

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

Melbourne — 5 August 2009

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Reverend D.J. Palmer, Convener, Church and Nation Committee, and
Mr P. Faris, QC, adviser, Presbyterian Church of Victoria.

The CHAIR — Thank you for attending today for the public hearings of the committee. The purpose of these hearings is to report to 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 this room is not so protected. I invite you now to make a brief statement to the committee on the relevant issues which you consider important to your organisation in terms of this inquiry. That will be followed by some questions.

Rev. PALMER — I had a handout, and I wonder if the committee has it? I see that you have.

On behalf of the Presbyterian Church of Victoria, I would like to thank you very much for the opportunity to speak this morning. The first thing I want to say is that the church totally opposes any narrowing of the religious exceptions in the Equal Opportunity Act.

The Christian religion was the cornerstone upon which Australia was built. The Presbyterian Church existed in Victoria from the earliest days of British settlement. Freedom of religion is one of the basic freedoms of a democratic society that has a pedigree going back 300 years to the Bill of Rights of 1688, which is in the Victorian statute book.

This brought an end the persecution of persons for religious reasons in Britain. In the decade leading up to the Bill of Rights — the 1680s — the so-called ‘killing time’, 18 000 Scottish Presbyterians were killed, exiled, imprisoned or tortured on account of their desire to practise their Christian faith according to Presbyterian principles. It would be ironic indeed if the state reversed such a long-held and cherished freedom.

The United Nations considers religious freedom to be one of the fundamental bases of democratic freedom. Accordingly the United Nations has made extensive resolution to protect religious belief and practice, religious education and the right of persons of religious faith to participate in the public domain, all under the heading of freedom of conscience, thought and religion.

We note that the options bar — option 1 — presented in the options paper significantly reduces the exemptions to the act for religious organisations. This in turn narrows down the guarantee of religious freedom granted in the 2006 Victorian Charter of Human Rights and Responsibilities. Our contention is that it is critical to understand that the charter is the domestic manifestation of various UN policies.

We refer in particular to the Universal Declaration of Human Rights, particularly article 18, the international covenant on civil and political rights, articles 18, 20, 25 and 27, and the 1981 declaration on the elimination of all forms of intolerance and of discrimination based on religion or belief. Of course, there is interpretation for the way in which the limitations to religious freedom in article 18.3. There are clearly defined interpretations in the Siracusa principles and also in the 1993 general comment no. 22. All the details on that are in our submission.

These policies bind Australia in conscience and often in law. The committee must consider the matters before it in the light of the full scheme of UN protection of religion. We find it astonishing, if not bizarre, that in dealing with the religious exemption clauses the options paper fails to make any reference to the United Nations framework for religious freedom nor to the extensive legal case history. It is as if the slate was wiped clean with the passage in 2006 of the charter of rights. The slate can’t be wiped clean of UN declarations and covenants to which Australia is a signatory. Freedom of religion is an international issue; it is not a local issue. It has local manifestations.

We noted yesterday in a number of submissions from our opponents that heavy reliance was being placed on the limitation clause — section 7(2) of the charter — in order to privilege rights of equality above freedom of religion. We point out that section 7(2) applies as much to equality as it does to religious freedom. Therefore, to say as the person from the Human Rights Law Resource Centre said yesterday, and I quote, ‘Religion has to justify itself; equality does not’, we would hold that to be a nonsense.

I want to draw your attention to a particular problem with section 7(2) of the charter in respect of freedom of religion. The problem is that that the limitations in section 7(2) are defined expansively and subjectively and according to reasonableness, whatever that means in matters of religion and belief whereas in the UN

framework the limitations are narrowly and objectively defined and according not to what is reasonable but to what is necessary.

Given the almost total reliance on section 7(2) by those seeking to limit the scope of the religious exception clauses, the proximity of possible federal government legislation for a federal charter of rights, and the failure of section 7(2) to mirror the UN framework for limiting religious freedom, we recommend that the committee demonstrates great hesitancy in relying on section 7(2) in considering options that call for a narrowing of the religious exception clauses. I make a comment here about federal legislation as well, and I draw your attention to some legislation with the exact same words as section 75(2) of the Equal Opportunity Act.

If the proposed changes become law, our contention is that freedom of religion will be significantly diminished. The UN makes it very clear that overwhelming need must be demonstrated before religious freedom is narrowed by any state. The Presbyterian Church says that there is no evidence presented or capable of being presented to support any of these changes.

The distinction made in the options paper between core and non-core activities is completely false, with no basis in historical reality. The options paper fails to demonstrate any problems with religious practice. It is about an intolerant secular agenda to erode Christian belief and practice by reducing the protections that the law gives religious freedom.

Various speakers yesterday claimed, and somebody from the Public Interest Law Clearing House said, that there had been ‘massive change in society values’. That may be true in parts of society, but it certainly does not apply to religious faith and practice where we have sacred texts and, in the case of the church, 2000 years of tradition. I note further that when questioned by members of the committee, representatives of the Victorian Gay and Lesbian Rights Lobby as well as the Victorian Equal Opportunity and Human Rights Commission were unable to cite any specific examples of discrimination against their people by religious schools.

The changes proposed in the options paper are strongly opposed by the Presbyterian Church of Victoria as a matter of faith, human rights and common law. If the changes are made, the church will consider using all means at its disposal to challenge them, including legal challenge and engaging in civil disobedience based on religious conscience. Should Parliament choose to go down this route, there will be significant and ongoing conflict between the state and the church. The committee should not interpret what I am saying as a threat; it is simply an honest warning. Please take it at that. It is an honest warning of what will come to pass, and it reflects the depth of Christian feeling on these issues. Thank you.

The CHAIR — Thanks a lot. The Victorian charter as well as the UN conventions as well as the Universal Declaration of Human Rights all recognise the importance and primacy of the freedom of religion. What I want to really focus on — you have said that exemptions should not be narrowed, but does that mean that we should maintain an exemption on all attributes, given the number of attributes that are in the Equal Opportunity Act? It does not seem to me that they all conflict with religious doctrine.

Rev. PALMER — I think that you have been asking the other religious groups that question, and I think we have something in our submission. As far as the church is concerned, the areas of sensitivity are going to be around sexual ethics and gender. I think other attributes, as you have heard from other religious leaders concerning age, disability, race — I mean, in the Presbyterian Church at least 30 per cent of our people are new Australians of umpteen different varieties, nationalities. There are some attributes that we do not discriminate at all on.

Mr BROOKS — A number of the major churches you would have heard this morning gave evidence and in their submissions have indicated that the list of attributes on which they are permitted to discriminate under the current act — their view is the full is not required; they have narrowed the list of requirements down to probably three or four core requirements. I was wondering what your position is in relation to the list of attributes that are covered in what is essentially a blanket exemption under the act.

Rev. PALMER — I think that is a similar question. My answer is our detailed submission. It basically is that where our discrimination will operate will be in the area of sexual ethics and gender — and gender only in the area of our requirement that our eldership should be male. As far as schools, aged care facilities, that kind of thing, I do not think we have a requirement there.

Although I was interested in Francis Moore's response to you that there may be separations in girls schools or boys schools — while we have got one boys school and one girls school, there may be some requirement there, but I am not particularly aware of that.

Mr BROOKS — They have listed pregnancy as well as another one.

Rev. PALMER — No, we are not to pregnancy.

Mr SMITH — I am just referring to your comments about religious freedom rights above equality rights. I just want to ask: if a complaint were made against a religious or a Christian body to the Equal Opportunity and Human Rights Commission, would you have any confidence that the commission would uphold religious freedom rights above other rights?

Rev. PALMER — No, we do not have any confidence in that respect. Our level of confidence in the Equal Opportunity and Human Rights Commission is pretty low. I was taking notes yesterday when Mr Gorton was speaking for the commission. Right at the end he said some fundamental religious beliefs are not acceptable in our pluralist, secular society. I felt that he gave the game away there; he was really saying that we measure all things on the basis of a pluralist, secular society.

I think there would be a widespread view within churches, not only my own church, that the commission is biased in support of equality rights above freedom of religion. Freedom of religion is one of the most basic rights, with a long history. It cannot derogate even in times of war. So the answer to your question is no. I think that if your committee could actually make a recommendation to the government for reform of the commission, that would be greatly appreciated — that there be a requirement that in the commission there would be people certainly from the Christian side; there should be representatives of the Catholic Church, the Orthodox community and the Protestant community to make sure that freedom of religion is going to be upheld in the commission, because at this stage we say it is not going to be. The comment by Mr Gorton is I think damaging to the commission in the eyes of the church.

Mr O'DONOHUE — Mr Faris, I want to ask you a similar question to the one I asked the Anglican Church — that is, how the proposed system put forward by the Law Institute of Victoria and others would operate in practice. That is, people who wish to seek an exemption from the act would need to justify that before VCAT using the section 7(2) test of the charter?

Mr FARIS — This is really a secular licensing of religion. If you want to practise your religious beliefs, you have to go a government organisation and get permission. That has been tried before under the guise of equality. This was the way that Communist Russia was run. Everybody there was equal, and the churches were relegated to no real place. I adopt what was said by my legal colleague — whose name I have forgotten — who last spoke from the Anglican Church. It is just not going to work. I spend my life in the courts. Courts are not set up to decide what religious doctrine is.

That is not their function; that is not their training. There are so many diverse religions, for a start. If you really want to look at this, I recommend that you read the Two Dannys case, of the ring of fire, or whatever it was. Read the VCAT decision — it is up on the net — of Judge Higgins, who was not just an ordinary member but an actual judge. It was absolutely disgraceful. After months and months of arguing about religion or religious views, it is absolutely indefensible and shows no understanding of either the Christian religion or the Muslim religion. That is the problem you are always going to face. Nobody is really qualified to make these judgements.

If you are going to protect religion — and we say you should, because we say that is a fundamental — if you take the protection away, society will crumble, we say. If you are going to protect religion, in the end you have to respect religious beliefs and diverse religious beliefs and not have a government appointee saying what you are entitled to believe and what you are not entitled to believe. The VCAT thing is really not going to work.

Mrs PEULICH — Thank you very much for your submission. It is probably a very clear one, especially your conclusion that on matters of faith, human rights as well as law that the proposal to remove the exemptions is misguided and does not stand up to scrutiny. In particular what I found useful was your identifying the inconsistency between the United Nations requirement that there needs to be an overwhelming need in order to narrow religious freedom, as opposed to a much lower threshold of reasonable limits, and obviously allowing

those sensible interpretations, and worse still, political interpretations, of what are essential human rights, I see it as a state attack on freedom of religion and freedom of association.

Could you comment on your notion of a pluralist society? Is a pluralist society advanced by having every group measured and reflecting the same mores, the same standards and the same ethos, or is a pluralist society advanced more by that mixed economy of groups and their views within a broad legal framework where those human rights are protected?

Rev. PALMER — Yes. I mentioned before that the Presbyterian Church of Victoria has many people from different cultures. We have separate congregations, in many cases Sudanese, Arabic-speaking Christians, Chinese, Koreans, Cook Islanders, Samoans, Japanese, Chinese et cetera. They are separate because there are cultural things et cetera. So yes, we say we are a multicultural society; there ought to be space for people of belief — whether it is Christian, Muslim or whatever other belief.

Mrs PEULICH — Or Jewish.

Rev. PALMER — Or Jewish people. There ought to be room for people. I think the public domain must not be cleared out for the supremacy of secular humanism that is intolerant. There ought to be a place for different religious groups. As a Christian, I want to make it clear on behalf of the Presbyterian Church: we are not going to vacate the public square. Where we think we have a voice, something reasonable to say, we are going to be out there; and we are going to be more up-front than we have been in the past. As to the result of the kind of freedom of religion and belief project that we have been through, the charter of rights I think federally, and this inquiry, one of the results has been that Christian groups have been caucusing together. I mean Catholics, Anglicans, Lutherans, Pentecostals — and we are talking also with our Islamic — —

Mr FARIS — Friends.

Rev. PALMER — Friends. And we have had, over a number of years, good relationships into the Jewish community as well. We are not going to vacate the public square.

Mrs PEULICH — Could you comment perhaps a little further about those interfaith initiatives? I have certainly had some dialogue. Could you make a few comments in relation to that?

Rev. PALMER — They tend to be things like you have heads of churches, you have the Victorian Council of Churches, but you also have informal gatherings. I think you have received a submission from the Ad Hoc Interfaith Committee group, which is very extensively subscribed to, not only by Christians. There is a very complex networking going on.

Ms PULFORD — I have a very quick question, and if you would be so kind, could you give a brief answer because I am getting gesticulations from all over the table about our time restrictions. In both your written submission and your presentation today you have said that you are opposed to all amendments. But similarly, the submission talks about an openness to the idea of restricting the number of attributes.

Your point about caucusing is very valid, because the comments about restricting the types of attributes are very similar to some of the commentary we have had and some of the submissions from the Catholic Church and Anglican Church representatives. Could you perhaps clarify that for me? On the one hand there is an acceptance about some type of change specifically in that context, but then throughout an assertion that the only acceptable position is no change.

Rev. PALMER — If you go through the options there are 20-odd options there. I do not recollect any of them particularly focusing on attributes. We have made our comments in our submission because clearly we do not rely on a number of those attributes. But our rejection is a rejection of the options, which really do not deal with attributes as such.

The CHAIR — Thanks a lot for that contribution, Reverend David Palmer and Peter Faris. I would like to thank the Presbyterian Church for its contribution to this debate; it has been very valuable. Thank you.

Rev. PALMER — Thank you for the opportunity.

Witnesses withdrew.