' such an action. The Bill (Section 22Z) simply protects a religious ethos organization from being forced to "engage in conduct, including use of its property, in a manner which is contrary to the doctrines, tenets, beliefs or teachings of that organization". So, a religious ethos organization could take action only if participation in a State program was made conditional on its acting **contrary** to its beliefs. The question is not about "accessibility to the public" but rather about whether a State authority can **coerce** people exercising their freedoms of religion and association to act contrary to their beliefs in order to participate in a government program.