

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

Melbourne — 5 August 2009

Members

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Witnesses

Ms D. James, general secretary, and
Ms T. Clarke, Victorian Independent Education Union.

The CHAIR — The next witnesses will be Debra James and Tania Clarke from the Victorian Independent Education Union. First of all, thanks a lot for coming today and giving up some of your valuable time.

The purpose of these hearings is to report to the Parliament whether any amendments should be made to the exceptions and exemptions to 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 would like to invite you now to make a brief statement to the committee on the relevant issues that you consider important to your organisation concerning the inquiry, and that will be followed by some questions.

Ms JAMES — Thank you very much. I appear this afternoon in my role as general secretary of the Victorian Independent Education Union. I am accompanied by Tania Clarke, who is an officer of that union. I thank you for the invitation and opportunity to appear today before the committee.

Our remarks today are made, of course, further to the submission that we made to the Department of Justice inquiry into the exemptions and exceptions to the Equal Opportunity Act and our response, recently tabled, to the options paper.

The union, for the information of committee members, represents staff in Victoria's non-government schools. We have as members of our union principals, teachers and all classifications of non-teaching staff, from clerical and admin staff to learning support staff, technical aides, grounds and maintenance staff and cleaners. The vast majority of our members work in schools that are operated in the context of a particular religion. As you can see, it is a very relevant issue for our members — the current exceptions to the Equal Opportunity Act.

Obviously the task that the committee has and the purpose of the review is to balance, what we say are, two competing rights: the right to religious freedom and the right of individuals to be equal before the law. The removal of exceptions or any narrowing is being characterised by those supporting their retention as being an attack on religious freedom, an action that would fatally compromise the capacity for faith-based schools to educate in faith or to uphold the particular ethos of their faith.

Indeed when listening to the evidence of the earlier speakers this afternoon there was a question also about whether they would continue to operate if the exceptions were removed. We say this is not an attack on their religious freedom, nor will it actually compromise their capacity to deliver quality education in the context of the faith in which they are established.

It will not seriously compromise their capacity to continue to perform their roles as places of education within the context of their particular religion. We believe amending a law to allow broader protections for the employees are justifiable limitations on the employers of faith-based schools, which will not impair their rights to religious belief or the promotion of their own doctrine.

The provision of education is an important public function, and the organisations in which our members work are schools first and foremost, not religious organisations — schools first. It is an endeavour that the state has a legitimate interest in regulating, even when those schools are conducted by religious organisations.

That they are schools first is also essentially what was argued by religious organisations in the High Court of Australia challenge to the funding of non-government schools in the so-called 'DOGS case'. Bishop after bishop would appear before Justice Lionel Murphy to give evidence to the High Court of Australia, contending that they were schools first and religious organisations second.

The focus of our submission is on the religious exceptions as they apply only to the employment of staff in religious schools. In particular we deal with sections 25, 75, 76 and 77. Faith-based schools cannot and should not operate in isolation from the communities they serve and the community more broadly. It must be said that the communities they serve are as diverse and as human as those who seek to work in their schools.

By and large such schools enrol the children of families who choose that particular education for their children. But the families are not all strict adherents to the faith of the religion that they choose for their children. Not every family that sends their child to a Catholic school are solid, practising Catholics. There are children of de facto parents attending Catholic schools. There are the children of gay and lesbian parents attending Catholic

schools. We know that there are many employees working in these schools who are themselves in the same position as the parents and the families of those who are attending those schools.

It has been asserted on many occasions by those who support a broad-brush approach to the religious exception that parents who send their children to religious schools expect that the schools promote and protect the religion as it is taught to their children. It is a reasonable expectation, and that should occur.

Yet these families who choose a faith-based education for their children will not all be practising members of that religion. You can be assured that there are divorced parents, there are divorced parents who have remarried, and yet if you are a staff member in a Catholic school and you were divorced and you remarried, under the current exceptions you could be dismissed, demoted or injured in your employment in some way without any recourse to the protections of the Equal Opportunity Act.

Close to 29 000 teachers work in Victorian non-government schools, and some 13 000 are employed in various support roles. We are looking at a workforce of about 42 000. Due to the sheer volume of staff needed, it is simply not possible to employ those staff along denominational lines only and expect such numbers to demonstrate strict adherence to religious doctrine.

It is an undisputed fact that there is a diverse range of employees working in schools — staff in de facto relationships, non-Jewish staff working for Jewish schools, non-Catholics working in Catholic schools, and non-Christians working in Christian schools. The schools have not fallen over, as the religious authorities would put to this committee. They do not fall over because they currently employ non-Catholic staff or non-religious staff.

The idea that the parent body is a homogenous group all agreeing to a common set of standards is a myth. De facto relationships are widespread and broadly acceptable in society. We contend that the law must be brought into line with contemporary standards. It must also be brought into line with the Victorian Charter of Human Rights and Responsibilities.

In our first submission VIEU provided legal opinion from Kristen Walker, which clearly concludes that the religious exception is incompatible with the charter, in that it is too broad and does not adequately allow individuals to be treated equally before the law. Religion is not under threat and nor are religious schools, by our submission and by the review of the exceptions. If the religious exception is amended, we are confident that the religious life of schools will continue to operate and, I have no doubt — as Stephen Elder put this afternoon — grow. I am confident that that will occur, nor should religious sensitivities allow intolerant attitudes to prevail.

Those with sensitivities should not be able to take away basic employment rights of employees working in religious schools, if the employee is overall respecting of the religious life of the school. In being tolerant of others and tolerant of difference, people are not being asked to abandon their personal convictions or approve or endorse certain actions or behaviours; they are merely being asked to respect the rights of others.

VIEU members are committed to their schools and work to promote and enhance the religious experience of students regardless of their lifestyle choices, which may in some cases be in opposition to a particular religious doctrine.

Those arguing for the retention of the exceptions, in particular the submissions of the Catholic Church of Victoria and the Catholic Education Office, contend there is no evidence that the current exemptions have been misused or that Catholic schools have acted unjustly or insensitively in these matters. The existing blanket exemption for religious schools effectively means that employees with attributes who would be able to bring an action alleging discrimination in other industries, cannot do so in Catholic education.

That is not to say there is no dispute — there is, when discrimination occurs. On average every year the union will deal with cases dealing with alleged discrimination. In these instances we have discussions and interactions with those religious employers, with the Catholic employers and the Catholic employing authorities. We can organise member and community support for employees in these circumstances. But the fact is that at the conclusion of the discussions in each instance there is simply no legal option of redress available to the employees. In the great majority of instances members are being made only too aware of their rights at law, or the lack of their rights at law, by their employer or employer's representative and are simply too fearful to progress the matter any further.

We have represented members in discussions and negotiations with individual employers to varying degrees of success. Often employers do not want the detail of the case to become public and they agree to settle. So far be it, in a way, for the floodgates to be open and employees — as put by Mr Elder this afternoon — taking cases to the courts in order to get cash settlements.

I can assure you the cash settlements are available now — and what stops those, I suppose, or what enables those is a fear of the matter being played out in the public arena. Our experience of many members is that they do not want to pursue the matter publicly from fear of the possibility of public humiliation.

Our written submission extensively canvasses our position on the various options. In summary, our primary position is that the exemptions should be removed — those contained in sections 25, 75, 76 and 77. However, having considered the options outlined in the options paper and taking into account submissions from other organisations, we believe that workable solutions exist in relation to sections 75 and 76 which will allow for the redrafting of the religious exception as it currently applies to schools.

Basically we believe the workable solution lies in the ‘inherent requirements’ test. It was put to the committee this afternoon by the Catholic Education Office that this would be unworkable because it would be too hard, because cases would pile up at VCAT. I put to you, members of the committee, that you should not be swayed from making a change simply because it appears on the face of it too hard or cumbersome, or may provide work for the courts. That is not a legitimate reason to deny rights to individuals. If this is the way to go, we find a way to make it work. But it is legitimate that there can be some testing of the inherent requirements of the job.

The Catholics sat here this afternoon and talked about every employee, when asked by a member of the committee about core activities and non-core activities. Surely we would have to accept that there is a difference between the principal of a school, the leader of a faith community, a religious education coordinator, a person on staff who prepares students for the receiving of sacraments in Catholic schools, or an imam or a rabbi in a school.

There have to be particular exceptions where we understand it would be reasonable. But does the cleaner have to be a practising Catholic or a practising Jew or a practising Christian? Does the maths teacher? Does the phys. ed. teacher? A person with a private lifestyle that is known by some in the school to be contrary to the teachings of the church, but is not a public lifestyle to students, a person who is otherwise exemplary in their conduct and behaviour, who is not actually agitating for an alternative lifestyle to their students — why is it that that person, if their personal situation were found out, could be in a position of being terminated in their employment or injured in some way in their employment?

Those who seek to retain the exceptions say their hands will be tied as employers in dealing with employees who, for example, proselytise or advocate practices contrary to the teachings of a religion. Our members are well aware of their obligations to their employers. Every employee should be aware of their obligations to their employer; the obligation of fidelity; these things that come with the common law contract of employment.

Wearing a T-shirt that supports abortion is obviously not going to go down well in a Catholic school, and it would be an employee who, with peril, would take such an action; in that case the person would be making their own decision about doing that. It must be possible for those employers to be protected.

It is also suggested that there need be no changes because of the Fair Work Act, so, ‘In any event, do not worry about the exceptions, the Fair Work Act actually provides an exception in respect of employees’. We submit that that is not the case, that it is arguable that the Fair Work Act provides that exception and that in any event federal legislation, whether or not it overrides this aspect of the state legislation, should not stop the state from doing what is right for the state.

My concluding remarks are: the review is timely, the exceptions and exemptions have been in existence for 30 years, it is appropriate to review them and take into account the Charter of Human Rights and Responsibilities and changes in society. The legislation should reflect the needs of modern society and foster tolerance and respect for diversity.

Our primary position is that all exceptions to the act be removed, however we have also outlined what would be a workable compromise, in our opinion. The legislation affects the work of our members. They currently do not

have the same protections under law as other employees in Victorian workplaces. It is a matter of fairness and equity.

An argument for no change is an argument to continue to legitimise discrimination. Our members are concerned that SARC should recommend to the government that all employers need to be sent a clear message that intolerance and discrimination will not be permitted in any workplace in Victoria.

The CHAIR — Thank you, Debra. Earlier today the Catholic bishops stated that the church does not police people's private lives and that issues, for example, of teachers who might have attributes that conflict with doctrine, those issues are dealt with at a local level, and dealt with adequately at a local level. Could you give us some insight about that?

Ms JAMES — I think the practice would vary from school to school and whilst it may be true that in certain workplaces they do not go seeking information, when the information becomes public, even if inadvertently, in many schools they would be forced to act on it.

One particular kind of case that I will draw to attention — it is a matter that could be a private matter which becomes quite obviously public very quickly and the union deals with this every single year — there is an unmarried mother teaching in a school or working in a school, who in the eyes of some in schools becomes something that cannot be accommodated. We put up every year with people who are being urged to commence their parental leave at the two-month or the three-month mark before it becomes apparent to the school community that they are actually pregnant and not married. I am going to ask Ms Clarke to talk about one particular incident.

Ms CLARKE — I have been an organiser with the union for about six years. I have taken quite a few inquiries in relation to this and I can give you an example which is confidential so I just have to be careful about how I relate to the committee.

The CHAIR — Sure.

Ms CLARKE — Basically we had a member in a Catholic primary school — —

Mrs PEULICH — Excuse me, would it be more useful to move into in camera so that you can actually share perhaps the numbers of complaints that you have dealt with, say over the last 12 months, and some of the details. Would it be useful to deal with it that way?

The CHAIR — No, we will just continue with a general observation.

Ms CLARKE — Okay. And we received a call from a member in a Catholic primary school and she was very excited because she had become pregnant. Unfortunately because of that she was in a situation where her employment the following year was being denied. She had been a teacher at the school for quite a number of years and was well respected amongst the parent community, the students and the leadership, and when it became apparent that she was in conflict with the religious doctrine, she was basically told that her employment rights would be affected.

Luckily she was a union member, and we were able to represent her. We had a meeting with the parish priest and the principal, and she relayed her extreme disappointment about the situation and the way she was treated. She was very distressed. As a result they did employ her for the following year but obviously she took maternity leave.

I heard before, one of the organisations talked about the unintended consequences. If we had not stepped in for her, she would have actually been denied access to her paid parental leave, which is approximately 14 weeks in the Catholic sector. So that is one situation that I personally dealt with.

The CHAIR — Thank you.

Mrs PEULICH — Could you comment perhaps on the numbers over, say, the last 12 months of similar disputes or representations that you have made on behalf of your members, in numbers and the nature of those?

Ms CLARKE — Yes. We have a service which is called a ‘duty officer’ and basically any member of the union can call at any time, obviously within office hours, and often those calls are received on a confidential basis so someone would just call to work out what their rights are. I would say it is not 20 a week but just in the last couple of months, in the beginning of this year, I would say I dealt with at least five cases of people.

Mrs PEULICH — So over a period of 12 months?

Ms CLARKE — And they are union members.

Mrs PEULICH — Is that just telephone referral?

Ms CLARKE — Yes, just on that — that is me personally.

Mrs PEULICH — How about those apart from the referral service, which is obviously very useful, in terms of the intervention, negotiations and settlements that you were referring to? How many of those cases have you had over, say, the last 12 months?

Ms JAMES — Over the 12 months we would have had, in varying degrees of capacity for intervention, 20 to 30. Some of those — a percentage of the 20 will just not want to go any further because they will realise that they have no rights. They will realise that there is nowhere to go and they do not want to pursue things publicly, so it ranges from the first calls about their rights and where they can go with certain things, to people who decide they have not been promoted because they are not a practising Catholic and they will not be promoted to maths coordinator because there is a policy at the school only to promote practising Catholics — an informal policy at the school to promote not practising Catholics, but Catholics as opposed to non-Catholics, so they decide either to leave the school, they move on, they decide perhaps not to pursue it.

We have varying degrees of success. Several per year would be down to our lawyers, Maurice Blackburn, whereupon the legal advice mostly is that there is little likelihood of success in the running of any case. There is a good reason why there is not a vast raft of disputation, quite frankly at the moment there is nowhere to go.

Mrs PEULICH — You were referring to settlements that had already taken place?

Ms JAMES — Settlements.

Mrs PEULICH — How many of those would your union have been involved in over the last 12 months and what would be the magnitude of those settlements, and what is the nature of those complaints?

Ms CLARKE — The settlements usually involve the restoration of employment rights. That is basically not really looking at financial compensation.

Mrs PEULICH — Sorry, I think you were saying there were financial settlements?

Ms JAMES — Yes, and in other cases there are financial settlements where it is decided that it is perhaps in the best interests of the employee all round to leave the school, so what then might be negotiated is a severance package.

So when I talk about financial settlements, I am not talking about a compensation claim or compensation paid for the discrimination. It is: there is a situation; it is a dispute. We work it through and in the end the employee decides they do not want to work there any more, it has become untenable because of the situation that has gone on, or the school is pressing that the situation is untenable, and then, hey presto, the employee is no longer an employee of the school or they tender their resignation in return for a half a year’s pay, 26 weeks — —

Ms PULFORD — If I can make a comment and then ask a question: in my experience in a previous life as a union official, working in some respects in this legislation and in other areas quite close to it, it is certainly my experience that when the law says there is nowhere to go, then your capacity to negotiate a settlement of any kind is very much impeded and that would certainly explain why we do not have a lot of people progressing to a convoluted series of discussions about how to resolve their problem because the laws in Victoria currently say there is no resolution to those, and no restitution possible, which is one of the things we are looking at.

We have had presentations during the course of the day from a number of organisations, including some of the larger religious bodies in Victoria who have suggested that a number of the attributes are not of interest to them because they do not conflict with their religious doctrines. Some of these that have been canvassed include age, impairment, race, lawful industrial activity, which I imagine would also not conflict too directly with religious doctrine. Is that a movement that you would welcome?

Ms JAMES — Of course. Any narrowing of the exceptions would be welcome, and by and large the comments that I have heard this afternoon from Catholic employees in relation to age discrimination, impairment, those are things which are, as they said this afternoon, contrary to their own religious beliefs, not I would not say that it ever happens in schools, but I certainly would welcome the limitation in those regards. We contend, though, that that does not go far enough. The real issues come with what I think are the stickier points in religious organisations — sexual orientation, marital status. These are the contentious issues for us.

Mr SMITH — I want to refer to your comments about tolerance of people's views within organisations. As a Liberal Party member with all the views and beliefs, how do you think I would go getting a union membership?

Ms JAMES — You would be welcome getting a union membership.

Mrs PEULICH — How about a job?

Ms JAMES — A former member of the VIEU is a member of your party.

Mr SMITH — Former member?

Ms JAMES — When he was teaching; when he was principal of a school.

Mrs PEULICH — I mean as in a job with the union.

Ms JAMES — By all means. Next time we are advertising, stick in an application and we will consider you with other applicants.

Mr SMITH — It will be an interesting exercise.

Ms JAMES — For the record, the union is not affiliated to the ALP.

Mrs PEULICH — What is the size of your membership?

Ms JAMES — In excess of 16 000.

The CHAIR — Just over half the workforce, is that right?

Ms JAMES — Yes, that is right.

Mr LANGUILLER — Thank you for your submission. Correct me if I am wrong — I think I followed you — did you refer to section 75?

Ms CLARKE — Yes.

Mr LANGUILLER — In your remarks I think you said — and I do not wish to paraphrase you — that you can work through that, and you gave the impression that you could actually accommodate some changes and some form of compromise?

Ms CLARKE — That is correct.

Mr LANGUILLER — Can you elaborate further on that and clarify exactly what you meant by that section 75 comment?

Ms CLARKE — I guess in terms of our primary position being removing the exceptions in their entirety, having had a look at the options paper, it was very useful in the discussion. We thought that there were some workable solutions by redrafting sections 75 and 76.

Mr LANGUILLER — Do you have any ideas that you might wish to share with us?

Ms CLARKE — Basically we are seeking the redrafting of sections 75 and 76 to basically bring it into line with the common test, being the inherent requirements of the job test, so that is our preference — the reason being because it focuses on the job. It focuses on the position at the school and not so much religious doctrine.

Obviously that can be a factor in determining the inherent requirements of the job, as Deb mentioned before, about religious education teachers, so it would be an inherent requirement of the job, but that ultimately would be something that would be tested upon application to VCAT, so we would submit we do not need to actually determine that here. That is something that would be tested on a case-by-case basis, based on the local circumstances at the school at the time. Does that clarify your question?

Mr LANGUILLER — Yes.

The CHAIR — Just in terms of how this works out in the field, let us say, is the issue about the appointment of teachers and the use of the exemptions to not appoint teachers of certain attributes — gays, lesbians, de facto — or is it more to do with when the opportunity to discipline them or not promote them in terms of sort of using it as an opportunity where they have no recourse? Is the filtering done at the start or is it during the — —

Ms JAMES — No, it is all of those. It is partially filtering at the start, and then it is some filtering and of course then as a person's employment is moving on. I find it abhorrent that a person who is a non-Catholic, for example, and who is known by the school to be non-Catholic, who is happily engaged to teach various things at the school, perhaps could not be promoted or be given other positions in the school because of an attribute that was not relevant at the time of employment.

Ms CLARKE — What is also pertinent there is that people's lifestyle choices change during their employment. In the case that I gave before, she became pregnant whilst employed. Sometimes someone might be working in a school for 10 years and they decide to enter into a de facto relationship.

Ms JAMES — Catholic employers and religious employers often talk about the whole person. Let us look at the whole person, a person who is otherwise competent to teach or to work in their field who otherwise embraces and embodies all of the other values of a particular religion — tolerance, compassion, understanding, forgiveness; these sorts of things — but who in one aspect alone of what should be a private lifestyle somehow offends a religious sensibility.

That person could be dismissed or action could be taken against them because of one element. It is the employer, the religious body, that is the one body that gets to make that call. Nobody else gets to test that; nobody else gets to test whether or not that is fair.

Mrs PEULICH — But with all due respect, the argument has been put the opposing side is that teachers are more than those who deliver content. As we know, being a former educator myself, it is not just the explicit curriculum that is taught, it is the relationships, it is the living role model, it is the discussion of values, the shaping of the person, so how could you say that one is not related to the other?

Ms JAMES — That is exactly what I am saying. It is about the shaping of the whole person, but to pick on one aspect — —

Mrs PEULICH — But we are talking about children, we are not talking about teachers.

Ms JAMES — That is right, but — —

Mrs PEULICH — Teachers are adults who have already exercised their choice. Young children do not have those choices.

Ms JAMES — But we are talking about a person who is teaching in school and who embodies all of the other outward values, displays them, lives them out in their daily life except for one thing: they are not actually married, they are living in a de facto relationship — just like the parents of one-third of the school community.

It is something that is part of their private lifestyle but for some reason has just become publicly known because somebody in the school community has learned of that. When every other aspect of that person's working life

does not conflict with the religious sensibilities of that organisation, why, for that one instant, is it a fair action for that employer to be able to take?

Mrs PEULICH — But there are other more dramatic examples than the one you have selected which then, by removal of the exemption, certainly creates a much more significant issue?

Ms JAMES — I come back to the point that I made earlier about the responsibility of employees to show some fidelity to the business of the employer. You cannot tout the business of a rival company while you are working with a particular employer, so it goes to the very actions of the person in what they say, in what they may proselytise to students, what they advocate to students. We have encountered people who have done nothing and said nothing and whose private life becomes public through no action that they have taken, and then they are punished about that when in every other aspect of their dealings with students they are exemplary in their conduct.

This cannot be a fair situation, and it cannot be sustainable, especially when across Catholic schools, across 40 000 people employed in religious schools it cannot be that these things are evenly screened. One parish priest can tolerate the unmarried mother; the parish priest two parishes away decides that he cannot. These things are not universally applied by the church itself.

Mrs PEULICH — But they are a reflection of their immediate community.

Mr JASPER — I have listened with a great deal of interest to the comments that have been made, particularly by the others who have been in here. From my point of view as a person on the committee I would like to be able to hear some of the contrary views to the issues you have raised. I think we as a committee need to perhaps take on board what you are saying.

You have given very emotional views to us. I have not seen much of that displayed within my electorate of Murray Valley, and that has been quoted by other members today in discussions. I would like to know how often it has happened, giving specific examples. Is it a huge example, going on all the time?

I would like to put those questions to the Catholic people to be able to clarify it in my mind, but also to take it back to the education system within Victoria and how often it happens. I see it in the government schools where we have issues when a particular principal does not want a particular teacher at that school for whatever reason — you made mention of some of the reasons — and they make sure they move that teacher on. Do not say it is only in one area; it is certainly going on in the public education system as well.

From my point of view, I don't think the discussion can go much further today, but I would like to think that we as committee take on board what you have said. In my view we should get further information to be able to clarify that before I come down to saying what I think we should be doing with the report we are preparing for Parliament.

The CHAIR — The evidence we had both from the Catholic and the Anglican churches is essentially that their staff are quite representative of the broader population, hence there are gays and lesbians and de facto relationships. To some extent, particularly in the Catholic system, that is dealt with at a local level. I personally find it quite intriguing to understand how that occurs. I suppose the question really is: given that they employ people with those attributes whom they are prepared to discriminate against, why do they want the right to discriminate? Have you got any view on that?

Ms JAMES — Because they have currently got it. It is a very good question. I can only speculate, I really cannot put myself in their shoes about why they want it. You have heard them this afternoon and you have read the submissions. They say they need it. I do not believe they do.

Ms CLARKE — Can I just comment on that? Looking at the options, Parliament cannot decide, the courts cannot decide, the tribunals cannot decide, but we can. That seems to be the basic primary position.

The CHAIR — Thank you, that was very informative and, again, it adds to our deliberations.

Ms JAMES — Thank you for your time today.

The CHAIR — I would like to thank Hansard for their work over the last two days, thank those who have attended the hearings for their patience and interest. I also thank the staff and members of SARC for their diligence and work over the last two days.

Mrs PEULICH — And their stamina.

The CHAIR — And their stamina. we have a long way to go to get through to the final report but I thank everyone and look forward to our deliberations.

Committee adjourned.