

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**HUMAN RIGHTS DIVISION**

**ANTI-DISCRIMINATION LIST**

**A208 of 2005**

**Catchwords**

*Anti- Discrimination- exemption- to enable incorporated association with close relationship to Mornington Baptist Church to employ only those who hold certain Christian beliefs – services provided by association to all, irrespective of religious belief – relevant considerations –Equal Opportunity Act 1995 s83.*

**APPLICANT:** Mornington Baptist Church Community Caring Inc.

**WHERE HELD:** Melbourne

**BEFORE:** Deputy President, Cate McKenzie

**DATE OF HEARING:** 13 October 2005

**DATE OF ORAL REASONS:** 17 October 2005

**DATE OF WRITTEN REASONS:** 10 November 2005

**ORDER:**

1. This application is dismissed.
2. The Applicant has liberty to apply for the more limited exemption mentioned in the Tribunal's reasons for decision given today.

**CATE McKENZIE**  
**DEPUTY PRESIDENT**

**Appearances**

For the Applicant: Pastor Dale Stephenson

## DECISION

- (1) I am now in a position to hand down my decision in this matter and my decision is that the application is dismissed. However, as I explain later in my decision, I will be prepared to grant an exemption in a much more limited form. I now give my reasons.
- (2) Mornington Baptist Church Community Caring Incorporated, (which I call “MBCCCI”), has applied to the Tribunal for exemption from certain provisions of the Equal Opportunity Act 1995 (“Equal Opportunity Act”). As clarified at the directions hearing and at the hearing of the application, the application is to enable it to employ in the MBCCCI a number of employees including a manager or coordinator and also to engage volunteer interviewers, counsellors and coaches to work in its programs. It wishes to employ in these capacities only those who have publicly confessed Jesus Christ as both saviour and lord of their lives, have been baptised as believers in obedience to Christ's command and are walking in daily fellowship with Jesus and his people. It wishes to be able to advertise these matters.
- (3) I first deal with the law. I then say something about the material before me.
- (4) Under s.83 of the Equal Opportunity Act, the Tribunal has a broad discretion to grant exemptions from the provisions of the Act. It has discussed this discretion in many cases and applies a relatively uniform approach. It first asks whether there is possible prohibited discrimination involved. If there is, it looks at all the circumstances before it including the scheme of the objectives of the Act and whether the application is consistent with one of those objectives; the scheme of the express exception provisions in the Act and whether the application is consistent with the spirit although not necessarily the letter of one of those exception provisions and any other compelling interest which might justify the exemption.

- (5) I now come to the material. After the Tribunal's directions hearing, and in accordance with the Tribunal's directions, MBCCCI advertised the application and invited submissions on it. No submissions have been received either by this Tribunal or by the applicant.
- (6) I now deal specifically with the material. Until November 2004, the Mornington Baptist Church in addition to its other activities operated a number of outreach or community care projects. In November 2004 there was established an incorporated association to conduct these outreach care programs. The content of these programs and of the COACH program in particular is described in extensive material before me. I also have submissions from Pastor Stephenson and Mr Champion who appeared at the hearing.
- (7) The purpose and structure of this incorporated corporation, which was called MBCCCI, can be seen from its statement of purposes and its rules which are included in the material. In brief, its purposes are to assist individuals and families affected by poverty, addiction, substance abuse, mental illness or physical illness, isolation, family relationship breakdown, unemployment, poor life skills, low self esteem, or lack of resources, to be strengthened and supported by the community. The objectives include to provide practical and material relief in the form of food, clothing, furniture, financial assistance or otherwise to connect these individuals and families to the community, to facilitate the development of practical life skills such as budgeting, meal preparation, parenting, managing the household, and to improve the confidence and self esteem as individuals and families so that they can again take responsibility for their lives and for meeting their own needs. Its purposes also include to provide referrals to other services where appropriate.
- (8) The third and fourth purposes in the list in the statement of purposes are "to fulfil the great command and love the Lord our God with all our heart, soul, mind and strength and love our neighbour as ourselves and to demonstrate unconditional love

and acceptance and respect to members of the community”. Clause 4(2) provides among other things that the association's membership comprises those who have publicly accepted Christ as lord and saviour, have been baptised as believers in obedience to Christ's commandment and walk in daily fellowship with Jesus (see Clause 4 (2)(B) to (D)). The words used here are similar to those used in this application for exemption. They are also similar to some of the wording of the Baptist doctrine which is set out in a schedule to the Baptist Union Incorporation Act 1930. That schedule contains the constitution of the Baptist Union which in turn sets out both Christian doctrines in which Baptists believe and also those doctrines which may be described as distinctively Baptist.

- (9) The association's Board determines whether to accept or reject an application for membership. It is clear from Clause 4(11) that members are expected to give financially and consistently to support the association. The Board manages the association's affairs. The Board is constituted by officers who are required to be members of Mornington Baptist Church. This is clear from Clause 19(3).
- (10) The day to day management of the association is vested in an executive. The executive comprises at least three Board members including the senior Pastor of the Mornington Baptist Church or his or her appointed representative. This is clear from Clause 19 (5). The Senior Pastor or his or her representative if the chair of the executive. Under Clause 20, the senior Pastor is also the president of the association. Under Clause 21, if the senior Pastor resigns his or her pastoral position or leaves the association, the eldership (defined as the committee of elders of the Mornington Baptist Church), may invite him or her to remain on the association. The association is a not for profit body (Clause 34).
- (11) At the hearing, Pastor Stephenson explained that the incorporated association was formed to operate outreach community care programs because of the advantages of having those programs operated by a body with corporate status and also so that the

body could obtain the status of a public benevolent institution for the purpose of taxation laws.

- (12) The association operates a number of care programs for individuals and families in the Mornington community. One of these is called “Back on Track”. It provides food for families in need.
- (13) Another is called “COACH”, “Creating Opportunities and Casting Hope”. I will describe this program shortly.
- (14) COACH, Back on Track and the other care programs operated by MBCCCI respond to peer needs in the Mornington community. These needs are described in an interim report by three academics in the Monash University's Faculty of Education, Associate Professor Gale and Doctors Peeler and Jane. This report evaluated the success of the COACH pilot project. The needs are also described in the material before me which includes some financial submissions prepared by MBCCCI.
- (15) The Mornington Peninsula covers ten per cent of Victoria's coastline. In 2001 it had a population of 125,000 clustered mainly between the towns of Mt Eliza and Dromana. The population has grown rapidly, approximately 20 per cent more rapidly than that of Melbourne. There is significant building and construction in the area. People in the area are disadvantaged in a number of ways. These include homelessness, isolation, unemployment, financial hardship, domestic violence and family relationship breakdowns. Adolescents are at greater risk than elsewhere of educational failure, substance abuse and relationship breakdowns. The Mornington area has the highest reported incidence of family violence in the State.
- (16) MBCCI programs such as Back on Track and COACH seek to provide practical help at a very basic level. The Back on Track program provides food and other emergency necessities.

- (17) The aims of COACH are broader and more comprehensive. COACH is a community mentoring program. It appears that it is the first of its kind, at least in the Melbourne area, and probably in Victoria although there are some similar programs overseas. The program seeks to meet the various kinds of needs which I have just described by identifying families which it then matches with volunteer mentors or coaches. The program aims to develop close relationships between the coach and the client family. The program aims to provide a local solution to a local community problem. The coach tries to help the client family develop enough self confidence and social and other skills to begin to tackle their problems themselves. The coach will also give information about available resources such as where to go to seek employment and how to prepare a household budget and so on. The coach offers a holistic approach to support the family's needs, material, financial and spiritual. The program will cater for kinds without regard to race, religion, sexual preference or any other personal attribute. The coach is not a missionary but will not refuse to speak about spiritual matters if this is what the clients wish to do.
- (18) Coaches aim to foster social, economic and spiritual well being in their client families, to help foster family's parenting skills and prevent things such as relationship breakdown which may then lead to homelessness and educational failure in children. Coaches seek to help socially isolated families connect again with the community through encouraging participation in recreational and other community activities.
- (19) The February 2005 Monash University Faculty of Education report shows that the program is having considerable success since its beginnings in late 2003. It has given practical help to 46 families. Of these, some have taken up a community activity, such as recreation. Others have gained employment or begun to participate in education. Some others have started budgeting programs. 40 coaches have been trained and 16 of these are receiving additional training. The results of the surveys,

interviews and questionnaires which are collated in the February 2005 report indicate that satisfaction with the program both by client and coaches is high. The material before me also includes a number of letters of support for the program which make very positive comments on its achievements. The clients emphasise how the relationship with the coach has helped them and the coaches emphasise how the program has broadened their experience and has enhanced their lives.

- (20) The program aims to establish long term relationships between coach and client families, relationships with are expected to last at least nine months. One of the comments made by a number of the clients in the material before me and which is also mentioned in the February 2005 report is the non judgmental way in which coaches relate to their client families. In brief, the program seeks to foster hope, independence and self motivation and to restore links between individuals, families and the community.
- (21) The COACH program is operated in partnership with other local bodies such as the Mornington Shire Council, other local churches and the Mornington Community Information Support Centre. The program has a working action group which includes representatives of the MBCCCI and of the other partners involved in the program. Funding for the program's pilot project is made up of contributions from the Commonwealth Government (DFACS) from the Mornington Shire Council and from the Mornington Baptist Church. It is fair to say that the Mornington Baptist Church is a substantial contributor of funds. It is estimated that the budget for the program for 2006 will be \$154,000 of which the Mornington Baptist Church will contribute \$60,000.
- (22) The final report on the pilot project is due in November 2005. MBCCCI and its partners wish to continue and expand the program to other areas. As I have said, the material before me includes a number of letters of support for the program. These include letters from State Members of Parliament and school principals in the area.

- (23) I now deal with some of the paid employees with the MBCCCI itself. Currently, MBCCCI employs six paid employees. One is a full time co-ordinator and the others are part time paid staff. MBCCCI offices are at the Mornington Baptist Church premises. The church allows MBCCCI to use this premises free of charge.
- (24) I now come to the question of whether the exemption should be granted. I should first say that I do not intend my conclusions in this part of my reasons to reflect in any way upon the beneficial nature of the programs which MBCCCI operates. These programs are without question for the benefit of the community and are excellent programs. They benefit many disadvantaged people in the Mornington area and are strongly supported by the community. But this exemption relates not to the programs themselves, but to whether certain employees and volunteers of MBCCCI should be in effect required to be Christians. I first ask, is there prohibited discrimination involved?
- (25) At first glance, it would appear that there is possible discrimination on the basis of religious belief or activity in the provision of services. I note for example that in Dixon v. Anti-Discrimination Commissioner of Queensland (2004) Q.S.C. 58, the Queensland Supreme Court quashed the decision of the Queensland Anti-Discrimination Commissioner to decline a complaint by a woman who did not believe in God and who was required by the Baptist Church Family Support Service to include in her contract of employment a requirement that she commit to Baptist values. While this case is clearly not identical to the current exemption application, it does support my conclusion that there is possible discrimination here. That decision, I should add, did not end with a final determination of the case. The matter was simply remitted to the Anti-Discrimination Commissioner.
- (26) Is the proposal then covered by some express exception provision in the Equal Opportunity Act? In my view the proposal concerning volunteer coaches is covered

by such provision. This would also apply to the other volunteers, interviewers, counsellors and so on. That means that these volunteers do not fall within the Equal Opportunity Act and it is on this basis that I dismiss this part of the exemption application.

(27) The proposal in my view relates clearly to employment. The definition of employee in s.4 of the Equal Opportunity Act does not include an unpaid worker or volunteer. The definition of employment in the same provision does not include work on a voluntary or unpaid basis. The definition of employer does not include a person who employs another person on an unpaid or voluntary basis. As I have said, this means that this part of the application should be dismissed because the Equal Opportunity Act does not apply to it. It does not apply to voluntary coaches, interviewers, counsellors or other volunteers.

(28) There are two other exception provisions that have possible application. First there is s.75(2). Section 75 is headed "Religious Bodies". Section 75(1) relates to the ordination or appointment of priests, ministers of religion or members of religious orders and their training or education and to the selection or appointment of people to perform functions or participate in a religious observance or practice. Section 75(2) provides that nothing in Part 3, (which is the part that prohibits discrimination) –

"applies to anything done by bodies established for religious purposes that

(a) conforms with the doctrines of the religion or,

(b) is necessary to avoid injury to the religious sensitivities of people of the religion".

(29) I am not satisfied that this exception so clearly applies that I should not go on to consider the application further.

(30) First, it is possible that MBCCCI may not be a body established for religious purposes, even though it is required to be constituted by members who have certain

Christian beliefs and its structure confers certain specific functions on the Pastor of the Mornington Baptist Church. Its statement of purposes concentrates on community care rather than religious matters and includes only two purposes that could be described as explicitly religious.

- (31) Second, even if it is a body established for religious purposes, it is not clear from the material before me that in effect the exclusion from employment with the MBCCCI of non Christians conforms to Baptist doctrines.
- (32) Third, it is not clear from the material that such exclusion is necessary, (the words are "necessary" not "reasonable" and not "reasonably necessary") to avoid injuring the sensitivities of Baptists.
- (33) The second exception is in s.77. It is headed "Religious Beliefs or Principles". It provides –
- “Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuinely held religious beliefs or principles”.
- (34) Again, I am not satisfied that this exception so clearly applies that it is unnecessary to consider this application further. The provision again refers not to “reasonable” or “reasonably necessary” but to the word "necessary". There is insufficient material to satisfy me that the exclusion of non Christians from employment by MBCCCI is necessary for the association or its members to comply with Baptist beliefs or principles.
- (35) I have not found or been referred to any legislation which specifically authorises what MBCCCI wants to do. This is not a situation similar to Anglicare which is established directly by the Anglican Welfare Agency Act 1997. Nor is it similar to the Baptist Union itself which is established directly by the Baptist Union

Incorporation Act 1930. That Act, as I have said, includes the Union's constitution and expressly refers to various doctrines of the Baptist church. It is argued for MBCCCI that the exemption should be granted because the programs now operated by the association were originally initiated by and operated by the Mornington Baptist Church. Also the applicant says that people employed by MBCCCI are required to represent the church and that it is appropriate that they should be able to represent its values properly. They can only do this if they comply with the criteria proposed in the exemption application. Pastor Stephenson in his submissions to me, said that MBCCCI currently has some non Christian volunteers and that it proposes to keep them. He also says that its programs are available to people of all beliefs and religions and in fact were provided regardless of personal attribute. He argued however that given the religious nature of the association was clear from its membership and management and the closeness of its links with the Mornington Baptist Church, this justified an exception of this kind being granted.

- (36) Although with some hesitation, I have come to the conclusion it is not appropriate to grant the exemption in the current form. MBCCCI operates programs for all without discrimination. I am not convinced on the material before me that it would be appropriate to permit discrimination among those whom it employs. A diversity of beliefs among those who provide the services for which it operates may well be beneficial for those who receive those services. It will reflect the diversity of the Mornington community. A client of a particular background may feel more comfortable in approaching an MBCCCI employee of the same faith background. There will be a larger choice of employees if there is no limiting of them to those who are Christian. This may give the association a greater and more skilled employee pool from which to draw.
- (37) The situation may have been different if the association remained part of the church itself. But it, of course, has been separated from it. Nor do I consider that it necessarily follows from the structure of MBCCCI that its employees must only

be Christians. The association already has power to guide, develop, manage, establish and monitor programs for community care. These powers of course are not affected by the faiths or religious views of the association's employees.

- (38) One of the objectives of the Equal Opportunity Act is to promote the recognition and acceptance of equality of opportunity. Sometimes exemptions have been granted on the basis that allowing difference or distinction where there would otherwise be discrimination, is necessary to correct an imbalance or to address a disadvantage. On the material before me, I am not satisfied that this falls into such a category.
- (39) It follows that I dismiss this exemption application. In conclusion, I would make two comments. First, although I have dismissed the application in its present form, I would be willing, if the association applied, to grant an exemption in a more limited form. Such an exemption could perhaps permit an applicant for employment or employee to be asked to agree that they would not, in the course of their employment, criticise the Baptist faith and agree to a requirement that they would explain to clients the role of MBCCCI and its links with the Mornington Baptist Church and also, if requested by clients, they would be able to refer these clients to someone either in MBCCCI or in the Mornington Baptist Church who could give them the necessary advice or guidance as to matters of the Christian faith.
- (40) Second, I would urge MBCCCI to obtain its own legal advice about Rule 4(2) Paragraphs (B) to (D) as to qualifications for membership concerning the holding of various Christian beliefs. That advice would need to have regard to the provisions of the Equal Opportunity Act and also to s.21(4) of the Association's Incorporation Act 1981 which among other things provides that a rule of an association is of no effect if it is contrary to law.

(41) That concludes my reasons for decision.

**CATE McKENZIE**  
**DEPUTY PRESIDENT**