

“Homophobic Harassment”

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The discussion paper *With Respect: A Strategy For Reducing Homophobic Harassment In Victoria* by the Joint Working Group of the Victorian Attorney-General’s and Health Minister’s Advisory Committees on Gay, Lesbian, Bisexual, Transgender and Intersex (GLBTI) Issues, (hereafter *With Respect*), makes a case for amending the Victorian Equal Opportunity Act to:

- Address homophobic harassment against GLBTI people (Recommendation 10, pp. 33-6) and include the amendment in a separate part of the Act so that the section is not covered by the current exemptions under the Act, including the religious exemptions (Recommendation 11, p.36-7).
- Ensure that the harassment provisions should operate as broadly as possible and should not be confined to the areas of public life identified in Part 3 of the Equal Opportunity Act. The approaches warranting further consideration include:
 - Applying the harassment provisions to public acts;
 - Excluding private acts from the operation of the provisions;
 - Limiting the operation of the provisions to circumstances where the harm done is reasonably foreseeable; and
 - Applying the provisions to harassment wherever it occurs. (Recommendation 12, pp. 37-42)
- Make it unlawful to harass another person on the basis of their sexual orientation or gender identity. (Recommendation 13, p. 43-5)
- Define harassment as ‘conduct that offends, humiliates, intimidates, insults or ridicules another person’, and so that other features of the definition include:
 - that harassment be assessed against an objective standard, requiring that a reasonable person (having regard to all the circumstances including the history of discrimination or otherwise against persons of that sexual orientation or gender identity) would have anticipated that the other person would feel offended, humiliated, intimidated, insulted or ridiculed.
 - that, consistent with existing Victorian provisions, harassment be capable of being constituted by a single act. (Recommendation 14, pp. 43-6)

This is of concern to religious people and their organisations because most religions condemn behaviour that involves genital sexual intimacy between people of the same sex. It is customary for religious people to make a distinction between people and their behaviour, but it is also customary for those lobbying for the rights of people who described as gay, lesbian, bisexual, transgender and intersex (GLBTI) not to distinguish between condemnation of certain acts and condemnation of the people who may be described in any of those ways and who may be thought to perform those acts. It is therefore to be expected that continuing to teach on the morality of the behaviours would

cause people who are gay, lesbian, bisexual, transgender and intersex to feel offended, humiliated, intimidated, insulted or ridiculed.

It would seem that what a preacher or a religious health educator might ordinarily say about sexual intimacy between people of the same sex, that is that such activities are immoral because unchaste, would qualify as harassment because a person who engaged in those activities might feel offended, humiliated, insulted or ridiculed. A preacher who read aloud from the Scriptures, from, for instance, Romans 1, I Corinthians 6, 1 Timothy 1, Genesis 1: Be fruitful and multiply...., Genesis 19: the story of Sodom & Gomorrah, Leviticus 18:22, Leviticus 20:13, Deuteronomy, Judges or Kings, may also be considered to have committed the same offence of harassment that the authors of the paper want to be become law.

One of the things the authors of *With Respect* decry is the fact that 35% of Australians believed homosexuality was immoral. (p. 13). Presuming that many of those who responded in that way were religious, the claim would not seem to distinguish the common religious belief that being homosexual is not immoral from the religious belief that genital sexual intimacy between people of the same sex is immoral. In this respect the religious belief about such behaviour is related to the belief that sexual intimacy between people who are not married to each other is immoral. It would appear that the authors do not make that distinction between the attribute or orientation and the behaviour.

The source given is Flood, M. and Hamilton, C. (2005) *Mapping Homophobia in Australia*. The Australia Institute.¹ Flood and Hamilton give their source for the above claim as a large database compiled by Roy Morgan Research using self-completion interviews with 24,718 respondents aged 14 and over. The same data is referred to by Shirleene Robinson in *Homophobia: An Australian History* Federation Press/Sydney 2009². Robinson says that the question survey respondents were asked was whether they agree or disagree with the statement "I believe that homosexuality is immoral." She says that this is a limited measure of homophobia and refers to further analysis of the same data that showed a marked gender difference with 43% of men and 27% of women agreeing with the statement and other data³ that shows that male attitudes towards female homosexuality are much less negative. She postulates that the male response has something to do with masculine identity and the notion that gay men violate masculine identity which is essentially heterosexual.

¹ Accessed 9/2/10 from <https://www.tai.org.au/documents/downloads/WP79.pdf>

² Accessed 9/7/10 from http://books.google.com.au/books?id=IWHOI2s9JqQC&pg=PA20&lpg=PA20&dq=Roy+Morgan+Research+homophobia&source=bl&ots=Eh1-VCuwu-&sig=TV9yG_TzChwZnUV2DWNue8ZTiQw&hl=en&ei=_ttwS8_-IYugkQW67_SGCg&sa=X&oi=book_result&ct=result&resnum=3&ved=0CBUQ6AEwAg#v=onepage&q=Roy%20Morgan%20Research%20homophobia&f=false

³ Gail Mason *The Spectacle of Violence: Homophobia, gender and knowledge* Routledge/London 2002 pp.58-77

Australian respondents to the Roy Morgan survey were also asked whether they agree or disagree with the following statement. "Homosexual couples should be allowed to adopt children". Flood and Hamilton report that, as might be expected of those who believe that homosexuality is immoral, only seven per cent think that homosexual couples should be allowed to adopt children. However even amongst those who do not agree that homosexuality is immoral around half think that gay couples should not be allowed to adopt children.⁴ The latter negative judgement is thus separated in the minds of many from the morality of homosexuality. It might of course be a judgment about a child needing both a father and a mother rather than negativity towards homosexuality per se.

Much of the literature refers to negative religious attitudes towards homosexuals but in the material referred to above, the distinction between attitudes to the behaviour and attitudes to the person is not made. That raises a question about whether it would be practicable for a religious person to use the distinction as a defence against a charge of homophobic harassment. In the way in which the proposal has been worded the test is not what the speaker meant by the words, but whether a reasonable person (having regard to all the circumstances including the history of discrimination or otherwise against persons of that sexual orientation or gender identity) would have anticipated that the other person would feel offended, humiliated, intimidated, insulted or ridiculed.

One might argue that the law should make a distinction between what is said about a person on the basis of a mere attribute such as sexual orientation and what might be said about particular behaviours. That is to say, religious people may well hold that it is unfair and unjust to speak badly of someone merely because of their sexual orientation and even that the law should protect people who are GLBTI from being verbally abused for their orientation. The problem would seem to be that popular discourse does not make the distinction between such abuse of the *person* and what a religious person might say about the moral issue of *behaviour* that includes genital sexual intimacy between people of the same gender. The problem for religious people is the difficulty of reconciling in the public forum the two very different propositions that Christians and other religious people are likely to hold:

- We deplore the treatment of homosexual persons as objects of violent malice in speech or in action and condemn it as a disregard for others which endangers the most fundamental principles of a healthy society including the intrinsic dignity of each person which must always be respected in word, in action and in law.⁵
- To choose someone of the same sex for one's sexual activity is immoral because it annuls the rich symbolism and meaning, not to mention the goals, of the Creator's sexual design and homosexual activity is not a complementary union, able to

⁴ Flood, M. and Hamilton, C. (2005) *Mapping Homophobia in Australia*. The Australia Institute p. 5

⁵ See for instance CONGREGATION FOR THE DOCTRINE OF THE FAITH *LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS* 1986 n. 10. "It is deplorable that homosexual persons have been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the Church's pastors wherever it occurs. It reveals a kind of disregard for others which endangers the most fundamental principles of a healthy society. The intrinsic dignity of each person must always be respected in word, in action and in law."

transmit life; and so it thwarts the call to a life of that form of self-giving which the Gospel says is the essence of Christian living.⁶

Religious people see no conflict between these propositions because we are used to discussing the morality of behaviours without condemning anyone. The Christian religion welcomes sinners and we do not exempt ourselves from being classed as sinners⁷. On the basis of Biblical teaching, we welcome the sinner, we stand ready to forgive the sinner, while condemning the sin. But for others, such an approach may be difficult to understand and they may find it difficult to separate attitudes to sin from attitudes to the sinner.

With Respect contains the above proposals for laws that by implication may require us to give account of ourselves with respect to these two propositions. According to the first proposition it may follow that religious people should support a law that protects homosexual and other persons from violent malice of speech or action directed towards them because of their orientation. According to the second we should be free to express a moral view about unchaste activities. The immediate need therefore is to convince the enquiry and our legislators that there is a distinction to be made that is not reflected in the way in which the legislative proposal is currently expressed in *With Respect*.

In that respect the proposed test is unjust because it is not a test of the reasonableness of the anticipated response of the person that he or she would feel offended, humiliated, intimidated, insulted or ridiculed. If comment on the behaviour, but not the person, is anticipated by a reasonable person to be a cause of the other feeling in any of the ways listed, then that is sufficient to establish the offence even if no such meaning was intended nor reasonably implied by what was said. As such the creation of the offence would unjustly restrict free speech in relation to being able to discuss and draw moral conclusions about unchaste behaviour freely.

The *With Respect* proposal is obviously too broad. It aims to protect people who are GLBTI from abuse but its effect would be much broader than that because the test for such abuse would prohibit discussion of sexual morality, especially religious discussion of morality. The proposal endangers both freedom of speech and freedom of religion.

For religious people sexual morality is primarily about chastity which involves the successful integration of sexuality within the person and thus the inner unity of man in his bodily and spiritual being and thus involves beliefs about the way in which men and women are made. Religious people tend to believe that we exist for the purpose of our relationship to God. For religious people, therefore, sexuality has a purpose in the

⁶ Ibid. n. 7, To choose someone of the same sex for one's sexual activity is to annul the rich symbolism and meaning, not to mention the goals, of the Creator's sexual design. Homosexual activity is not a complementary union, able to transmit life; and so it thwarts the call to a life of that form of self-giving which the Gospel says is the essence of Christian living. This does not mean that homosexual persons are not often generous and giving of themselves; but when they engage in homosexual activity they confirm within themselves a disordered sexual inclination which is essentially self-indulgent.

⁷ In using the language of "sin" and "sinner" we follow our Biblical tradition, without any desire to cause offence by the use of this language.

complete and lifelong mutual gift of a man and a woman. In other words we are gendered for a reason.

To say as much as that however could be considered an offence of homophobic harassment under the recommendations in *With Respect*. If the proposal became law it would become an offence to preach or teach a biblical understanding of sexuality.

The proposal would severely restrict both freedom of expression and freedom of speech such that discussion of the morality of certain acts could be considered an offence. Such a limitation would be unlikely to improve the status of people who are GLBTI, rather, if anything it would be likely to foster resentment. Matters of morality are better conducted freely and without restraint so that irrationality can be exposed by that discussion. There may be a need to protect people who are GLBTI and other identifiable groups from those who would incite hatred against them, but this proposal goes much further than that.

A further danger in the phrasing of the offence is that it does not require any intent on the part of the perpetrator to cause harm. The test is whether a reasonable person would anticipate that another may be offended. If there is to be an offence of this nature it needs to reflect the intention of the perpetrator and the test needs to be in relation to intentionally inciting hatred.