

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE
Inquiry into exceptions and exemptions in the Equal Opportunity Act

Melbourne — 5 August 2009

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Mr R. Ward, Victorian state director, and
Mr M. Sneddon, member, state council, Australian Christian Lobby.

The CHAIR — I particularly thank Rob Ward, who has been a stayer over the past couple of days. We appreciate his interest and that of the Australian Christian Lobby in the work of the committee. Thanks for attending the public hearing. The purpose of these hearings is to report to the Parliament on whether any amendments should be made to the exceptions and exemptions in the Equal Opportunity Act 1995. Anything you say or publish before the committee today is protected by parliamentary privilege. However, once you leave the hearing anything you say or publish outside the room is not so protected. I invite you now to make a brief statement to the committee on the relevant issues that you consider are important to your organisation concerning this inquiry. That will be followed by questions and then by us having a break.

Mr WARD — I would like to thank the committee for the opportunity to speak today. We welcome the opportunity to review the exceptions in the act. As someone said earlier today, it is not a perfect document and it does deserve some attention from time to time.

The Australian Christian Lobby occupies a somewhat different space from some of the other church and church-related groups whose representatives have spoken today. We are not a church, we are not a peak body seeking to represent schools or welfare agencies, we are certainly not a political party and neither are we a denomination. The Australian Christian Lobby has a vision, in that we seek to see Christian principles and ethics accepted and influencing the way we are governed, the way we do business and the way we relate to each other as a community.

We are, in the most commonly accepted term, a parachurch group, with a goal of speaking particularly in the political and public policy areas at both state and federal levels — which is why most of you recognise my face. Parachurch organisations are, by definition, Christian faith-based organisations which work outside and across denominational boundaries. As such, the Australian Christian Lobby is in a unique position, I believe, to reflect to the committee today the depth and breadth of concern felt across the wider Christian community over some of the proposals contained in the Options Paper.

Here in Victoria my role with the Australian Christian Lobby is as state director. As such, I caucus quite widely and am engaged with a number of different groups across the Christian community, ranging from Catholic to Pentecostal, to Baptist, to Anglican — quite broadly. You will have seen in amongst the hundreds and hundreds of submissions you received a fairly substantial submission from the Ad Hoc Interfaith Committee, which, if you recall, has attached to it some 60-odd signatures of people from across Christian and other faiths. I would like to draw your attention to that, quite separately from the ACL submission, because it demonstrates the breadth of concern. This is not an issue that is upsetting simply a few radical people; it is of deep, abiding concern right across the church and faith communities.

Our submission, both to this committee and also to the earlier Department of Justice inquiry — by the way, where is the report from that inquiry? — argues for the retention of the existing exemptions and the clarification in particular of section 75 to provide some certainty to groups not directly under the government or control of a church or religious order. I think the previous witnesses spoke to that to some degree.

I believe you have more than 1000 submissions, with 700-plus full-bodied submissions and a number of simple proformas. I do not want to add to your reading, and I do not intend to dissect our submission directly. I am sure you have read and memorised all the cogent points. Rather, with your indulgence, I would like to make two key points before I hand over to my colleague, who will dig a little deeper into some broader concerns that we have.

Firstly, others in the course of these hearings have challenged one of the most perplexing assumptions in the Options Paper, that of dividing religious expression into core and non-core sections. With respect, one might as well take a sword and divide a living, breathing human being into two parts, left and right, and expect them to function separately from each other. It just will not work. For a person of deeply held faith, the expression of that faith involves a whole-of-life living out of that belief.

Indeed I suspect that the faithful of all major religions would share this view. Especially in the case of Christianity, one is not a Christian simply because you attend mass or church at the weekend but because you believe in and have faith in God and therefore live out that faith in every area of your life; you cannot divide them. Somebody said that you cannot chop it up into little pieces, and I agree.

The idea put forward in the Options Paper that a distinction can be made between core internal and wider extended activities of religion and that religion is primarily a private matter for an individual is wrong. This

assumption is unworkable and problematic. It fails to acknowledge the central motivation of faith in the public and private lives of believers, particularly in acts of service. Indeed it would be fair to say that faith-based organisations, especially those with a Christian foundation, have carried a disproportionate burden in the education and welfare sectors of Victoria for more than two centuries, and still do today. It is not an unwelcome burden; it is an expression of faith that causes people to give in that way. We reject completely this underlying — and we suggest contrived — basis of the Options Paper to divide religion into core and non-core.

Secondly, as has been mentioned briefly above, the essential character of Christianity contains a call to serve the poor and those in need of support. To tear at the very heart of Christian faith by denying the past and indeed the present reality of the key role Christian good works play in our society is either malicious or demonstrates a blinkered, intolerant secularist approach that is blind to the value of Christian service through our wider society. The provision of welfare services to all and sundry regardless of race, colour or creed is an essential element in what makes Australia a great country and indeed Victoria a great state. Church-based agencies, some with government support and many without, serve in the streets of Melbourne and beyond every single day.

Many of these groups are boosted in their effectiveness by the addition of volunteers who give selflessly, motivated by Christian love and concern. It would be a foolish person indeed who forced Christian agencies to surrender their very reason for being in order to secure government funding. Indeed we would suggest that in many cases, and I think it has been referred to earlier today, the government chooses to support such faith-based initiatives because they get more value — more bang for their buck, if you will excuse the expression — from the motivated volunteers who thus serve in those groups.

As I hand over to my colleague I would ask if anyone would demand that the Liberal, Labor or National parties would accept into their ranks a person whose ethos, world view and values ran directly counter to those of that party. Why then should people of deeply held faith and conviction be compelled to employ somebody whose ethos, world view and values run directly counter to that of their faith? I was tempted to ask if faith or politics was more important, but I was afraid that I might get the wrong answer from this table! With that I will hand over to my colleague, Mark Sneddon.

Mr SNEDDON — Thank you, Rob, and thank you to the members for giving us the time to present to you today. My remarks are directed to what we see as two fundamental flaws in the reasoning in the Options Paper and in a number of the submissions which it discusses, such as the one from the Victorian Equal Opportunity and Human Rights Commission.

The first flaw which I direct the attention of members to is some confusion in the Options Paper as to its understanding of the role of exceptions. The Options Paper begins promisingly enough — we think correctly — at page 5 by seeing exceptions and exemptions in the Equal Opportunity Act not as a carve out from a stand-alone right of equality but an essential and integrated part of defining what is unlawful discrimination. In the Equal Opportunity Act discrimination is defined simply as ‘different and less favourable treatment’. But a moment’s reflection will tell you that in millions of examples every day we treat people differently and less favourably, and not all of those different and less favourable treatments are unfair or should be prohibited by law or are bad.

It is really only unfair discrimination that we are trying to prohibit, and in order to pull back what is already an over-broad definition of ‘different and less favourable treatment’, being discrimination, and to bring it back to something which is unfair discrimination that we want to prohibit, the Act uses the exceptions and the exemptions, and you can read this in the Options Paper at pages 5 and 6. Hence, the exemptions and the exceptions are vitally important to make the Act operate fairly. Taking them out or watering them down substantially risks having the Act prohibit fair and reasonable discrimination where discrimination is simply differential treatment.

Although the Options Paper starts by recognising that on pages 5 and 6, by page 11 and thereafter it slips into quite a different mindset. The different mindset is that nondiscrimination means equal treatment — or, put the other way, freedom from differential treatment — and that of itself, by itself, is a fundamental right, and any exception to that fundamental right not to be treated differently must be necessary and justified as proportional to the purpose of the exception. Without explaining why or how, the paper changes to a position where the rule of no different treatment is enshrined as a right on its own, and all the balancing exceptions are relegated to

second place to justify themselves if they possibly can. That is a very subtle but important shift in reasoning, which is not explained or justified.

The second flaw, and I would point out that this is perhaps even more foundational, is that the Paper and a number of the submissions have a fundamental blind spot. They assume throughout that the right to be free from differential treatment is paramount and that all other rights and any other balancing considerations are secondary and should be permitted only on the most stringent justifications. But why? Why is the right to equal treatment paramount over the right to freedom of association? Why is it paramount over freedom of religion or of conscience or of any other right or freedom? The Paper does not really answer that question, and neither does the submission of the Commission.

The assumption appears to have been derived from applying the balancing test in section 7 of the Charter of Human Rights and Responsibilities. Section 7 says that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified ...

The Paper says we must see if each exception in this Act to the right to equal treatment or right to equality can be justified by reference to the section 7 Charter criteria. Indeed the Paper suggests that the exceptions need to be pulled back because there is a danger that the Equal Opportunity Act, with those exceptions in there, might infringe the right to equal treatment under the Charter. But hold on. By an unargued assumption that analysis privileges the equality or non-discrimination right as the paramount protected human right to which any exception must be justified. But if you look at the Charter, there are a bunch of rights in there. There is nothing in the Charter, or indeed in any other international or domestic human rights instrument, to say that the equality right in section 8 has any priority at all over the right to freedom of conscience, religion and belief, which is in section 14 of the Charter.

We can equally well turn our analysis around. Instead of saying, 'Here is an equality right; justify every derogation to it', we can say, 'Here is a right to freedom of religion, freedom of belief, freedom of conscience; justify the derogations of that which are put in the Equal Opportunity Act'. You see, without the exceptions in sections 75 to 77, the Equal Opportunity Act will limit the freedom of conscience, religion and belief of all Victorians as individuals and as associations of individuals.

It will do this by prohibiting them from giving effect to their genuinely held religious beliefs if to do so would involve them treating people differently and less favourably on the basis of one of the attributes listed in the Act. To remove or water down the exceptions would leave the Equal Opportunity Act, I say, vulnerable to an attack that it infringed the Charter's guarantee of religious freedom in section 14. You can argue it both ways. The Options Paper only argues it one way. The Commission only argues it one way.

For example — let me make that point a little sharper — without sections 75 to 77, the Equal Opportunity Act would seem likely to compel an orthodox Jewish fasting and spiritual retreat centre to employ staff and to welcome to the retreat those who are not Jewish and who did not agree with or practise fasting or Jewish ceremonial cleanliness requirements. That would surely infringe on the freedom of religion of the centre, the members of the centre and the Jewish participants in the retreat. So, subject that to a Charter analysis. Is that restriction on the freedom of religion of the Orthodox Jews in the name of equality rights justified? Is it proportionate? Is it reasonable? Is it no more restrictive than is absolutely necessary in terms of section 7 of the Charter? I would say not.

By preferencing the equality right the Options Paper — and the submissions of the Commission — has said equality is at the top and everything else must be justified. That is not the way the law is written, that is not the way the international human rights instruments are written and it is not the way the philosophy of human rights works.

Take another example: section 77 is a very important provision to protect individuals' freedoms to comply with their genuine religious beliefs and principles, but take out section 77 and the Equal Opportunity Act would force the Muslim operators of a B & B to accept a gay couple for an overnight stay, even though their fundamental religious beliefs — whether you agree with them or not — would hold that gay intercourse is an anathema and would make their premises and themselves spiritually unclean by permitting and being associated with it.

Whether you agree with that or not, that would be the effect on their conscience. Is that restriction on their freedom of conscience and religion in the name of equality rights justified, proportionate, reasonable and no more restrictive than reasonably necessary? What if there were plenty of other B & Bs where that gay couple could go and their owners would have no such scruples or religious convictions?

In summary, the Options Paper and many of the submissions assume, without argument, that equality rights are paramount and must prevail or substantially prevail in any contest with religious freedom, but there is no warrant for that assumption in the Charter or anywhere else. Following that assumption and amending the Equal Opportunity Act in the way advocated by the Commission and others will make a mockery of religious freedom in Victoria; it will not keep faith with the Charter, despite what proponents are saying; and it will indeed invite legal challenge that an amended Equal Opportunity Act without those exceptions or with very watered down exceptions will fall for being inconsistent with the Charter. We urge the Committee to be aware of the significant blind spot in the Options Paper and in the submissions and to not remove or wind back the religious freedom exceptions in sections 75 to 77. Thank you.

Mr WARD — Thanks, Mark. Just to wrap up, I must admit when I first saw the Options Paper I was encouraged by pages 5 and 6, because pages 5 and 6 are almost completely a direct quote from the Australian Christian Lobby's submission justifying the need for exceptions. Then it seemed to go adrift from there; an interesting exercise.

The CHAIR — I have got two questions, one for each. Rob Ward, you spoke about the faith groups coming together and basically being almost convinced that there is an attempt to secularise schools and religious organisations. I am just wondering how people have come to that conclusion.

Mr WARD — I do not think I did say that, but certainly I would agree that there are people who feel that — that this is a direct attack on the freedom of religion. The Christian schools are perhaps seen at the front line of this. It is an acknowledged fact that non-government schools receive a lower share of government funding for education than government schools do. I am a good example. I chose to send my three children, who are now adult children — and they have produced four grandchildren of whom I am immensely proud — to small, low-fee private schools.

I recognised that not only was I seeing less of my taxes returned to me by way of education funding, but I was also required to pay an extra amount to have my children educated in that way. I made that choice because I wanted my children to be brought up in an education environment that complemented what I was teaching them at home. If these proposed changes to the exceptions go through, particularly some of the more draconian changes to the exceptions, then the value of that is diminished immediately. It would not be hard to see it as a direct attack on Christian values.

The CHAIR — Mark Sneddon, in relation to section 77 I will just use another example: dogs. To many people of the Muslim faith the dog is haram. Guide dogs are often refused in taxis. Blind people with guide dogs are refused taxis by certain drivers, and certainly shops will not allow guide dogs in. It is a bit complex as to how that is worked out in the real world, but they are two issues. That is something that indicates the conflict that we have. I am just wondering: a blanket exemption can dramatically affect the vision-impaired community.

Mr SNEDDON — The exception to section 77 is actually fairly tightly drawn. The conduct has to be necessary, not desirable, to give effect to a genuinely held religious belief; not something you have just made up, not something that you have dreamt up as you walk down the street, but something you can point to and say, 'Here it is in the Koran' or whatever the source of the belief is. That is tied back well to an actual belief, and it is tied back to a test of necessity. Nevertheless I take your point that it will produce a conflict between access to certain services and the conscience of the person who is providing those services.

Nevertheless, it is not beyond the wit of man to work out a balancing arrangement there. For example, with the taxidivers you could have a provision saying that anybody who has a fleet of more than three taxis must make sure that on the road at any time at least 60 per cent of their drivers do not have any problem taking blind people. You could make sure that you were ensuring there is an adequate provision of services to people who are visually impaired, while not infringing the genuinely held religious convictions of the provider.

Mrs PEULICH — First of all, could I thank both of you, in particular the Australian Christian Lobby for the very good work that you have done over many, many months — Rob, you in particular — but also in fostering

that interfaith dialogue. It has been most useful for parliamentarians having to confront a range of issues. My question goes to Mr Sneddon. Could I say: what a submission! It was just what we needed at this stage.

Mr WARD — At this time of the day.

Mrs PEULICH — Yes, it was well timed. Yesterday — I am not sure whether you sat through it yesterday, but Rob did — one of our witnesses shared the view — and he was speaking on behalf of, it may have been the gay and lesbian rights lobby — that faith-based and independent schools, in denying gay men, lesbian women, the transgender or whoever, the opportunity to be employed and to operate within faith-based schools are actually denying the children there the opportunity to develop a more diverse view of the world and that this was discriminatory and created enclaves that possibly may have even cultivated a culture of bullying. In view of what you have said, could you comment on that?

Mr SNEDDON — I see those sorts of rules for faith-based schools as being an issue of positive selection which is designed to achieve — I think as the prior witnesses to the committee said — the demonstration, the living out of an ethos of community and the instilling of values of that community in the students, who have either chosen to go there themselves, if they are of age, or have had their parents choose that they go there. It has been a positive selection.

Is it discriminatory? Well, it is not discriminatory in terms of employment opportunities, because there are plenty of employment opportunities elsewhere in schools which do not have those types of religious filters, as it were. Is it discriminatory in terms of the children? Not without destroying the religious ethos of the school. The same argument could be made saying occultists should be able to come to the school and teach them how to use a ouija board or do magic skills with pentagrams, because otherwise the poor children would be deprived of that experience of life. That is notwithstanding and never mind the effect that has on the very purpose of setting up the school in the first place — which is to say, ‘This is the way we think we ought to live. This is our expression of our fundamental meaning of life, of our relationship with God and with one another’.

If intermediate communities in the civil society, such as churches and schools and clubs, cannot get together and say, ‘This is who we are’, and express ourselves in this way without being forced to take on every contrary value and give expression of that to their members, including their more impressionable younger members, what are we doing in civil society? Are we trying to reduce everyone to some smorgasbord which is valueless and say, ‘There you are. It’s all there — choose’.

Ms PULFORD — Thanks for your submission. In your introductory comments you told us a bit about what the Australian Christian Lobby is not, rather than what it is. Perhaps there is an opportunity for you, in answering my question, to express who it is and what organisations you represent. What is your perspective on the views expressed by representatives of the Catholic and Anglican churches earlier in the day about what they see as acceptable limitations to attributes? Also, in response to your observation that the Options Paper presumes a greater right to equality than to religious expression, is it your assertion that we have got that back to front, or is it your assertion that they are equally important competing rights and that that is our challenge?

Mr WARD — There are three questions. If I may refer the third one to Mark, I will handle the first two. Thank you for the opportunity of doing a commercial for the Australian Christian Lobby. I did spend a fair bit of time saying who we were not, and I think that is important because it demonstrates that our perspective could be wider and broader than individual groups who have spoken here today. The Catholic Church speaks for the Catholic Church, the Anglican Church for the Anglicans and the schools for the schools. We take a sort of helicopter view of many of those organisations and groups.

As to who we are, the Australian Christian Lobby has been in existence for about 12 years. It is based in Canberra. I am based here in Melbourne — just down Collins Street, my office is — part of the time, at least. Who do we represent? That is a question I often get asked. We represent our supporters, who number in the thousands. I am not going to tell you how many, any more than the Liberal Party is going to tell me how many people there are in the Liberal Party and Labor how many members there are in the Labor Party. But it is certainly in the thousands. They are drawn from right across the Christian community, from every denomination.

Mrs PEULICH — Thousands of them?

Mr WARD — Thousands of them, and there are thousands of denominations. It seems that way sometimes, anyway. I guess an indication of where we are seen by the broader Christian community could be evidenced by our participation last year in probably one of the most contentious issues — that is, the Abortion Law Reform Act. I was invited, with the blessing of the Catholic archbishop, to lead a prayer in the cathedral. I then left there, had a bit of a break and came and spoke at the more protestant rally here on the steps of Parliament House. So the ACL is not owned by a denomination or a group in any sense; it is there fairly broadly. I would suggest that we would represent — I hate to use the word ‘mainstream’ — but the more core values across the whole, wider church. Your second question goes to the issue of attributes, if you are happy with that answer.

Ms PULFORD — Yes.

Mr WARD — It is a complex one, that one. I have been listening to the questions. Carlo has seemed to throw that one at most people during the day, and I thought, ‘Well, how am I going to answer that one?’.

The CHAIR — I was going to put it to you later.

Mr WARD — At least it gave me the chance to prepare for it to some degree. I do not think it is as simple as some people have made it out to be, possibly because each of the groups that have spoken so far has represented their particular individual denomination or religion’s perspective on that particular issue.

There is no doubt that age discrimination would be almost a non-issue; that in many cases race — in fact in almost every case that I can think of — would be a non-issue; but I wonder if that is quite the same for some religions that may not have been represented here today. Somebody asked the question about race of Deborah Stone, and for some members of the Jewish community, race is an important issue. So it is not quite as easy as saying, ‘Here are these attributes. This one is okay; this one is okay; this one is not’, because it will be different for different people, and I think the appropriateness of the current exceptions is that it is down to the individual religion to decide what is appropriate and what is not.

I do not think Catholic schools, for instance, make an age discrimination or a race discrimination — I do not think. I certainly know that Christian schools that I have been associated with would never have made that distinction. The church from which I came a few years ago now, I think within its congregation, had 43 nationalities represented. I do not think it is quite as simple as ticking off some attributes. If work is to be done on an area, it needs closer examination, would be my answer to that.

Perhaps Mark has not had a chance to answer the third question, unless you have a supplementary?

The CHAIR — No, we are running out of time, so Ryan can ask the last question.

Mr SMITH — I want to ask a question in terms of schools and the teachers that work in those schools. Certainly in my electorate I know that some of the teachers that work at faith-based schools get very little more than state school teachers, so I just wondered if you could explain to me, in your experience, what is it that draws teachers with a faith to teaching in those schools?

Mr WARD — My observation would be, and I have not only put my own children through school, I know a number of different Christian schools, so a really brief answer, if I can, is that often they are paid less — the bare minimum. Obviously they are not paid an illegal rate, but they could earn more by going to some of the larger private schools which are not necessarily Christian or religiously based. For many of them it is a calling; it is a vocation.

I will give you a brief example, not so much of a teacher but of the importance of the fact that the whole school is involved in the life of the students — I need to be careful, because I do not want to do in my kids — but one of my children, who shall remain nameless, received greater pastoral care and made a greater connection in some of his struggles through school with the maintenance guy at the school, who is now dead and they named a wing of the school after him. There was a chaplain there, there were teachers there and there was pastoral care, but this maintenance guy connected with one of my children and made a huge difference in their life, because he shared the values of the school. And that is why I think it is important.

Mr JASPER — When some of the private clubs were in here making their submissions questions were put to them such as, ‘If there were changes to the Equal Opportunity Act, would you be able to go to VCAT? How

would you handle that?'. Then subsequently with the last group that were in here — and I have raised the issue — were asked, 'If there were changes to the Equal Opportunity Act' — and you would suggest changes of course, particularly to 75, 76 and 77, and you also referred then, as I understand it, to the Charter of Human Rights and Responsibilities, particularly section 7 — 'how much would you rely on the charter?'. It seems to me there is a conflict, as I understand it.

Mr SNEDDON — Our position is arguing for no substantive change to the exceptions in the Equal Opportunity Act, and we think that they strike a reasonable balance between the right of equality and the right of religious freedom and conscience at the moment. That is answering the question that Jaala asked, saying that the two rights are important and they need to be balanced. We think the balance that is struck at the moment is correct and sound. We note that yesterday the Commission said it had had very few, and could not even name one, complaints about the operation of the religion exceptions, so we do not think there would be any need to go off to the Charter of rights because we think the Equal Opportunity Act has struck the right sort of balance.

My point was that if the exceptions were removed or substantially watered down, then we do not think there would be an appropriate balance then between the equality right and the religious freedom right, and we think it would be open to religious groups or people of religious persuasion to say that in their view the Equal Opportunity Act (cut down, with those exceptions removed or substantially watered down,) was in fact interfering with their right to religious freedom under the Charter and that they could seek a declaration of inconsistency in the Supreme Court.

The CHAIR — Rob Ward and Mark Sneddon, thank very much for your contributions, your submission and also your interest in the workings of the committee, particularly over these two days of hearing.

Witnesses withdrew.