



Freedom of Religion and Belief in the 21st Century Submission
Race Discrimination Unit: Education and Partnerships Section
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

Via email: frb@humanrights.gov.au

6 March 2009

Dear Sir/Madam,

**Submission to the Australian Human Rights Commission Inquiry into
Freedom of Religion and Belief in the 21st Century**

We welcome the opportunity to make a submission to this Inquiry. This is a joint submission prepared by Kingsford Legal Centre, on behalf of the Combined Community

Legal Centres Group (NSW) with assistance from the Public Interest Advocacy Centre, Women's Legal Services NSW, Inner City Legal Centre and Redfern Legal Centre.

1. Who are we?

Community Legal Centres (**CLCs**) are located throughout Australia in metropolitan, outer-metropolitan, regional, rural and remote Australia. CLCs are experts in 'Community Law' – the law that affects our daily lives. They are often the first point of contact for people seeking assistance and/or the contact of last resort when all other attempts to seek legal assistance have failed.

Kingsford Legal Centre (**KLC**) is a CLC that provides legal advice, assistance and representation to people who live, work or study in the municipalities of Randwick and Botany in NSW. KLC conducts a specialist service in employment law and a state wide service on matters of discrimination law.¹

The Public Interest Advocacy Centre (**PIAC**) is an independent, non-profit legal and policy centre located in Sydney. PIAC makes strategic interventions in public interest matters.

Inner City Legal Centre (**ICLC**) is a CLC that provides legal advice, information and referrals to people who live in the inner city and eastern suburbs of Sydney. ICLC also has a specialist legal advice service for gay, lesbian and transgender people across NSW.

Women's Legal Services NSW is a community legal centre providing women with a range of free community legal services, including legal advice and information, education, training and resources across metropolitan and regional areas of NSW.

Redfern Legal Centre (**RLC**) provides free legal advice, legal services and education to people who live in the Botany, Leichhardt and City of Sydney municipal areas and to groups who advocate for them.

¹ KLC would like to thank Tom Bowes and Eustina Zaky for their assistance with this submission.

The Combined Community Legal Centres Group NSW (CCLCG) is an incorporated association consisting of, and representing, the network of 39 CLCs throughout NSW.

2. Our Submission

Our submission is principally informed by our experience in representing individual clients within our respective catchment areas and areas of specialisation, and our work lobbying for law reform on behalf of these clients. We have limited our comments to those areas in which we have expertise, and have structured our submission around these issues. We have not included any comment on the issue of Indigenous spiritual beliefs and practices, but strongly recommend that the Commission seek particular advice on this issue from Indigenous peoples.

3. Overview

The purpose of this submission is to support the initiative of the Australian Human Rights Commission in bringing Australia up to date in its compliance with Article 18 of the *International Covenant on Civil and Political Rights (ICCPR)* and the other international obligations it has with regard to the right to freedom of religion. We offer a perspective on Australia's laws and political culture in the light of these obligations.

It is our submission that the freedom to believe or not believe should not be in any way limited. However, the manifestation or practice of such beliefs or non-beliefs must be limited to protect the fundamental rights and freedoms of all – both those who adhere to a particular religion or belief system, and those who do not.

We highlight four main areas in which we believe Australia's laws are inadequate given our international obligations. These are:

1. the limited nature of the constitutional protection of the right to freedom of religion,
2. the absence of positive obligations on State and non-State organisations to comply with obligations relating to the right to freedom of religion;
3. the absence of religious belief as a ground for unlawful discrimination and vilification Federally and in some State jurisdictions; and

4. the blanket exceptions granted to 'religious bodies' and 'private educational institutions' from the obligations to not discriminate created by the various State, Territory and Federal anti-discrimination acts.

We also identify three trends in the current environment which we believe pose a threat to Australia's compliance with international obligations, our separation of church and State and/or to social harmony among the religions generally. These are:

- the targeting of Muslim Australians in different contexts related to the so-called 'War on Terror' and Federal counter-terrorism laws;
- the reported increase of inflammatory comment about certain religions in the media; and
- the rise in the provision of social and welfare services by religious organisations.

We do not advocate the priority of the right to freedom of religious practice – or any other right – in all cases. Rather, in the event that the right to freedom of religious practice and belief is at odds with another fundamental right or freedom, we advocate for a transparent determination process by the appropriate State, Territory or Federal human rights or anti-discrimination body.

We oppose, in particular, the granting of blanket exemptions to churches and religious organisations from anti-discrimination law.

We also call for the introduction of an *Equality Act* that would require organisations to report on their compliance with our obligations in international human rights law, including Article 18, and we believe this would reduce the occurrence of infringement of individuals' rights that we describe in this submission.

We present a series of recommendations for law reform that aim to protect all fundamental rights and freedoms of people in Australia.

4. Overview of International Law Obligations

There are a number of international legal sources for the right to freedom of religion. This submission will commence with consideration of the obligations Australia has agreed to in international instruments.

The *International Covenant on Civil and Political Rights (ICCPR)* relevantly provides:

Article 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.
- (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief in his choice.
- (3) Freedom to manifest one's religion or belief 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.
- (4) The States Parties to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 20

- (1) Any propaganda for war shall be prohibited by law.
- (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

As the principal basis for Australia's obligation to protect the right to freedom of religion and belief, these Articles, taken together, are the proper starting point for evaluating the protection offered in Australia and setting basic minimum standards for that protection.

Article 18 of the ICCPR is supplemented by the UN General Assembly's *Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief* and has been the subject of comment by the UN Human Rights Committee in its *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*. As a non-discrimination provision, interpretation of Article 18 is also aided by reference to the Human Rights Committee's *General Comment 18: Non-discrimination* (paragraph 2) and Article 8 of the *Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief*.

Article 27 of the ICCPR recognises the rights of ethnic, religious and linguistic minorities to practice their own religion as a fundamental element of the preservation and perpetuation of their distinctive identities.² Further, and relevantly for Australia, Article 12 of the *Declaration on the Rights of Indigenous Peoples* states:

- (1) Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
- (2) States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

It is clear that Australia has an obligation to protect and provide the right to freedom of religion, as set out in international law. That means within specific parameters. This submission will draw attention to inadequacies in the legal regime by which Australia implements these obligations and will also identify current practices which we consider to be a threat to the right to freedom of religion protected by these obligations.

² *International Covenant on Civil and Political Rights* art 23 General comment.

5. Protection of all fundamental rights and freedoms

While it is clear from international law that freedom of religion is a fundamental human right, the international norms for the protection and limitation of the right of freedom of religion reflect the well-known axiom that human rights are 'universal and interdependent'. Human rights are not absolute. Each right is limited by the requirement to protect all fundamental rights.

Article 18(3) of the ICCPR stipulates that "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." In other words, while the freedom to believe or not believe is not in any way limited, the manifestation or practice of such beliefs or non-beliefs must be limited to protect the fundamental rights and freedoms of all – both those who adhere to a particular religion or belief system, and those who do not.

For example, the right to freedom of religion may clash with the right to gender equality, and the right to freedom from discrimination on the basis of sex, marital status, pregnancy or potential pregnancy. The *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)* is the primary international human rights instrument relating to gender equality. Australia has signed and ratified CEDAW, and it is annexed as a schedule to the *Sex Discrimination Act 1984 (Cth)*. In relation to the practices and manifestations of religions and beliefs, it states:

Article 5

States Parties shall take all appropriate measures:

- a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

The December 2008 *Senate Committee Report on the Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*³ sets out the concerns and complexities of balancing the right to freedom of religion with the

³ See p 92-107.

rights to equality between men and women and to not be discriminated against on the grounds of sex, marital status, pregnancy or potential pregnancy.

It is our submission that one fundamental right should not be automatically privileged above others by the granting of a permanent blanket exception. For example, to allow a religious body to generally discriminate on the grounds of sex, marital status or pregnancy, simply because certain members of that religion claim that it is required by their tenets, doctrines or beliefs, is arbitrary, and allows the right to freedom of religion to unreasonably take precedence over the right to not be discriminated against on the basis of sex, marital status or pregnancy.

On each occasion that rights, such as freedom of religion and gender equality, are seen to clash or be in competition, a considered investigation of how best to protect each of those rights must be undertaken.

An example of such a clash and the attendant investigation is the case of a single woman employed by a religious welfare agency whose employment is terminated on becoming pregnant, on the grounds that her employer believes that sex before marriage is contrary to their religious beliefs and doctrine. The rights involved are:

- The right to freedom of religion;
- The right to freedom from discrimination on the grounds of pregnancy;
- The right to freedom from discrimination on the grounds of marital status, and
- The right to gender equality.

An investigation into how to protect these rights could validly consider, among other things:

- Whether the prohibition on sex before marriage is a central or essential belief or element of doctrine;
- Whether the worker was in a position that was responsible for upholding, promoting or teaching the religion;
- Whether termination of employment was the least harmful or restrictive way of protecting the right to freedom of religion;
- The impact of the termination on the employee, and
- The impact of reinstating the employee on the employer.

Such an investigation would allow a determination of how best to protect the various rights involved, without automatically privileging one right over another.

Considering whether anyone's human rights will be 'harmed' by a certain religious practice may also be helpful in conceptualising the limits required. If such a guiding principle is adopted, an objective standard of 'harm' needs to be established, for example to prevent a religion from excusing a harmful practice as being for the other person's 'own good'.

In circumstances where there is no impairment or intrusion on the freedom of others, the right to freedom of all personal religious practices should be implemented. Religious dress, for example, does not in any way impinge on the freedoms of others. Therefore, this expression or manifestation of religious belief, such as the wearing of the hijab, a habit or monks robes, should be protected.

However, the protection of the right to practice and manifest one's religion should not be absolute where the rights, freedoms and interests of others are harmed. Consistent with this conception, it is inappropriate for the right to freedom of religion to receive blanket protection, such as through general exceptions to anti-discrimination laws, where it may intrude on other freedoms and the secular nature of the State established by s116 of the Australian Constitution. See the section on [Anti-Discrimination Laws and Exceptions for Religious Bodies](#) for further discussion of this issue.

While it is clear that there are limitations on the right to freedom of religion, it is also clear that it is a fundamental human right. It is important that this right, with limitations, is protected in Australian law.

6. Constitutional Protection

Discrimination on the basis of religion is not comprehensively prohibited in Australian law. The Australian Constitution provides limited protection for the right to freedom of religion.

Section 116 of the Australian Constitution restricts the Commonwealth – but not the States – with respect to freedom of religion. Section 116 states that the Federal Parliament cannot:

1. “make any law for establishing any religion”;
2. impose “any religious observance”;
3. prohibit “the free exercise of any religion”, or
4. require a religious test as a qualification for any office or public trust under the Commonwealth.

Section 116 does not provide for the general protection of an individual's right to freedom of religion, thought, conscience or belief. Nor does it provide redress for the violation of that right. It merely restricts the power of the Federal Parliament to make laws which might restrict that right.

The few cases on section 116 that have been decided by the High Court have been concerned with the ‘free exercise’ clause. The High Court of Australia has interpreted the provision narrowly and has never upheld a claim based on section 116. For example, the Court has rejected arguments based on the belief that an act could be against one’s conscience and the will of God. In *Krygger v Williams* in 1912, the Court rejected the arguments of Edgar Krygger who wanted to avoid compulsory military training as “attendance at drill is against my conscience and the will of God.”⁴ The Chief Justice, Sir Samuel Griffith, found that there may be a requirement of the law for a man to do an act which his religion forbids that was objectionable on moral grounds, but would not come within the prohibition within section 116.⁵

It is evident that section 116 does not on its own meet Australia's obligations at international law to protect the right to freedom of religion.

7. Legislative Protection – Anti-Discrimination Laws

7.1 Anti-discrimination laws: A focus on negative protection

In the absence of Constitutional protection, individuals must rely on a variety of Federal and State Acts for any protection of the right to freedom of religion. The *Human Rights*

⁴ *Krygger v Williams* (1912) 15 CLR 366, 367.

⁵ *Ibid* 369.

and Equal Opportunity Act 1986 (Cth), the Race Discrimination Act 1975 (Cth), and various State and Territory anti-discrimination and equal opportunity acts offer an uneven patchwork of protections across Australia. Not only are there jurisdictions which do not cover religious discrimination at all (see the below section on Religious belief as a ground in anti-discrimination laws for more detail), but the protection provided in anti-discrimination laws is not the same as the provision of a right to freedom of religion.

This is because the anti-discrimination legislation which does cover religion protects the *right to freedom from discrimination on the ground of religion*, rather than protecting the *right to freedom of religion and belief* itself.

The difference is important in that the current protection is negative – a right to *not* be discriminated against – and is not enlivened until it is breached. Currently in Australia, the work of lodging a complaint in relation to a breach of anti-discrimination law, and taking it through conciliation and potentially to hearing, rests with the complainant. The complainant must drive the process and prove the discrimination. It is often too onerous a burden for an individual. Further, the enforcement process also leads only to an individual remedy, rather than systemic change – so the right to freedom from discrimination on the ground of religion can only be secured for the complaining individual, in the particular area of public life of the complaint. Relying on an individual complaints mechanism for enforcement will not effectively promote community harmony more broadly, nor lead to systemic change for better compliance with Articles 18 and 26 of the ICCPR.

7.2 The benefits of positive protection

Enacting a positive duty to ensure the right to freedom of religion and belief would be far more effective to achieve systemic change and promote better human rights protection. The work of Dr Belinda Smith sets out the detail of such a positive duties system, and the benefit of such a system.⁶

For example, government departments, authorities and those agencies providing government funded services can report against a positive duty to protect the right to

⁶ Belinda Smith, 'Not the Baby and the Bathwater – Regulatory Reform for Equality Laws to Address Work-Family Conflict', (2006) 28 *Sydney Law Review* 689.

freedom of religion and belief by setting out their policies and practices that aim to do so, and reporting on the effectiveness of such measures. In other words, systemic protection becomes a requirement. An example of the kinds of accommodation which could be made by employers in order to meet a positive obligation include:

- paid or unpaid 'religious leave' could be granted for a number of days each year to enable individuals to practice their faith; and
- there could be greater flexibility in choosing break times so that employees can practice religious rituals.

A further example relates to prison facilities and practices. There are currently limits on the practice of Islam by people in prison. Whether the individual is on remand or detained for other reasons, the availability of Halal food and of prayer facilities, and accommodations for Ramadan are particularly inadequate.⁷ A positive duty to ensure the right to freedom of religion and belief could encourage corrective services to address these issues.

In the event that an agency's report indicates that they fall short of the required protection, government assistance should be made available to help the agency meet the requirement. This system, which requires a third party enforcer, encourages systemic change, and the promotion of harmony and human rights protection. In the event that an agency continually fails to meet the required protection standards, both civil and criminal sanctions should be available, once all efforts have been made to assist compliance.

Retaining an option for an individual complaints mechanism would allow those incidences of breaches that would not otherwise be scrutinised to come to light, as well as allowing those individuals who would find it beneficial to seek an individual remedy to do so.

Given the current uneven protection of rights via anti-discrimination legislation, it is proposed that more coherent and comprehensive protection could be provided through

⁷ See for example NSW, *Parliamentary Debates*, Legislative Council, Hansard, 29 May 2001 (Hon. Lee Rhiannon) Questions and Answers.

the mechanism of an overarching *Equality Act*. Such an Act could incorporate human rights protections established in international treaties and conventions, to which Australia is a signatory, into domestic legislation.⁸

In the event that the Federal Government introduces some form of Charter of Rights, an *Equality Act* could usefully sit alongside such a Charter. It is quite possible that a Charter may not provide individuals with a cause of action, nor any remedies. Depending upon the model of Charter adopted, an *Equality Act* could function to provide both a cause of action for individuals who have been discriminated against, as well as a mechanism for an independent authority to apply any exemption procedures, and to monitor and enforce compliance with the positive duties set out in the Act, thus effecting systemic change. This role could be performed by the Australian Human Rights Commission or State and Territory anti-discrimination boards.

7.3 Religious belief as a ground in anti-discrimination laws

Federal legislation does not effectively prohibit discrimination or vilification on the ground of religion. There is limited protection provided in the *Human Rights and Equal Opportunity Act 1986 (Cth)*. While religion as a ground is covered in that Act, it only applies to discrimination in certain situations, and provides no enforceable remedies. All the States and Territories, apart from NSW and South Australia, make religious discrimination unlawful.⁹ Only Victoria, Queensland and Tasmania prohibit religious vilification.

The fact that NSW legislation does not comprehensively cover religious discrimination is problematic. The *Anti-Discrimination Act 1977 (NSW)* makes discrimination and vilification on the grounds of 'ethno-religious origin' unlawful.¹⁰ The laws only benefit

⁸ The concept of the *Equality Act* is discussed in more detail in Submission 52 to the Senate Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality (pp. 39-40), available at: http://www.aph.gov.au/SEnate/committee/legcon_ctte/sex_discrim/submissions/sublist.htm.

⁹ *Discrimination Act 1991 (ACT)* s 66(1); *Anti-Discrimination Act 1991 (Qld)* s 124A; *Anti-Discrimination Act 1998 (Tas)* s 19(a); *Racial and Religious Tolerance Act 2001 (Vic)* s 7(1); *Equal Opportunity Act 1984 (WA)* s 53; *Anti-Discrimination Act (NT)* s 19.

¹⁰ *Anti-Discrimination Act 1977 (NSW)* s 4 definition of 'race' amended by *Anti-Discrimination (Amendment) Act 1994 (NSW)* s 4.

those religions whose followers can be identified with a particular country of origin. The term 'ethno-religion' is not defined in the legislation. The Attorney-General's second reading speech for the Act that introduced the amendments indicated that the term was intended to include "Jews, Muslims and Sikhs".¹¹ However, the Administrative Decisions Tribunal has ruled that where an applicant seeks to establish a complaint under the ethno-religious ground, it will be insufficient for them to merely assert their faith. There must also be a close tie between that faith and the applicant's race, nationality or ethnic origin.¹² So far, it appears that Sikhs and Jews are protected under the NSW legislation. However, Muslims and people of other religions are unlikely to be covered where the discrimination relates solely to their religion and is not also tied to their ethnicity.¹³

Case Study – Religious Discrimination

Women's Legal Service advised Sarah, who was discriminated against on the basis of her religion. Sarah, dressed in a hijab, entered a boutique-clothing store in Sydney in order to try on a dress advertised in the store's display window. When Sarah walked into the store, the store manager requested she leave the store immediately as there would not be any items that would interest her. Sarah informed the manager that she would like to try on the dress displayed. The manager said that she would be unable to try on or purchase the item, as she does not want to sell her items to Muslims. WLS advised Sarah about the possibility of lodging a complaint to the Anti-Discrimination Board or Australian Human Rights Commission but that a complaint to these bodies would have a limited prospect of success, as religion is not a ground for discrimination.

This gap is best filled by the enactment of an *Equality Act* which includes the right to freedom of religion, as discussed above. However, in the event that the *Equality Act* proposal takes some time to find favour, it is crucial that the Federal Government, and all

¹¹ NSW, *Parliamentary Debates*, Legislative Council, Hansard, 11 May 1994 (The Hon. John. P. Hannaford) Second Reading Speech, Anti-Discrimination (Amendment) Bill 1994. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999) 5.9.

¹² *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 120, [51] – [60]

¹³ See, eg., Kathryn Gelber, 'Hate Speech in Australia, Emerging Questions', [2005] UNSWLJ 52 which addresses the inability of the complainants in *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2005] VCAT 1159 to bring their claim in NSW.

State and Territories urgently enact legislation which prohibits discrimination, vilification and harassment on the grounds of religion.

7.4 Prejudice, discrimination and vilification of Muslims in Australia

The Australian Muslim community is extremely diverse, and includes ethnic Javanese, Malays, Pakistanis, North Africans, Iranians and Afghans, as well as the 20 per cent of the Muslim community who were born in a predominantly Arab country.¹⁴ The lack of protection for Muslims in NSW and Federal legislation is particularly problematic given that half of Australia's Muslims live in NSW.¹⁵

As is clear from the studies referred to below, since September 11 2001, and the London and Bali attacks, suspicion of Islam and discrimination against Muslims has been on the rise. This has resulted in many Muslims feeling a sense of alienation from the rest of society. See the section below on Counter-Terrorism Laws for more discussion of the impact of those laws on Muslims in Australia.

Numerous studies have illustrated the existence and extent of discrimination against Muslims in Australia:

1. The report by the then Human Rights and Equal Opportunity Commission *Isma-Listen* revealed that many Muslims have either directly experienced discrimination or more than likely knew of someone who had.¹⁶ The report also revealed most Muslims feel that other Australians perceive them as being terrorists, merely for being a Muslim or coming from an Arabic background. These experiences were reported to mostly occur in public spaces such as shopping centres or while driving or at their local park. Other experiences include attacks against mosques, by neighbours at home, and direct and indirect discrimination based on misconceptions about the diversity of Muslims in Australia and about Muslim women.

¹⁴ Justin Healey, *Racial Discrimination, Vol 278 Issues in Society* (2008).

¹⁵ Australian Bureau of Statistics, *Religious Affiliation by Sex: Australia and Religious Affiliation by Sex: NSW* Australian Bureau of Statistics Census Data (2006)
<<http://www.censusdata.abs.gov.au/ABSNavigation/prenav/TopicList?prenavtabname=Topic%20List&collection=Census&period=2006&breadcrumb=T&navmapdisplayed=true&textversion=false>>

¹⁶ Human Rights and Equal Opportunity Commission, *Isma — Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004).

2. A study conducted by the University of NSW in 2003 found one in eight Australians interviewed admitted they were prejudiced, particularly towards Muslim Australians. The study found that some Australians were living in denial of such prejudice though 80 per cent of those surveyed recognised racism was a problem. Most had not even met a Muslim.¹⁷
3. The Racism Monitor Group of the University of Technology Sydney also produced a report *Respect and Racism in Australia*, in June 2004. The report outlined that Australian Arabs and Muslims have been and continue to be unfairly targeted. The participants said that racism endured by Muslims and Arabs was so frequent that they feel the general population has almost accepted this practice. The report also revealed that Muslims do not feel entitled to make complaints.¹⁸
4. In 2004, Islamic Women's Association of Queensland Senior Women's Respite Group, along with the Human Rights and Equal Opportunity Commission held a consultation in Brisbane with 81 participants from diverse backgrounds in order to discuss the issue of eliminating prejudice against Arab and Muslim Australians. Consultation participants reported numerous incidents of women in hijab being spat at, of objects being thrown at them from passing cars and of their hijabs being pulled off. Forcible removal of the hijab in public was regarded by Muslim women as the worst violation.¹⁹
5. Another 2004 study found that Muslim women encounter considerably higher levels of discrimination than men, mainly because of their visibility (being easily identified).²⁰
6. A report in 2005 by the University of Technology Sydney, Sydney Shopfront revealed that there was a strong link between visible makers of 'difference' such

¹⁷ G Hassan, *The Rise of Islamophobia in 'White Australia'* (2005) Global Research <<http://www.globalresearch.ca/PrintArticle.php?articleId=1485>> at 21 December 2008.

¹⁸ Ibid.

¹⁹ Human Rights Equal Opportunity Commission, *Consultation with Islamic Women's Association of Queensland Senior Women's Respite Group* (2003) [2.1] <http://www.hreoc.gov.au/racial_discrimination/isma/consultations/meetings/17june03qld.htm> at 21 December 2008.

²⁰ S Poynting and G Noble, *Living with Racism: The experience and reporting by Arab and Muslim Australians of discrimination, abuse and violence since 11 September 2001* (2004) 6.

as wearing the hijab, turban or having a beard and experiences of prejudice and assault.²¹

7. A report released by the Anti-Discrimination Board, NSW in 2003 argued that that the discussions in the media about the war on terror, asylum seekers and crime have led to a “damaging environment of anti- Arabic and anti-Muslim sentiment” which resulted in an increase of racial vilification and discrimination towards these communities.²²

The findings of these studies and reports correspond to the experience of Women’s Legal Services NSW (**WLS**). In particular, women have reported to WLS experiencing discrimination when wearing the hijab or headscarf in public places such as buses, beaches, streets, shopping centres or educational institutions. Many reported that most of the attacks against Islam and Muslims were towards Muslim women in hijab, or Muslim men with a beard and/or turban.

Muslim women have also expressed fears to WLS about leaving their homes at times, particularly when there is a report on the news regarding ‘terrorist attacks’ carried out by Muslims. Many women have also expressed their concerns that their sons with Muslim names such as ‘Muhammad’ and ‘Ahmed’ are unable to obtain employment because of their name and/or appearance. Some Muslim clients of WLS feel that racism against Muslims was openly promoted by the Bush and Howard governments which resulted in legitimising unlawful acts against Muslims.

The media has played a significant role in the negative portrayal of Muslims.²³ The use of the terms ‘fundamentalist’ and ‘terrorists’ and the media linking these terms to Muslims have further generated discrimination issues for Muslims. Muslim clients of WLS feel that the comments made in the media incite hatred towards Muslims and Islam. The clients

²¹ T Dreher “‘Targeted’: Experiences of Racism in NSW after September 11, 2001” (2005) *UTS Shopfront Monograph Series No 2*.

²² NSW Anti-Discrimination Board, *Race for the Headlines: Racism and Media Discourse* (2003) <http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_raceheadlines> at 20 December 2008.

²³ See for example the case of Romzi Ali: *Ali v Nationwide News Pty Limited* [2007] NSWSC 58 (15 March 2007)

have also expressed their sense of helplessness when it comes to laws which are supposed to protect from this sort of vilification. Muslims have expressed that they are being made to feel as though they do not belong in Australia.²⁴

Muslims are also facing great difficulties in obtaining approval for the construction of Muslim schools, mosques and alike from local councils and communities.²⁵

It is clear in the face of the increasing fear and alienation of Muslims in Australia that the limited laws addressing religious discrimination and vilification have clearly failed to provide adequate protection for Muslims. There is a particularly urgent need to address vilification and discrimination against Muslim women.

Comprehensive protection for the right to freedom of religion and belief is needed. In the event that a positive duties system and an *Equality Act* take some time to find favour, it is crucial that the Federal government, and all State and Territories urgently enact legislation which prohibits discrimination, vilification and harassment on the grounds of religion. See the sections: [The benefits of positive protection](#) and [Religious belief as a ground in anti-discrimination laws](#) for further exploration of this issue.

It is also important that exceptions granted to media organisations in any proposed vilification laws are heavily scrutinised and deemed necessary before allowed. Any proposed vilification legislation needs to properly protect both the right to freedom of speech and the need for genuine public debate, and the right to freedom of religion.

²⁴ G Hassan, *The Rise of Islamophobia in 'White Australia'* (2005) Global Research <<http://www.globalresearch.ca/PrintArticle.php?articleId=1485>> at 21 December 2008.

²⁵ See for example the recent case of the Islamic school development application for Camden, which was refused by Camden Council: <http://www.abc.net.au/news/stories/2008/05/27/2257402.htm>.

8. Counter-Terrorism Laws²⁶

Many aspects of Australia's counter-terrorism measures raise concerns in relation to the right to freedom of religion and belief in Australia. This is particularly the case for Australia's Muslim and Arab populations. See the above section on Prejudice, discrimination and vilification of Muslims in Australia, for more discussion on the experiences of Muslims in Australia in recent years. In the context of the alienation of and discrimination against Muslims in Australia, outlined in that section, the targeting of Muslims under counter-terrorism measures is particularly problematic.

8.1 Definition of 'Terrorism'

The *Criminal Code Act 1995 (Cth)* (**Criminal Code**) criminalises all serious violence, actual or threatened, that is politically, religiously or ideologically motivated, and that is intended to intimidate any government, or any public or section of the public, wherever in the world such violence or threats occur.²⁷ The Criminal Code also criminalises a wide range of conduct ancillary to, or directly or indirectly connected to, such acts or threats of violence. This includes being a member of any organisation, training with any organisation, or giving or receiving funds or assets to or from any organisation that directly or indirectly fosters such violence, even where the membership, training, funds or assets are not themselves connected in any way to violence.

8.2 Listing of 'Terrorist Organisations'

The Criminal Code gives the Australian Government the power to list organisations as 'terrorist organisations' on the grounds that they are directly, or indirectly, engaged in, assisting, preparing, planning or fostering acts or threats of violence or on the basis that they directly advocate 'terrorist acts'.²⁸ To date, 19 organisations have been listed as 'terrorist organisations', with all but one of those organisations being self-identified

²⁶ This section borrows heavily from the *Freedom Respect, Equality, Dignity: Action - NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights*, which can be found at:

http://www.hrlrc.org.au/html/s02_article/article_view.asp?id=380&nav_cat_id=135&nav_top_id=57.

We are grateful to the authors of the Report, as well as the authors of the relevant section for allowing us to use their work. See the report for more details on the counter-terrorism laws.

²⁷ *Criminal Code* (Cth) s 100.1(1).

²⁸ *Criminal Code* (Cth) s 102.1(2)

Islamic organisations. Only a small number of the listed organisations have actually threatened violence against Australia.

The effect of a listing is to increase, in certain circumstances, the scope of criminal liability for involvement with the organisation in question. Listing also acts as a significant condemnation by public authorities of the political, religious or ideological goals of the organisation in question. Under the Criminal Code, people who associate with terrorist organisations are liable for criminal prosecution, regardless of the nature of that association or the intention of the individual to engage in terrorist acts.²⁹ This is 'guilt by association'. That the majority of the organisations listed are Muslim, disproportionately exposes people of the Muslim faith to guilt by association and the terrorist organisation offences.

8.3 Administration and Policing

Very few prosecutions have been brought under Australia's counter-terrorism laws. Where they have been brought, however, there is reason to believe that the prosecution has been motivated, in part, by considerations of the political or religious beliefs and affiliations of those prosecuted.³⁰

Information received by CLCs in Australia from their clients indicates that the Australian Federal Police and Australian Intelligence Security Organisation, in undertaking inquiries in relation to political violence, focus disproportionately upon those members of the Australian community who are Muslim. Anecdotally, Muslim people have expressed

²⁹ *Criminal Code* (Cth) s 102.6 – 102.8.

³⁰ The vast majority of charges made under the *Criminal Code* have been made against Muslims: *R v Mallah* (2003); *R v Thomas* (2004); *R v Lodhi* (2006); *R v Khazal* (2006); *R v ul-Haque* (2006); *R v Benbrika & ors* (2006). Charges have also been brought against two alleged members of the Liberation Tigers of Tamil Eelam: *R v Vinayagamoorthy & Yathavan*. Only one other charge, unrelated to membership of a political or religious group, appears to have been brought: *R v Amundsen* (2006). See also Submission to the Senate Legal and Constitutional Committee on the Anti-Terrorism Bill 2005 (Cth), Parliament of Australia, 9 November 2005 (National Association of Community Legal Centres) available at <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/terrorism/submissions/sub145.pdf>.

feeling harassed by ASIO's intelligence-gathering operations, and some have described harassment by law enforcement officials.³¹

It is crucial that the counter-terrorism laws are implemented in a non-discriminatory fashion. We understand that the current Government is appointing an independent reviewer of the counter-terrorism laws. We strongly recommend the laws and their implementation be scrutinised in accordance with the right to freedom of religion.

9. Anti-Discrimination Laws and Exceptions for Religious Bodies

The focus of this section is on the exception for 'religious bodies' from the application of anti-discrimination law. All Federal, State and Territory anti-discrimination acts include a 'religious body' exception, which shields religious organisations from liability under the laws in a range of situations.

In the absence of religion as a ground of discrimination, the 'religious bodies' exception is the only form of recognition given to the right of freedom of religion in NSW and SA. Where it is successfully relied upon in defence of allegations of discrimination, the 'religious bodies' exception grants far wider protection of the free exercise of religion than similar provisions protecting the right of individuals to freedom from discrimination on the grounds of religion. In this regard, the exception demonstrates the point that negative rights place the burden on those who have been discriminated against.

It is our submission that the exception arguably places religious bodies 'beyond the law' in a way that is neither legitimate nor justified and privileges the collective right to freedom of religious practice over other fundamental rights.

An example of a 'religious bodies' exception is found in s56 of the *Anti-Discrimination Act 1977* (NSW), which is expressed in the following terms:

Nothing in this Act affects:

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order,

³¹ Combined Community Legal Centres Group (NSW), Australian Muslim Rights Advocacy Network, NSW Young Lawyers and the Federation of Community Legal Centres (Vic), *Submission to the UN Special Rapporteur on Human Rights and Counter-Terrorism*, 27 March 2006, 49.

- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
- (c) the appointment of any other person in any capacity by a body established to propagate religion, or
- (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

The 'religious bodies' exception provisions, including s56, generally have the following features:

1. The exception is general, excepting the conduct of religious bodies from the application of anti-discrimination law that would otherwise prohibit that conduct as discriminatory on the grounds of age, disability, sex, race, marital status, pregnancy, sexuality etc;
2. The exception usually applies specifically to the appointment and education of clergy (eg allowing the churches to refuse to appoint female clergy), and the employment of teachers at religious schools (eg discriminating against single mothers or gay or lesbian teachers);
3. The exception usually includes a general provision relating to conduct "necessary to avoid injury to the religious susceptibilities of the adherents of the religion".

There has been little consideration of the 'religious bodies' exceptions by courts or tribunals. It has been argued by religious organisations that the exception is wide and covers a vast array of their activities.³² However, it is clear that there are limits on the exception. The NSW Equal Opportunity Tribunal has said in relation to the ambit of s56(d) that it:

protects the members of religious orders or bodies established to propagate religion in relation to its own members and its own structures. The section does not operate to allow the members of any religion to impose their beliefs on secular society, so as to exempt them from the operation of the law. For example, it may be the practice of a religious body to promote the interests of persons of white skin colouring to the disadvantage of all others. Such a practice would not operate to exempt an employer who was a member of that religious body from the *Anti-Discrimination Act* and thus enable the employer to refuse employment to persons of black skin colouring.

³² *OV and anor v QZ and anor* (No.2) [2008] NSWADT 115.

Similarly, if a person is a member of a religious body whose doctrines promote marriage as being essential for persons wishing to live together, this belief may not be imposed on persons wishing to obtain accommodation as a criteria for obtaining such accommodation.³³

The Commission's previous enquiry entitled *Article 18: Freedom of Religion and Belief*³⁴ relied on the distinction between public life and private life to determine where the balance between competing rights to non-discrimination and freedom of religious expression should lie.³⁵ It is necessary to distinguish, for example, between a religious body's internal organisation and the services it provides to the broader community. This distinction takes into account the source of the funding supporting those activities.

Courts and tribunals have grappled with this distinction. In one Victorian case, the Victorian Civil and Administrative Tribunal considered in obiter that a religious body was established for mixed purposes, only some of which are 'explicitly' religious or pastoral and those purposes did not apply to the foster care service it provided to the general community. Consequently, it was not necessarily a "body established for religious purposes".³⁶ Similarly, in Queensland, it has been observed that religious bodies do not always "invoke the ministry of the Church as such" but it has not been found that such a body falls outside the general 'religious body' exception for this reason.³⁷

The cases and literature demonstrate that the need for a balancing of rights to non-discrimination and freedom of religion arise in circumstances including foster care,³⁸

³³ *Burke v Tralaggan* [1986] EOC 92-161.

³⁴ Human Rights and Equal Opportunity Commission, *Article 18 Freedom of religion and belief* (1998), 8.

³⁵ *Ibid*, 108.

³⁶ *Mornington Baptist Church Community Caring Inc [exception anti-discrimination]* [2005] VCAT 2483, 10 November 2005, Csr McKenzie, 30, Cf *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* [1983] 154 CLR 120 at [3].

³⁷ *Dixon v Anti-Discrimination Commissioner of Queensland* (2004) 1 QdR 33 at [1], applying s 109 of the *Anti-Discrimination Act 1991* (Qld).

³⁸ *OV and anor v QZ and anor (No.2)* [2008] NSWADT 115, *Mornington Baptist Church Community Caring Inc [exception anti-discrimination]* [2005] VCAT 2483, 10 November 2005, Csr McKenzie

private & religious schools,³⁹ and charities for the homeless.⁴⁰ For discussion of a recent case on sexuality discrimination and foster care, see the below section on Sexuality discrimination and religious bodies.

In *Article 18 Freedom of Religion and Belief* the Commission argued that it is appropriate to have a general exception for religious 'institutions' but not for businesses and employers.⁴¹ In our view, it would be more appropriate if any exclusion of religious bodies from the operation of anti-discrimination law were provided by way of exemption granted *ad hoc* by the Human Rights Commission. The exemption process should be the same as it is for all organisations and religious organisations should not be given special treatment. Such exemptions should only be granted for a limited time, pursuant to a process that is public and transparent, and includes public notification of applications, hearings and incorporating an appeals process.

Similarly, if Federal and State and Territory governments decide to continue contracting with religious organisations for the provision of welfare services (see the section on Provision of Public Services by Religious Bodies for more discussion of this issue) the contracts should require compliance with anti-discrimination law. They should also require reporting on how the religious body makes its services and employment practises accessible to all members of the public including people of faiths other than that practiced by its adherents. Compliance with these provisions should be necessary condition for renewal of such contracts. Compliance information should be publicly available.

The present treatment of religion in anti-discrimination law does not accord with the need to protect freedom of religion, for individuals or organisations, and to recognise that the right to freedom of religion is only one of a number of fundamental rights that need to be

³⁹ Human Rights and Equal Opportunity Commission, *Bringing them home: The 'Stolen Children' report*, (1997).

⁴⁰ See below section on Sexuality, Gender and Sex Identity and Religion.

⁴¹ Human Rights and Equal Opportunity Commission, *Article 18 Freedom of religion and belief* (1998), 109.

protected. The present structure grants considerable protection to religious groups that is not granted to individuals and does not provide any process for determining the best way to protect both collective and individual rights.

10. Sexuality, Gender Identity, and Religion ⁴²

A number of CLC clients have told us of difficulties in dealing with discrimination in relation to their sexuality or gender identity by people in faith communities. These difficulties are compounded for young gay, lesbian and transgender people. The *Writing Themselves in Again* report from 2005 discussed the difficulties faced by young Christian people when trying to reconcile two parts of their life:

In most cases (same sex attracted Christian young people) were forced to choose between their sexuality and their religion. In many cases the rejection of their sexuality and the embracing of their religion resulted in young people hating and harming themselves. Leaving their faith for many was a painful but necessary road to recovery – a sad loss for the church and a survival choice for the young person.⁴³

Similarly, a number of our transgender clients have spoken of the process of trying to reconcile their gender identity with their religion. This has included clients from a number of different religious backgrounds, including Christian, Muslim and Hindu. Many transgender people find that they lose their religious or cultural community and their faith when they recognise their gender identity. They have been excluded from their religious community because of their gender identity, and report that this exclusion affects them more than other problems in their life, such as poverty or homelessness.

Religious communities such as the Metropolitan Community Church are a good example of a Church that is inclusive of all members and openly welcomes lesbian, gay and

⁴² Thanks to Liz Ceissman from the Gender Centre for her assistance with this section.

⁴³ Lynne Hillier, Alina Turner and Anne Mitchell, 'Writing themselves in again: 6 years on'. The 2nd national report on the sexual health & well-being of same sex attracted young people in Australia Australian Research Centre in Sex, Health & Society (ARCSHS), La Trobe University, 2005. ix.

transgender people.⁴⁴ Inclusive counsellors who come from a faith-based background have also been very useful in helping lesbian, gay and transgender people reconcile with their families and their religious communities.

The position of same-sex attracted and transgender people is a major issue in the guarantee of universal freedom of religion.

10.1 Anti-Discrimination Law, Sexuality, and Gender identity

Presently, there are no Commonwealth laws that prohibit discrimination on the basis of sexuality or gender identity. A person may be able to make a complaint about discrimination on the basis of sexual preference in employment under the *Human Rights and Equal Opportunity Act 1986*. However, the legislation provides a limited remedy for this complaint. It might also be possible to make a claim for unlawful termination if someone has been dismissed on the grounds of their sexuality or gender identity.

In NSW 'homosexuality' and 'transgender' are recognised grounds of discrimination under the *Anti Discrimination Act 1977*, in the areas of employment, education, provision of goods and services, accommodation and registered clubs.⁴⁵

10.2 Sexuality discrimination and religious bodies

*OV and anor v QZ and anor (No.2)*⁴⁶ involved a complaint of sexuality discrimination by a gay male couple who applied to a Wesley Mission-run agency to become foster carers. They were told that the agency would not assess their application because it did not accept applications from same-sex couples. This decision is pending appeal before the Administrative Decisions Tribunal Appeal Panel.

The Tribunal found that the gay men had been discriminated against on the grounds of their homosexuality. The decision turns on the facts of the case, particularly in relation to

⁴⁴ Metropolitan Community Church (MCC) Sydney <<http://www.mccsydney.org/>>.

⁴⁵ *Anti-Discrimination Act 1977* (NSW) Part 3A and Part 4C. It should be noted that there is no specific legislation to protect intersex people from discrimination, although they may be covered under the category of 'transgender'.

⁴⁶ [2008] NSWADT 115
<<http://www.lawlink.nsw.gov.au/adtjudgments/2008nswadt.nsf/731b718ec02a5793ca25684e00413824/649a0e73baf29b1dca25742d000aa85b?OpenDocument>>.

the religion alleged to be practiced by Wesley Mission. Wesley Mission submitted that the Tribunal should recognise that the relevant religion for the purpose of section 56 of the *Anti-Discrimination Act 1977 (NSW)* was an evangelical form of Christianity allegedly particular to Wesley Mission. This submission was rejected by the Tribunal, which found that the relevant religion was Christianity. Importantly, the Tribunal found that Wesley Mission is a member of the Uniting Church, a non-hierarchical Christian denomination which has diverse views about homosexuality and no formal doctrine about it. The result of the case could have been very different if the respondent had been the Catholic Church.

Further, while this case raises issues about whether bodies providing public services to the community should be able to use religion as a justification to discriminate, it remains unclear whether this is relevant to the application of the exception. If the 'religious bodies' exceptions were repealed, and religious bodies compelled to seek exemptions from anti-discrimination laws in all instances, factors such as the use of public funds in the delivery of social and welfare services could be considered.

10.3 Sexuality and gender identity, and religious bodies providing education

Although 'homosexuality' and 'transgender' are recognised grounds of discrimination under the NSW *Anti Discrimination Act 1977*, there are specific exceptions under the grounds of 'homosexuality' and 'transgender' for private educational authorities.⁴⁷ There appears to be no sound ideological basis for these exceptions. There are also general exceptions for charities, religious bodies and not-for-profit bodies.⁴⁸ See the section on Anti-Discrimination Laws and Exceptions for Religious Bodies above for more discussion on the exception for religious bodies.

These exceptions mean that religious schools can lawfully expel or refuse to accept an enrolment of a student who is lesbian, gay or transgender. Private schools can also lawfully dismiss or refuse to hire teachers who are lesbian, gay or transgender. CLCs have received a number of complaints from students and teachers at private schools, who have been discriminated against because of their sexuality or gender identity, with no remedy under NSW discrimination laws.

⁴⁷ *Anti-Discrimination Act 1977 (NSW)* ss 38K and 49ZO.

⁴⁸ *Anti-Discrimination Act 1977 (NSW)* Part 6.

Needless to say, cases such as these can be extremely traumatic for the individual involved and their family. It is our submission that the current blanket exception for religious bodies from anti-discrimination law does not give adequate protection to the individual's right to receive education without discrimination on the grounds of sexuality.

This argument is further strengthened by funding patterns of private education in Australia. In 2004-2005, Australian governments provided \$31 billion in school funding. In this period, the Commonwealth government provided \$4.8 billion to non-government schools, and State/Territory governments provided \$1.8 billion to non-government schools.⁴⁹ It is a serious anomaly that non-government schools are able to receive such large amounts of public funding, while not being required to treat all their employees and students and staff fairly, regardless of sexuality or gender identity.

We submit that private educational institutions should not have blanket exceptions to anti-discrimination laws. If a private educational institution wishes to avoid liability under the laws, they should be required to apply for an exemption like all other organisations. As explained earlier, this process should be transparent and any exemption should be time limited.

11. Provision of Public Services by Religious Bodies

The Discussion Paper indicates that the Final report will explore the consequences of the emergence of faith-based services as major government service delivery agencies.⁵⁰ We are concerned about the consequences of this trend for equality of access, discrimination on the grounds of religion, discrimination on other grounds such as sexuality, the right to freedom of religion and the constitutional and political separation of religion and the State. We submit that the State must guarantee the provision of secular service delivery agencies. We recognise that sometimes it is appropriate to provide

⁴⁹ Andrew Dowling, *Australian School Funding System* (2007) Australian Council for Educational Research, Policy Analysis and Program Evaluation Unit
<http://www.acer.edu.au/documents/PolicyBriefs_Dowling07.pdf>.

⁵⁰ Human Rights and Equal Opportunity Commission, *Freedom of Religion and Belief in the 21st Century – Discussion Paper*, (2008) 8, Research question 3.1.

services by and for a particular religious group. However, if this is to occur there must be realistic alternatives to those services, which are open to all individuals.

11.1 Which services?

There are a number of services which the State undertakes to provide universally. These include health, welfare and education. The public provision of these services is usually not exclusive of private, charitable and religious provision of the same services. In each area, there is an accommodation between the State and private providers. Typically, as in education syllabi, the State sets minimum standards for all service providers but permits and enables freedom on the part of the private providers to practice according to their creed, consistent with these standards.

Australian governments are far more supportive of non-State providers of such services than many overseas governments. As highlighted above, in education the Federal Government administers a grants scheme that accounts for a significant proportion of the budgets of religious and independent schools. In France, by contrast, private schools cannot receive funding that represents more than 10% of their turnover from public sources.⁵¹ In the US, State funding of 'parochial' schools is barred by the 1st Amendment establishment of the separation of Church and State.⁵²

Services which are relevant to subsets of the entire population are more susceptible to being dominated by religious groups. They include, among others:

- abortion counselling services;
- adoption and foster care services;
- after-school care;
- personal and spiritual support for people in public institutions;
- drug treatment services;
- job seeker and vocational training;
- sexual assault counselling services;
- prison rehabilitation services;
- refugee support services; and
- sexual health services.

⁵¹ Code de l'Education, version a venire au 24 Avril 2005, Article L151-4.

⁵² See, eg., *Everson v Board of Education* 330 U.S. 1 and subsequent jurisprudence.

It is important to bear in mind that, even where religious organisations do not represent more than 50% of the supply nationwide, they may provide more than 50% of services in a certain area (eg in regional Australia) or for a certain group (eg youth).

11.2 The Problems

11.2.1 Access

People's rights to access fundamental services, and the right to equality of treatment, should be the direct concern of the State. Where religious organisations represent the majority of the providers of a certain service in a certain area, equality of access to that service is threatened. Individuals who do not share the faith of the organisation providing the service may be less inclined to access the service due to real or perceived discrimination, exclusion or incompatibility of beliefs.

For example, same-sex attracted individuals may be uncomfortable accessing services provided by a religious organisation known to oppose the practice of homosexuality. And Muslim refugees who are granted asylum may feel uncomfortable with the provision of support services by exclusively Christian groups.

This problem is further exacerbated where the staff of religious organisations are not representative of the wider community seeking the service. Non-religious people and people of other religions are less likely to seek employment at religious organisations. Religious bodies, moreover, can practise actual discrimination on religious grounds in their staffing under exceptions to anti-discrimination legislation (see the above section on Anti-Discrimination Laws and Exceptions for Religious Bodies). It is less threatening for individuals who share the faith of the service to approach the staff as it is for individuals practicing another or no religion.

providers are empowered to preach and proselytise to clients who attend not because of curiosity about the religion but because of their dominance in the market for the particular service. Recipients may feel pressured to practice aspects of the faith or may be instructed in a certain religion in the course of receiving the service. This is particularly the case where the clients are in desperate or vulnerable situations, for example people who are homeless, have an addiction, are unemployed, incarcerated or are recent victims of trauma.

Refugee services are an example. Recent refugees are likely to practice a variety of faiths not predominant in Australia, and these faiths may not be adequately catered for by providers of support services. The dominance of, for example, Christian groups in the provision of support services to refugees may directly or indirectly curtail their practice of religious freedom.

The model of using religious organisations to provide social service arguably impinges on the liberties of the population at large, particularly the non-religious. Individuals should retain the right to choose which, if any, religious organisations they support and want to be associated with. The use of tax revenue to fund religious organisations to provide a substantial proportion of welfare services compromises this right.

11.2.3 Freedom of the Religions

The freedom of religions to practice their faith without State interference is also compromised by our current model of social service provision by religious organisations. Where State functions are being performed, or public funding accepted, the State has a responsibility to regulate and audit the activities of the organisation. This leads to the kind of government involvement in the affairs of religions that the separation of church and State was designed to avoid.

There is inevitable conflict between the priorities and obligations of the State and the priorities of the religious service. As is argued below, these cannot be easily reconciled by safeguards.

11.2.4 State neutrality toward religion

The provision of social services by religious organisations fundamentally calls into question the principle of State neutrality toward the religions. This principle is incorporated into the Australian political system by s116 of the Constitution which prohibits the State from making laws for the establishment of a religion. The award of tenders, consents, licences, buildings and funding to enable religious organisations to become service delivery agents necessarily favours certain religions. It also involves the allocation of public money to religious bodies. The award of privileges to certain religious bodies is at the expense of other religious bodies.

State funding and support of majority religious organisations amplifies the discrimination experienced by those who do not practice religion and those who adhere to minority religions in Australia. For instance, the NSW government enacted legislation designed to prevent protests during World Youth Day in Sydney in 2008, thus curtailing the civil liberties of other groups to stage a legitimate protests.⁵⁶ This legislation was partially struck down by the Federal Court.⁵⁷

If a religious service delivery agent is seen as indispensable to the provision of that service, there is a danger that its right to freedom of religion will be accorded a weight greater than that of, for example, an individual's right to freedom from discrimination. This is apparent from submissions made by counsel for the NSW Attorney-General, who is intervening in the appeal of the *OV and anor v QZ and anor (No.2)*.⁵⁸ Counsel argued that the failure of the Tribunal to extend the 'religious bodies' exception to the foster care services of Wesley Mission, might result in Wesley Mission ceasing to provide these services. Regardless of whether such an outcome would in fact result, this argument displays a concerning level of perceived power held by a religious body over the State.

⁵⁶ *World Youth Day Act 2008* (NSW).

⁵⁷ *Evans & Anor v New South Wales* (2008) 250 ALR 33.

⁵⁸ [2008] NSWADT 115

<http://www.lawlink.nsw.gov.au/adjudgments/2008nswadt.nsf/731b718ec02a5793ca25684e00413824/649a0e73baf29b1dca25742d000aa85b?OpenDocument>.

11.3 Safeguards

The insertion of non-discrimination clauses, or clauses that oblige the organisation to comply with anti-discrimination law, are, of themselves, ineffective to counter the problems of access and religious bias. The identification of an organisation as denominational is sometimes enough to deter non-adherents from accessing the service. The perception that religious organisations and their staff are evangelistic is also a deterrent. In addition, negative anti-discrimination obligations are very difficult to enforce.

Our submission is, therefore, that the most effective safeguard against the problems outlined above is the clear provision in all fields of a realistic secular alternative to the religious organisations. If Federal and State and Territory governments decide to continue with contracting with religious organisations for the provision of welfare services, then our secondary submission is that such contracts should require compliance with anti-discrimination law, without exception. They should also require reporting on how the religious body makes its services accessible to people of faiths other than that practiced by its adherents. Compliance with these provisions should be necessary condition for renewal of such contracts. Compliance information should be publicly available.

12. Summary of Proposed Recommendations

We recommend that Australian Governments take the following actions in order to improve the protection of the right to freedom of religion in Australia, while balancing this right with the other human rights of all:

1. That the Federal Government introduce an *Equality Act*, which would create positive obligations to promote individual rights, including the right to freedom of religion. The *Equality Act* would also retain the individual complaints mechanisms currently available for breaches of the rights it contains.
2. That the Federal, and all State and Territory Governments enact legislation to prohibit discrimination, vilification and harassment on the grounds of religion.
3. That the Federal, and all State and Territory Governments enact legislation to protect people from discrimination on the grounds of sexuality or gender identity.
4. That any exemptions granted to media organisations within anti-discrimination and vilification laws are limited and assessed as necessary.

5. That counter-terrorism laws and their implementation be scrutinised in accordance with the right to freedom of religion.
6. That the blanket exception for religious bodies in all anti-discrimination laws be removed. Religious organisations who wish to avoid liability under anti-discrimination laws should have to undergo an ad hoc exemption process, which is the same as other organisations. Such exemptions should only be granted for a limited time, pursuant to a process that is public and transparent, and includes public notification of applications, hearings and incorporates an appeals process.
7. That the State must ensure that there are secular service delivery agencies which are generally available to all.
8. If the State continues to contract with religious organisations to provide welfare services - that the grant of service contracts by Government to religious organisations include an obligation to comply with anti-discrimination law and a requirement to regularly and publicly report on how the religious body makes its services accessible to people of faiths other than that practiced by its adherents.

Thank you for allowing us to make the above submission. If you have any questions regarding this submission please do not hesitate to contact Teena Balgi or Shirley Southgate of the Kingsford Legal Centre on (02) 9385 9566.

Yours sincerely,



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