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## Rights and Freedoms in Australia

Response to the Australian Law Reform Commission interim  
report of its inquiry into Traditional Rights and Freedoms

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## Human Rights Law Centre

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# 1. Summary

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The Human Rights Law Centre is grateful for the opportunity to make a brief submission to the Australian Law Reform Commission addressing two discrete topics raised in its Interim Report entitled *Rights and Freedoms in Commonwealth Law*.

- a) parliamentary scrutiny mechanisms; and
- b) religious freedom and discrimination law.

# 2. Scrutiny mechanisms

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## 2.1 Strengthening the Parliamentary Joint Committee on Human Rights

In Chapter 2 of the Interim Report, the Commission highlighted the work of the Parliamentary Joint Committee on Human Rights (Human Rights Committee). The Human Rights Committee is an important parliamentary scrutiny mechanism. In this section we address some of the issues raised in the Interim Report concerning the Human Rights Committee below.

## 2.2 Statements of compatibility and explanatory memoranda

The Commission's Interim Report noted that some submissions had raised the need for detailed and evidence-based assessments to be included in statements of compatibility, and the need for greater rigour in preparation of statements (see 2.53 to 2.58). The HRLC strongly supports an improvement in the quality of statements of compatibility provided to the Human Rights Committee. Statements should clearly outline the rights that are engaged by a bill, any limitations on those rights and the justifications for such limitations. The Committee's workload could be significantly reduced by departments producing statements of compatibility that address these matters.

**Recommendation 1:**

That government ensures provision of the necessary capacity building to Commonwealth Departments to ensure high quality statements of compatibility are produced that measure the engagement of rights, limitations and the manner in which the department justifies any limitations.

### 2.3 Timing of the scrutiny process

The Interim Report also raises the issue of timeliness of committee reports, and noted that it was not uncommon for legislation to be enacted before the scrutiny committees had completed their reviews.<sup>1</sup> One issue up for review is whether the scrutiny committees should be required to comply with minimum timeframes.<sup>2</sup>

Parliamentary procedures and practices must ensure that the Human Rights Committee is given sufficient time to conduct inquiries and produce reports so as to enable community engagement and inform parliamentary debate in a meaningful way.

#### **Recommendation 2:**

Parliament should establish procedures for scrutiny by the Human Rights Committee that ensure, in all but the most urgent cases, that that bills are not passed by the parliament before the Committee has had a chance to report on compatibility with human rights and the parliament has been able to consider that report.

### 2.4 Limiting the role of the Human Rights Committee to the most significant human rights issues

The Interim report suggests that the Human Rights Committee ‘might focus its attention only on the most significant limitations on human rights’<sup>3</sup> and that it could follow the UK example, and adopt a list of ‘additional criteria’ in determining its work program.<sup>4</sup>

We note that Committee already ‘screens’ all bills that come before parliament. After the screening process, it is clearly appropriate that the Committee focuses on bills which raise prima facie human rights concerns.<sup>5</sup>

Nonetheless, it may be useful to articulate further criteria along the lines of those adopted by the UK Committee, if that would assist in focusing the committee on which bills that raise human rights require greater attention.

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<sup>1</sup> Australian Law Reform Commission, *Interim Report: Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Report No 127 (2015) 52 [2.59]-[2.61].

<sup>2</sup> Australian Law Reform Commission, *Interim Report: Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Report No 127 (2015) 52 [2.60]-[2.61].

<sup>3</sup> Australian Law Reform Commission, *Interim Report: Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Report No 127 (2015) 49 [2.49].

<sup>4</sup> Australian Law Reform Commission, *Interim Report: Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*, Report No 127 (2015) 50 [2.51].

<sup>5</sup> Human Rights Law Resource Centre, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Human Rights (Parliamentary Scrutiny) Bill 2010*, 5 October 2010, 7 [26(b)].

If new criteria are adopted, there should be enough flexibility to ensure that a focus on ‘significant limitations on human rights’ does not inappropriately oust consideration of legitimate human rights issues that require the expert attention of the Committee. For example, one of the UK criteria is to consider whether media or NGOs have picked up the issue. Some very significant human rights issues may not prompt media coverage, and similarly NGOs may not have had capacity to respond to significant issues. This does not necessarily mean that those issues should not be considered.

If ‘additional criteria’ were adopted by the Committee, based on the sifting criteria used by the UK Human Rights Committee but tailored to the Australian context, such criteria should guide the Committee, but not fetter its discretion

Further, filtering the work of the Committee would not necessarily limit its workload. The UK Committee’s output has not decreased since 2006, when it adopted the sifting criteria. However, thanks to an increase in resources to the Committee, its impact and influence have grown significantly.<sup>6</sup> Since getting those resources, there has been a dramatic increase in references to the UK Committee’s work in parliamentary debates.<sup>7</sup> There were 1006 references to the JHRC on the floor of parliament in 2005-10.<sup>8</sup> This was up from 23 references in 2000-05.<sup>9</sup>

However, the Human Rights Committee may be able to reduce its workload in other ways, for example by preparing shorter, sharper, more succinct reports focused on the key issues raised by bills. Currently reports can be long, academic pieces that result either in generic questions for the Minister to answer or vague findings as to the compatibility of the bill with human rights.

**Recommendation 3:**

If additional criteria are to be created to guide the Committee’s adoption of work, that those criteria guide the work but do not fetter the Committee’s ability to consider significant human rights issues.

**Recommendation 4:**

That the parliament increase the resources to the Human Rights Committee to enable it to expand its influence and impact in the legislative process.

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<sup>6</sup> Murray Hunt, Hayley Hooper and Paul Yowell, *Parliaments and Human Rights: Addressing the Democratic Deficit* (Hart Publishing, 2015) 139.

<sup>7</sup> Murray Hunt, Hayley Hooper and Paul Yowell, ‘Parliament and Human Rights: Redressing the Democratic Deficit’ (Public Policy Series Report No 5, Arts & Humanities Research Council, 2012) 22.

<sup>8</sup> Murray Hunt, Hayley Hooper and Paul Yowell, ‘Parliament and Human Rights: Redressing the Democratic Deficit’ (Public Policy Series Report No 5, Arts & Humanities Research Council, 2012) 18.

<sup>9</sup> Murray Hunt, Hayley Hooper and Paul Yowell, ‘Parliament and Human Rights: Redressing the Democratic Deficit’ (Public Policy Series Report No 5, Arts & Humanities Research Council, 2012) 18.

**Recommendation 5:**

That the Committee seek to publish sharper, more succinct and focused Committee reports that articulate a definitive view on whether a bill unjustifiably limits human rights. The Committee should make strong, clear recommendations about the compatibility of bills with human rights.

## 3. Balancing religious freedom with the right to equality

### 3.1 Introduction

Chapter 4 of the Interim Report the Commission looks at laws that interfere with freedom of religion. In this section we broadly address the topic of balancing religious freedom with the right to equality by making reference to international human rights laws and standards. We conclude that the *Sex Discrimination Act 1984* (Cth) encroaches on the right to equality and limitations need to be strengthened.

### 3.2 The right to freedom of religion under international human rights law

The right to freedom of religion is of vital importance and its recognition is necessary for the full realisation of human rights.<sup>10</sup>

Article 18(1) of the International Convention on Civil and Political Rights (ICCPR) states that 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 freedom to manifest one's religion extends to belief through worship, observance, practice and teaching.<sup>11</sup> It further includes "the right to declare religious beliefs openly and without fear of hindrance or reprisal"<sup>12</sup> and to attempt to convert others to one's beliefs (or in other words, to proselytise).<sup>13</sup>

However human rights are rarely absolute.<sup>14</sup> There are express limitations on many human rights as well as mechanisms available to States which allow them to limit their treaty obligations and restrict

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<sup>10</sup> Article 18 (3) ICCPR Article 9 ECHR

<sup>11</sup> See, eg, Art 18 of the ICCPR; s 14 of the ACT HRA; s 14 of the Victorian Charter.

<sup>12</sup> *R v Big M Drug Mart* [1985] 1 SCR 295 at 353-354.

<sup>13</sup> *Kokkinakis v Greece* (1993) 17 EHRR 397 at [31], where the European Court of Human Rights held that the criminal conviction of a Jehovah's Witness for proselytising violated his freedom to manifest his religion. See also *Larissis v Greece* (1998) 27 EHRR 329.

<sup>14</sup> The rights to freedom from torture and other cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, freedom from imprisonment for inability to fulfil a contractual obligation, prohibition

individual rights.<sup>15</sup> Whilst the freedom to hold religious beliefs is absolute, the manifestation element of this right can be limited if those limitations are “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>16</sup>

According to Nowak, the limitations contained in Article 18 of the ICCPR exercise an important corrective function due to the potential for far-reaching freedom of religion to lead to suppression not merely of freedom of religion of others but to other rights as well.<sup>17</sup> This is because of the inherently controversial character of freedom of religion - the fact that most religious faiths believe their faith to represent the “absolute truth” and thus reject the faiths of others. Nowak concludes that it is the interplay between the principle of freedom of religion and its restrictions that truly determines the actual scope of the individual’s right.<sup>18</sup>

Limitations on freedom of religion are also similarly expressed in the Convention on the Rights of the Child (CRC),<sup>19</sup> the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families,<sup>20</sup> as well as the European Convention on Human Rights.<sup>21</sup>

An example of the application of these limitations is the European case of *Pichon and Sajous v. France*, where the European Court rejected a “manifestly ill-founded” application from pharmacists who refused to sell contraceptives because of their religious beliefs, stating that “the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.”<sup>22</sup>

### 3.3 Limitations on religion are already reflected in law

With this in mind, it is important to understand that generally speaking civil and criminal laws in Australia apply to religious institutions and individuals. Neither full religious freedom in all circumstances, nor complete disregard for religious autonomy should be expected or accepted in practice. Rather, through discussion and debate, a line is drawn between those religious practices that can be accommodated in a fair and functioning society and those which cannot. This balance is discussed in the European Court of Human Rights case *Eweida and Others v. the United Kingdom* where the Court weighed up the rights of the applicants and the legitimate interests of their employers.

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against the retrospective operation of criminal laws and the right to recognition before the law, are the only human rights which cannot be restricted under any circumstance. Articles 1, 8 (1) 11 15 and 16 of ICCPR

<sup>15</sup> States can under certain circumstances derogate from their human rights obligations. They can also make reservations to certain articles of human rights treaties.

<sup>16</sup> *International Covenant of Civil and Political Rights*, art 18(3).

<sup>17</sup> Nowak, *UN Convent on Civil and Political Rights: CCPR Commentary (2<sup>nd</sup> revised edition)*, 408.

<sup>18</sup> *Ibid.* 409

<sup>19</sup> Article 14 (3).

<sup>20</sup> Article 12 (3).

<sup>21</sup> Article 9 of ECHR.

<sup>22</sup> European Court of Human Rights, *Pichon and Sajous v. France Application*, Application no 49853/99 2<sup>nd</sup> October 2001



A domestic example is the fact that Australian's can only be married to one person at a time; regardless of how deeply entrenched polygamy is in their religion.<sup>23</sup> Similarly, the ritual use of narcotic substances and misleading and deceptive trade practices are prohibited even where the prohibition infringes upon religious beliefs.

On the other hand, there are cases where concessions are made to religious groups and laws are altered to provide for religious freedom. For example, in some jurisdictions exemptions from animal cruelty laws allow religious groups to slaughter animals in a manner that is kosher or halal.<sup>24</sup>

Drawing this line is not a simple or uncontroversial exercise, but it is a legitimate and important subject for discussion and debate given that international and domestic human rights law allows for such limitations on the right to manifest religion and belief.<sup>25</sup>

### 3.4 The right to equality and freedom from discrimination

Non-discrimination and equality constitute basic and general principles relating to the protection of all human rights.<sup>26</sup> Australia is obliged to ensure full and effective legislative protection of the rights to non-discrimination and equality.<sup>27</sup> These obligations arise under the ICCPR, the International Covenant on Economic Social & Cultural Rights (**ICESCR**), the International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**), the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**), Convention on the Rights of Persons with Disabilities (**CRPD**), and the CRC.

For example, Article 2(2) of ICESCR requires that State Parties 'undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The Committee on Economic, Social and Cultural Rights has confirmed that this obligation extends to the requirement to ensure substantive equality.<sup>28</sup>

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<sup>23</sup> Carolyn Evans and Beth Gaze, "Between Religious Freedom and Equality: Complexity and Context" *Harvard International Law Journal* Volume 49, April 21, 2008; Cass R. Sunstein, *On the Tension Between Sex Equality and Religious Freedom*, Public Law and Legal Theory Working Paper No. 167 (2007)

<sup>24</sup> Evans and Gaze, *ibid*, p. 43.

<sup>25</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *International Covenant of Civil and Political Rights*, art 18(3).

<sup>26</sup> Human Rights Committee, *General Comment No. 18: Non-discrimination* (Thirty-seventh session, 1989), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003).

<sup>27</sup> See, eg, International Covenant on Civil and Political Rights (**ICCPR**) arts 2, 3, 26; International Covenant on Economic, Social and Cultural Rights (**ICESCR**); Convention on the Elimination of all forms of Discrimination Against Women (**CEDAW**); Convention on the Elimination of Racial Discrimination (**CERD**); Convention on the Rights of Persons with Disabilities (**CRPD**), art. 5.

<sup>28</sup> UN Economic and Social Council, Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights, UN Doc E/2009/90 (2009) [19].

Article 2(1) of the ICCPR provides that States Parties are obligated to respect and ensure the rights in the Covenant ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

Article 26 of the ICCPR further provides that:

[a]ll 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.

Australia is obliged under international law to ensure full and effective legislative protection of the right to equality and freedom from discrimination.<sup>29</sup> Recent studies have shown that equality not only increases social welfare, but is also associated with increased growth and prosperity,<sup>30</sup> thus demonstrating the importance of equality in Australian society. It is also notable that many religious groups see equality as an integral theological principle and a great number of these organisations undertake important work that promotes substantive equality.

### **3.4 Balancing the right to equality with freedom of religion**

As discussed above, freedom of religion is not an absolute right. In cases where the right to freedom of religion conflicts with other rights, for example the right to equality, neither right should automatically prevail. Instead, competing interests should be considered and balanced.

If a discriminatory policy or practice is explained and shown to be reasonable and proportionate then the discrimination should be allowed. If it cannot be shown that the discrimination is reasonable and proportionate, such discrimination should not be permitted under law.

The notion of balancing competing rights and interests is not radical. In fact, it is a fundamental concept embedded within the international and domestic legislative instruments protecting human rights. Schemes for limiting human rights to allow for the realization of other rights or public good are an integral part of the human rights framework and have been successfully applied for decades.<sup>31</sup>

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<sup>29</sup> Including *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 003 UNTS 3 (entered into force January 2, 1976); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

<sup>30</sup> Some of these are considered in the UK Equalities Review, see The Equality Review, *Fairness and Freedom: The Final Report of the Equalities Review* (2007), p 133-138.

<sup>31</sup> See for example, the UN Economic and Social Council in the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*; section 5 of the *New Zealand Bill of Rights Act 1990* (NZ) and section 36 of the South African Bill of Rights contained in the *Constitution of the Republic of South Africa 1996*.

Legislative mechanisms for balancing rights commonly provide that a right may only be limited in circumstances where the limitation:

- has a **legitimate aim** (the limitation must reflect a concern that is pressing and substantial in a free and democratic society and must have a specific purpose, rather than being based on a general concern);
- is **reasonable** (the limitation must not be arbitrary, irrational or ineffective); and
- is **proportionate** (there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised).

Action in accordance with a genuinely held religious belief will generally constitute a legitimate aim, so the question becomes whether the discrimination at issue is reasonable and proportionate to that aim.<sup>32</sup> The answer would be entirely different for, say, the refusal of a landlord to rent premises to a man on the basis that he wore an earring, compared to the refusal of a Christian church to hire a Satanist to teach Sunday school classes.<sup>33</sup>

### 3.5 False distinction between 'core' and 'non-core' religious functions

Some of the arguments regarding the operation of religious exceptions in discrimination law consider the extent to which the protected discriminatory activity is 'internal' or a 'core function' of the religion, as opposed to an 'extended activity' of the religious organisation. A core function usually refers to the observance, practice or teaching of a religion. An external function may involve the provision of a public service (such as welfare services) and possibly the receipt of public funds.

This distinction has been challenged on the basis that '[i]n reality, people of faith do not make a distinction between private and public, or 'core' and 'peripheral' observance... For a Christian, how one lives in the world is as much a 'religious observance' as ritual acts conducted in the privacy of a home or locked chapel.'<sup>34</sup>

This argument has some merit. Just as human rights advocates will argue that rights must be capable of practical realisation rather than merely formal recognition, religious groups place significant emphasis on the manifestation of their religious beliefs beyond private worship.

However, the distinction between 'core' and 'non-core' religious activities is significant not because it delineates vital and non-vital religious observance. The line dividing public and private is relevant because it marks the point at which the religious beliefs of one person or group impact upon other people and society generally. When religious practice affects those who do not subscribe to the religion, the Government's regulatory capacity and responsibilities are increased.<sup>35</sup>

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<sup>32</sup> See, for example, *Multani v Commission scolair Marguerite-Bourgeoys* [2006] 1 SCR 256 (Canada) and *R (on the application of Begum (by her litigation friend Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School* (Appellants) [2006] UKHL 15 (United Kingdom)

<sup>33</sup> In *Jubber v Revival Centres International* [1998] VADT 62 (7 April 1998) the (then) Victorian Anti-Discrimination Tribunal held that the refusal to allow males to wear earrings 'conformed with religious doctrines' and therefore did not constitute discrimination on the basis of sex.

<sup>34</sup> Mark Durie, above n.22.

<sup>35</sup> See for example, John Stuart Mill's statement "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it ...". 'On Liberty' in Mary Warnock (ed), *Utilitarianism*, Collins/Fontana, London, 1962, at p.205.

Consider, for example, a State in which single women are legally entitled to access IVF treatment. If IVF is only available at a small number of medical facilities and those facilities refuse, based on a religious principle, to treat single women, then the discriminatory manifestation of religious belief has a significant impact on women's legal entitlements. If a facility also receives public funds then a further objection is that single women contribute through their taxes, but are nevertheless excluded. The State's role in resolving this conflict is surely greater than in a case where a single woman is prohibited from participating in a particular religious ceremony.

The recognition of a distinction between public and private activities does not mean acceptance of a system in which all public activities are denied the protection of freedom of religion. It simply means that the impact of these activities on others will be a relevant factor in a balancing exercise.

For example, a religious school receiving public funds would not be prevented from teaching religious classes. On the other hand, a rural church-run emergency accommodation facility which received public funding would not be entitled to evict a lesbian into homelessness on the basis of her sexuality. In each case the impact of protection of religious freedom is vastly different in terms of harm done, the effect on those who don't subscribe to the religion, and the entrenchment of harmful stereotypes.

### **3.7 Application to the *Sex Discrimination Act 1984* (Cth)**

*The Sex Discrimination Act 1984* (Cth) allows religious bodies and educational institutions that have been established for religious purposes to be exempt from the prohibitions on discrimination in certain circumstances. Specifically, section 37(1)(d) permits discrimination when it:

- conforms to the doctrines, tenets or beliefs of the relevant religion; or
- is necessary to avoid injury to the religious sensitivities of adherents of that religion.<sup>36</sup>

The SDA also contains exceptions for religious groups conducting specific activities, namely:

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;<sup>37</sup>
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;<sup>38</sup>
- (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice;<sup>39</sup>
- (d) educational institutions established for religious purposes in relation to the employment of staff and the provision of education and training, provided the

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<sup>36</sup> *Sex Discrimination Act 1984* s.37(d) and s.38 (relating to educational institutions).

<sup>37</sup> *Sex Discrimination Act 1984* s 37(a).

<sup>38</sup> *Sex Discrimination Act 1984* s 37(b).

<sup>39</sup> *Sex Discrimination Act 1984* s.37(c).

discrimination is in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion;<sup>40</sup> and

(e) accommodation provided by a religious body.<sup>41</sup>

In the HRLC's opinion, the exceptions in subsections (a) – (c) are likely to be permissible in accordance with a human rights-based limitations analysis (i.e. the limitation on the right to equality is a reasonable and proportionate means of achieving a legitimate end, being the protection of religious freedoms).

However, the exceptions in (d) and (e) and catch all provision of section 37(1)(d) are overly broad and would allow for both permissible and impermissible limitations on the right to equality.

For example, the exception for education institutions may permit a school that receives substantial government funding to refuse to enroll a child whose parents are in a de facto relationship. The exception for accommodation by a religious body could provide a legal entitlement for a profit-making church-run accommodation service to evict a pregnant woman into homelessness. Neither of these examples is likely to meet the standard of a reasonable and proportionate measure to achieve a legitimate aim and should therefore not be sanctioned by law.

The application of these exceptions has the potential to cause significant harm to the community. Consider, for example, a same sex attracted or gender questioning young person who, at the election of his or her parents, is sent to a school with homophobic religious teachings and other practices. The harm the student may suffer, either through direct discrimination or as a consequence of the messages (both overt and implicit) imparted by the school, is unacceptable.

The HRLC recommends that the threshold for the exception be altered to reflect international human rights law standards, that is, to ensure that discriminatory conduct is only permitted when it is a necessary and proportionate means of achieving a legitimate end or purpose.

#### The limitation on discrimination in Commonwealth funded aged care should be extended

There is a specific carve out to the permanent statutory exception in section 37 (1)(d). This exception is not available in the provision of Commonwealth funded aged care services. This introduction of this limitation recognized the vulnerability of older people accessing these services.

While the HRLC's primary position is that religious discrimination should not be permitted unless it can be justified as a necessary and proportionate means of achieving a legitimate end, we strongly believe that if the exceptions are to remain that this carve out should be extended to other areas of government service delivery, particularly service delivery to vulnerable people in areas such as housing and homelessness, youth services and mental health.

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<sup>40</sup> *Sex Discrimination Act 1984* s.38.

<sup>41</sup> *Sex Discrimination Act 1984* s.23(3)(b).

**Recommendation 6:**

The permanent statutory exceptions for religious organisations contained in the *Sex Discrimination Act 1984* (Cth) should be amended to ensure that the right to be free from discrimination is limited only when discriminatory conduct is a necessary and proportionate means of achieving a legitimate end or purpose.

The limitation on discrimination in aged care should be extended to all areas of government service delivery.

**Transparency and accountability in reliance on permanent exceptions**

A further problem with the existing exceptions and exemptions for religious organisations is that there is little transparency around their operation. There is also a lack of clarity for people engaging with religious organisations who may be on the receiving end of discriminatory conduct. If the Government decides to maintain religious organisations' blanket right to discriminate, information about the nature of those discriminatory practices should be public. This is particularly so when the body that wishes to discriminate receives public funds or where the discrimination in question has some other public impact.

To this end, the HRLC recommends that a system be put in place whereby any religious organisation that wishes to be exempted from the operation of the *Sex Discrimination Act 184* (Cth) disclose and lodge with the Commission (or otherwise make public) a notice which specifies the exempted policy or practice. Religious organisations should also be required to notify those potentially affected by the exception of their intention to rely on the exception. For example, advertising material and information for job applicants should contain detail of the proposed discrimination.

Requiring such notices on a case-by-case basis would enable the Commission and the public to be informed about the rationale, nature, extent and likely impact of discrimination by religious bodies. It may also encourage religious bodies to assess whether the discrimination is necessary and appropriate in each case.

**Recommendation:**

If the permanent exceptions are to remain, religious bodies that wish to rely on an exemption or exception to excuse the operation of the *Sex Discrimination Act 1984* (Cth) should be required to publicly disclose and lodge a notice to that effect with the Commission, on a case-by-case basis, and/or ensure that consumers are publicly notified of the organisation's intention to discriminate.

**3.5****3.6 Protection of religious belief or activity in federal discrimination law**

Protection on the basis of religious belief or activity is a major area of discrimination not currently covered by federal anti-discrimination law, although recourse to the Commission is available in the area of employment by virtue of ILO 111.

Importantly, the attribute of religion should be broadly defined to include not having a religion or religious belief, consistent with international human rights law. The Human Rights Committee has issued a General Comment on Article 18 (freedom of thought, conscience, religion and belief) of the ICCPR which responds directly to this issue, stating that:

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.<sup>42</sup>

Including religious belief and/or activity as an additional protected attribute in federal discrimination law would reduce inconsistencies between Federal and State and Territory laws and strengthen protections for vulnerable communities within Australia in line with Australia's human rights obligations, including those arising under the ICCPR and ICESCR.

The volume of inquiries and complaints made to equal opportunity regulators in other Australian jurisdictions relating to religious discrimination and/or vilification also evidences the need for greater protections at the federal level. In particular, 'Islamophobia' and discrimination against people of Muslim backgrounds has been an increasing problem in Australia. This has been reflected in a number of recommendations made in the Universal Periodic Review of Australia by the Human Rights Council and other reviews by United Nations treaty bodies. Considerable research exists which evidences the discrimination experienced by Muslim Australians, both on the basis of race and religion.<sup>43</sup>

**Recommendation:**

Religious freedom should be protected through the addition of 'religious belief or activity' as a protected attribute (including not having a religious belief) in federal anti-discrimination law.

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<sup>42</sup> UN HRC General Comment No.22 on Article 18 available at:

<http://www.unhcr.ch/tbs/doc.nsf/0/9a30112c27d1167cc12563ed004d8f15>

<sup>43</sup> See, eg, Scott Poynting, Report to the Human Rights and Equal Opportunity Commission, *Living with Racism: The Experience and Reporting by Arab and Muslim Australians of Discrimination, Abuse and Violence since 11 September 2001* (19 April 2004) <[http://www.hreoc.gov.au/racial\\_discrimination/isma/research/UWSReport.pdf](http://www.hreoc.gov.au/racial_discrimination/isma/research/UWSReport.pdf)>; Islamic Women's Welfare Council of Victoria Inc, *Race, Faith and Gender: Converging Discriminations Against Muslim Women in Victoria (The Ongoing Impact of September 11 2001)* (11 December 2008) <[http://www.islamicwomenswelfare.org.au/files/iwwcv\\_race\\_faith\\_report.pdf](http://www.islamicwomenswelfare.org.au/files/iwwcv_race_faith_report.pdf)>.