

Day One of Public Hearings
Session: The Hot Button Issues

Presentation from Rt Reverent Robert Forsyth, Bishop of South Sydney

Introduction

The Anglican Church of Australia with other Christian churches is a tireless advocate of the rights of humans made in the image of God by our gracious creator. However, questions of human rights inevitably will involve clashes between rights, at least on the surface. That is because when each right is considered in itself in a somewhat abstract or general form it doesn't take into account the actual human and moral realities of the society in which we live. The general right to non-discrimination and the right to religious freedom do have the potential for this inevitable clash. Which leads us directly to the question of religious freedom and employment.

The Anglican Church of Australia is particularly concerned about 'competing rights' where these will impact upon the ability of religious bodies to be able to carry out their activities in accordance with their beliefs. A religious body should not be compelled to act contrary to conscience (which would be a denial of human rights), or to withdraw from involvement in its educational, welfare and other charitable activities because they violate another human right.

My remarks in two parts (1) The issue of religious freedom and employment, and (2) our concerns about the threat to religious freedom from anti discrimination law.

First Part: the Issue of religious freedom and employment
(Here are five points.)

1. Religious freedom is a fundamental human right

As we see in the United Nations International Covenant on Civil and Political Rights (ICCPR) Article 18

18.1 Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. The fact that Article 4 of the ICCPR permits no derogation from the right to religious freedom, even in a time of public emergency which threatens the life of the nation, demonstrates its fundamental importance.

2. Notice this right is limited in very narrow way only to what is necessary in five specific circumstances.

18.2 Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

3. This is not just a right to private religion

It might be thought that the right to freedom of thought, conscience and religion is understood simply as the right of individuals to believe what they like and to practise safely in their own homes whatever beliefs and cults they wish.

However, this is not the case. For a person to exercise their religious rights will also involve what one might call the right to gather together and work in communities and even institutions to manifest the religion. This involves more than "worship services" in churches, synagogues or mosques. For example, the involvement of the Anglican

Church of Australia in educational, welfare and other charitable activities in not an expression of altruism, but an expression of our whole of life religious commitment to loving our neighbour. This is expressed in the latter Declaration of Elimination of All Forms of Intolerance and Discrimination Based on Freedom of Belief, Article 6 (b) where the right to freedom of thought, conscience, religion or belief shall include the freedom “to establish and maintain appropriate charitable or humanitarian institutions;”

4. The exercise of this right necessarily involves being discriminating

This right will inevitably involves being discriminating as to who is employed in such institutions and ministries so as to maintain their character, ethos and integrity. This in principle is not controversial even though it does mean that religious bodies appear to be involved in what otherwise are exceptions to the general obligation to respect the right not to be discriminated against. This is why there are exemption provisions in anti discrimination laws for religious bodies. These exemptions are usually framed with the intention of allowing what is genuinely required for the exercise of the right of the freedom of religion while excluding unnecessary discrimination by the use of such categories as ‘the inherent requirements of the job’ and ‘made in good faith to avoid injury to the religious susceptibilities of the adherents.’ (HREOC Act 1986)

5. This is not a general right to discriminate but only to discriminate lawfully.

These qualifications are not a mere concession to religious organisations which gives them a ‘right to discriminate’. It is a qualification which goes to the heart of what unlawful discrimination means. Unlawful discrimination in employment means more than simply differentiating between job applicants based on their personal characteristics – it means that it is unlawful to differentiate between them if the differentiation is based on a certain class of ‘irrelevant characteristics’ for no better reason than ‘blind prejudice’ or ‘hatred’.

Second Part: Current concerns on the issue of religious freedom and employment

We are not so much calling for a change to existing law, policy and mode of administration, (though there are at the state level real concerns) but fear that well meaning changes in this very human rights process will now restrict the right of religious freedom by preventing religious communities and institutions employing those who are aligned and embody their values and mission. In other words we are anxious that the very efforts to protect human rights better may, unless great care is given to protecting the right of religious freedom, actually create the circumstances of the diminution of religious freedom in this country. I have just three points.

1. We are concerned about danger of overreach of anti-discrimination rights; a kind of ‘anti discrimination fundamentalism’, as it were.

The dominant moral code in public life in Australia is that one should not discriminate against anyone. Those who believe that anti-discrimination laws should be ever extended to cover more and more issues and to apply in more and more situations, tend to find it difficult to see any other point of view. There is an unspoken belief that non-discrimination is the right that trumps all others. As Professor Parkinson of the Faculty of Law the University of Sydney has written “There can be a fundamentalism about this as powerful and rigid as the most dogmatic of religious fundamentalisms.”

1 Such a movement is a threat to religious freedom. Or at best it frames religious communities as those who are grudgingly granted concessions that they really don’t deserve. Not a place we want to be.

¹ Patrick Parkinson AM Submission to Australian Human Rights Commission Freedom of Religion and Belief in the 21st Century January 2009

2. We are concerned at the undue narrowing of the criteria for exemption. We are concerned that the narrowing of the criteria for exemption will damage religious freedom.

That religious institutions must not be so narrowly understood as to as to exclude non-denominational religious organisations, or charitable or humanitarian groups established by people for religious reasons.

That religious purposes not be so narrowly understood as to preclude activities other than church service as than in educational, welfare and other charitable activities which are an expressions of our whole of life religious commitment to loving our neighbour.

That inherent requirements of the job be so narrowly understood as prevent religious bodies availing themselves of the well-accepted principle that all organisations can require all their employees to be capable of working towards the mission of their employing organisation while respecting the organisation's values.

3. We are concerned at the intrusion of external bodies in deciding religious questions. It is right for the law to be satisfied in some way that discrimination, or what would otherwise be discrimination but is required by the freedom of religion of a community or institution, is genuinely is required by it and that institution is not using its claims of freedom of religion as a smokescreen for what otherwise is inappropriate. This requires some scrutiny. However, if the scrutiny is sufficiently severe and the test sufficiently high we end up with the situation where courts and other bodies are being asked to determine the nature of religious doctrine and even the question of the doctrine of a particular church, for example, compared to the doctrine of a denomination. We believe that the genuine occupational qualifications cannot be determined externally, in ignorance of the religious mission, values and strategy of a religious organisation.