

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

Melbourne — 5 August 2009

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Witnesses

Archbishop P. Freier, Anglican Archbishop of Melbourne, and
Reverend M. Durie, Anglican Church of Australia, and
Mr C. Macaulay, SC, barrister.

The CHAIR — The next witnesses are Archbishop Dr Philip Freier and Rev. Dr Mark Durie from the Anglican Church of Australia, and Cameron Macaulay, SC. Thank you for attending the public hearings.

The purpose of these hearings is to report to the Parliament whether any amendments should be made to the exceptions and exemptions in the Equal Opportunity Act. 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 now like to invite you to make a brief statement to the committee on the relevant issues that you consider important to your organisation concerning the inquiry, and we will follow that up with a few questions.

Archbishop FREIER — Perhaps if I could start, Chair: as we approach this we are basically responding to the draft material that has gone out. We have read that and understand it. We have put a submission in that addresses those things in detail, but if I could summarise perhaps the wider position that our church takes.

We would reject the distinction of core and non-core activities in what we do. We think that is both untenable in terms of how we understand our motivations and the involvement we have in society and also, as I will come to a bit later, we think that is impractical to seek to arbitrate.

From where we see things, we do not see that there is a social ill that needs to be remedied. We judge that the known motivations of our church, the Anglican Church, that have led us to be involved in community service activities through a range of well-respected community service bodies, through schools and through our parish activities are ones that happen with a high degree of public satisfaction, and I am personally unaware of any social ill that needs to be remedied in terms of how we operate within the current legislation. As far as I have experienced it as Archbishop, there are no matters that people are bringing before me where they are concerned that we are acting inappropriately on the basis of current legislation.

Our submission seeks to continue those exemptions. The difficulty is that we are put into a position in public argument where we are perhaps being perceived as seeking to be discriminators. I think this is the difficulty of trying to have a fair and balanced discussion of this matter.

We know that the charter that has been adopted by the Victorian Parliament wants to enshrine various rights. It is just that we have in this matter of antidiscrimination legislation quite a specific articulation of what one particular right is like, and we do not have countervailing legislation about the rights of religious freedom. It is a very difficult kind of discussion to have in that way, because it seems to always be casting people like me and organisations like the Anglican Church as wanting to claim the ability to be a discriminator, which of course is against the broader values of our society and a difficult thing to mount. We are conscious of that.

We are also conscious that based on the draft material that we have read, we think the idea that there could be some easy resolution of these matters by a determination of VCAT is very unworkable. When the number of different religious principles that might exist in our community are extended widely, the possibility of an administrative tribunal seeking to provide clarity in those matters seems to me to be highly unworkable and impracticable.

On numbers of grounds, our submission broadly supports the kind of situation that we are in at the moment. We understand that there is a far greater social good that comes out of us acting on the basis of our Christian principles. We see that the capacities that we have expressed in corporate and institutional ways to show a love of neighbour are inherently a social good, and that seeking to corral some of these things within other legislation or letting a particular perception of antidiscrimination trump the capacity we have to do these things would not be a helpful thing and would start to attenuate our capacity to do the things we are doing in society.

I think as an opening statement that would be sufficient to say, and I am happy to take any interaction unless there are other things that my colleagues would want to add at this opening point.

Rev. DURIE — Not at this point; maybe in a few minutes.

The CHAIR — With the Victorian charter, we both recognise the freedom of religion and also the freedom of equality. The act says that we can limit one freedom if it conflicts with another freedom. I suppose the issue about the attributes that we allow exemption on in the previous discussions today were about potentially being

too broad. I suppose the question is: is it possible in your view to limit the attributes that potentially conflict with religious freedom?

At the moment you can discriminate on grounds of age, impairment and a whole host of issues. With limiting the right of equality, in terms of its conflict with religious freedom, how would you see that being handled? Is it possible to reduce the level of the attributes that potentially conflict?

Rev. DURIE — I believe there are some attributes that we are not interested in in that sense, like age and impairment. They are not an issue for us; that is true. Different religious groups might want to make distinctions, but others would not. I cannot speak for other groups, but certainly as far as the Anglican Church is concerned there are some areas which are not of interest to us in terms of making those distinctions. They are not of theological significance in the sense that they are integrated with our ethical and religious world view.

Mr SMITH — If the government were to remove these exemptions, what would be the Anglican Church's course of action following that?

Rev. DURIE -One of the effects of the exemptions is to allow the church to express its mission in the public domain, to build communities of workers who together share an ethos and value what the organisation is trying to do. The effect of getting rid of them completely could be the secularisation of many of our public institutions. Basically you could end up with groups that are no longer religious.

The alternative could be for us not to be involved in an institutional way in areas like social justice or education. It would be very difficult for us. Individuals might do work, but it would be very hard to do that work. It would be a great loss for us, for example, having put a lot of resources into schools, to see them having to be secularised. At present most Anglican schools would have in their constitution a statement that says that the principal should be a believer or committed to some sort of Christian observance.

If there is no exemption at all, that could become illegal and all their constitutions would be illegal. With many other organisations we are interested in, like World Vision, you would find that all their senior staff are required to sign a faith statement. It is a statement of commitment to ethos and belief. Basically the removal of that would result in the secularisation of many institutions. That does happen.

There are groups that have become secularised by their own decision, like the YWCA, which is no longer a Christian organisation. We are pretty committed to trying to continue our vision and mission in the organisations we have set up. That is the fundamental issue. Some states have acted to secularise institutions that religious bodies have set up, and to nationalise schools and hospitals and so on. There would be a great loss for society if that happened. You would lose the volunteer base for many of the organisations.

People would make decisions about their careers differently. There are teachers who decide to enter into teaching because they value the opportunity to teach in a Christian school and to be in a context where they are allowed to answer a question from a child about what a miracle is or who is God.

In a state school they might not have that freedom. Being able to express their vocation in a spiritual context, where the parents want that, enables them to make that choice. That could have quite profound effects on how people choose to enter into education. It would affect the way they choose their careers. Yes, it would have a very big impact on us.

Mr SMITH — Thank you very much.

Mr O'DONOHUE — A number of the groups that submitted yesterday, including the Human Rights and Equal Opportunity Commission, the Public Interest Law Clearing House, the Law Institute of Victoria talked in their submissions about the balance test. I think it is also part of the government members' options paper.

The balance test is about balancing rights and coming to a conclusion. Perhaps our member of the legal profession at the table would like to make a comment about VCAT as a jurisdiction, given that it is not a court and is not bound by precedent, and the administrative complications that may flow from each organisation having to seek exemption or seek to have that balancing test conducted by a tribunal?

Mr MACAULAY — As just a technician in the law and somebody who did have some experience in the Catch the Fire Ministries case, which gained some notoriety and prominence, I will draw your attention to the

footnote on page 15 of our submission, which in due course, you may like to look at it, because to me that encapsulates the very problem that I would like to answer your question with — that is, enshrining in the legislation any sort of a test, control or balancing factor which requires a tribunal, such as VCAT, or even a court for that matter, to come to a determination as to what is the appropriate, right or correct religious doctrine of any particular body.

In my view that was quintessentially the problem with the VCAT decision or the approach that was made by VCAT in the Catch the Fire Ministries case. Justice Nettle, in the Court of Appeal, drew attention to that and said that any legislation which effectively requires someone to say what is accurate or balanced, or reasonable for that matter, about a particular religious belief is most undesirable. It is calculated to lead to error for any secular tribunal to attempt to assess the theological propriety of, in that case, what was asserted at the seminar, or in this case what would be, for example, a decision by a religious body whether to employ or not to employ somebody in conformity with their religious belief.

We have advanced and argued as strongly as we can in our paper that if you are going to have a balance and control, it should respect the religious freedom of belief and conscience and thought of the individuals and of the body concerned, but nonetheless require that decision, that consideration, to be genuine, to be bona fide — not to be reasonable, because then you start getting into exactly the same danger that confronted the tribunal and ultimately the Court of Appeal in the Catch The Fire Ministries case.

You have a control which can be factually determined by a tribunal, ‘Does somebody genuinely hold the belief that this is necessary to conform to their religious doctrine?’, and that is as far as the forensic inquiry goes. Once you are satisfied by that, then you respect the religious freedom of the particular body to then make its decision in conformity with its religious doctrine.

If you go beyond that, you start to do what was criticised by the Court of Appeal: you start to invite a secular body to make determinations about what is proper religious doctrine and what is not. It is a most undesirable thing, I would have thought, for the state and for the religious body themselves.

As for exemptions, depending upon how your exemption is framed, you get into exactly the same problem if you frame your exemption as to whether this is reasonable judged objectively from a religious view. It is not a good idea.

Mrs PEULICH — Perhaps my question may go to Reverend Durie. Dare I say I have seen your YouTube video and commend you on it, because I think these issues go to the heart of the nature of our society. The argument that we heard yesterday was that a genuinely pluralist society cannot accept organisations that do not reflect a broader view of sexuality, gender, marriage, relationships, perhaps abortion laws and so forth.

The view I have been putting forward is that a genuinely pluralist society, and one that upholds the rights of people to believe and freedom of association, should be one of a mixed economy of groups that coalesce along the lines of their particular ethos within a broad legal framework. Could you just comment on the notion that somehow for a pluralist society, we must all be the same with the same threshold on many of these key and defining issues?

Rev. DURIE — I think there is an irony in saying that in order for everyone to be tolerant, we must not tolerate people who do not agree with us. It is really quite a disturbing trend of thought. Pluralism would mean allowing a number of different ethical world views to co-exist and somehow to mediate those, not to impose one single world view on every public institution.

One of the temptations in enforcing that kind of perspective in the way you are raising it critically is to say religion is just a private matter; we do not mind what people do in private but as soon as they go out the front door, as soon as they are doing anything in public, they have to conform to our ethical world view, our framework, which is what we think the whole state should have. That just cannot work.

There is hardly a religion in the world that does not have a commitment to public engagement. So we need to be able to allow people to have different ethical world views; we need to allow them to express that in public and to get on reasonably well in doing so.

I think the mechanism that is used in a way is this distinction between private and public, and trying to force that upon religions is just not going to work. It is not the way faith works. It is not the way ethics works. It is not the way identity works.

Mrs PEULICH — A follow-up question, if I may, and going again to this notion and understanding of religion and that some choose more expediently to believe that it is a relationship essentially between one individual and their god, rather than an individual, a god and the broader society. That is presumably the argument that you would mount as a broader concept?

Rev. DURIE — A huge part of the Bible is concerned with how you act in the public realm, and there are very strong statements that say that you might be worshipping and doing everything right, but if you are not caring for the poor, seeking justice, ruling rightly, your worship is completely valueless. It has no value whatsoever for all its private consistency. Faith is about how you live in a society; it is not about what you do when you are in your bedroom. It is a whole-of-life thing and every faith is like that.

People do not always like that, especially when they want their views to be dominant but that is the way ethics works. It is not just religion but political ideologies, general ethical frameworks — they relate to all-of-life. That is just the way it is.

Archbishop FREIER — I will just follow up with one other response in that I think it is sometimes underestimated the extent to which there is robust constituency debate within the Anglican Church. It is not as if we do not comprise members of our society who represent a very diverse range of values. So positions that we might come to hold and express are often expressed as a result of significantly debated and contested opinion.

People will probably be aware that internationally there is a significant debate in Anglicanism, amongst 80 million people worldwide, as to the relationship of some aspects of sexual ethics and who might have responsibilities in the ordained leadership of the church. These are well-debated subjects. It is not as if things somehow arise out of a vacuum and in our Australian context they arise out of citizens who are, in my experience, very informed and desirous of seeking a common good, of seeking a good for people and not seeking to do harm to people, are very aware of seeking themselves to find resolution to the balance of these things which they care very strongly about.

I think there is also this other level of jurisdictional debate within the church which informs the kinds of things we do.

Mr LANGUILLER — Archbishop, thank you for your contribution and that of your colleagues. I can assure you that I, and I know, my colleagues, respect and welcome your contributions very much. I was reflecting on the comments you made in the early part of your contribution, when you said that you felt uncomfortable in that you needed to justify or explain yourselves. For what it is worth, we apologise.

We all know that you play a wonderful role, not just in Australia but around the world, certainly in delivering services and support to those who need them most. You do not discriminate in your provision of service. I am trying to come to grips with the following dilemma in my mind and I seek your advice on this: I make the assumption that in your organisation you employ people who are gay or people who do not subscribe to marriage as you and I may ascribe to marriage — I include myself in that.

Is it not the fact that the issue is whether the persons become activists or wish to become champions of their ideas within the organisation, because that is contradictory of your values and ethos, and if that were not the case that effectively in day-to-day life you co-exist with diversity within your own organisation?

Archbishop FREIER — I think you would find that within our church membership and among those who are employed within church-related organisations there is a wide diversity that would represent much of our community. I think that is not the question.

The question is not so much about us seeking to have a universal capacity to have only people who have exactly all the opinions that might be part of the official teaching of the church. That is in a way one of the dangers of what is being proposed in the exposure material. It is seeking to have this test of consistency. I think the social effect of that will be to end up in a situation where organisations that largely balance these things well will be

pushed by some aspects of what might be put into legislation into more actively putting tests across people's participation, when we resolve those in a very harmonious and respectful ways at the present time.

I think that is one of the dangers of the exposure material that we have seen, that it would seem to want to push organisations to actually demonstrate that it mattered to them. It would have to matter enough that at every level and on every occasion the same response was made on everything to ensure the highest level of religious test. That has never been the way in which we approach membership of our church or employment broadly.

We understand that we use the opportunities of where tests are to be applied — as Dr Durie said, say, for the heads of our schools, membership of some schools boards, those kinds of things. We judge that these are important ways that we can be confident that the things that animate the mission of our organisations can be refreshed and that they will not just become ossified as bastions of social privilege but are ways for the values which form our organisations being refreshed by constant reference back to its values. I think that in many respects we balance these things in a very comfortable way for all the people who are participating.

Mr LANGUILLER — You touched on the work of volunteers and said how important that is to your organisation. What are we talking about, in terms of numbers? Can you quantify that work; is there a value that can be put on it?

Archbishop FREIER — It would be very significant. I do not have those figures at hand. Others may have some idea of them. It would be very significant across a range of many related organisations. The Anglican Church is expressed through quite independently incorporated bodies. Our schools and community service bodies are independently incorporated and the diocese of Melbourne and the other dioceses have many activities that would involve many people participating in community activities. I think the social good is very great.

The CHAIR — I have to draw this valuable discussion to an end. Thank you for your contribution, which has been very valuable, and the time and effort you have put in to this inquiry, and thanks for your participation today.

Witnesses withdrew.