



13 February 2018

The Expert Panel on Religious Freedom
C/O Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

By email: religiousfreedom@pmc.gov.au

Dear Panel Members,

Submission to the Religious Freedom Review

Kingsford Legal Centre (**KLC**), Community Legal Centres NSW (**CLCNSW**) and the National Association of Community Legal Centres (**NACLC**) welcome the opportunity to make this submission to the Religious Freedom Review.

Summary of recommendations

KLC, CLCNSW and NACLC recommend that:

1. Religion be a protected attribute under federal anti-discrimination law. Religion should be defined broadly to include both having a religion or belief and not having a religion or belief.
2. Protections against religious vilification be introduced at the federal level.
3. All religious exemptions (with the exception of sections 37(1)(a)-(c) of the *Sex Discrimination Act 1984* (Cth)) be removed from federal anti-discrimination law.
4. Religious organisations which receive public funding or perform a service on behalf of government should not be exempt from federal anti-discrimination laws.
5. Section 22 of the *Sex Discrimination Act 1984* (Cth), which prohibits discrimination on the basis of sexual orientation in the provision of goods, services and facilities be maintained.
6. The federal government introduce a Human Rights Act.

About KLC, CLCNSW and NACLC

Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since

1981. KLC provides general advice on a wide range of legal issues, including discrimination and other human rights issues.

KLC has a specialist discrimination law service (NSW wide), a specialist employment law service, and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

In 2016 KLC provided 215 advices in the area of discrimination, which was over 13% of all advice provided. These statistics indicate that discrimination remains prevalent among CLC clients. Of these advices, 4 were for discrimination on the basis of religion.

Community Legal Centres NSW

Community Legal Centres NSW (CLCNSW) is the peak representative body for almost 40 community legal centres in NSW. Our team supports, represents and advocates for our members, and the legal assistance sector more broadly, with the aim of increasing access to justice for people in NSW.

Community legal centres (CLCs) are independent non-government organisations that provide free legal services to individuals and communities, at times when that help is needed most, and particularly to people facing economic hardship.

CLCNSW represents the views of community legal centres to the government and broader community, advocates on key law reform and policy issues, and supports community legal centres to improve the efficiency and quality of services they deliver to the community.

National Association of Community Legal Centres

The National Association of Community Legal Centres (NACLC) is the peak national body for CLCs in Australia; NACLC's members are the state and territory peak bodies of Community Legal Centres. Together, these organisations represent around 200 centres in metropolitan, regional, rural and remote locations across Australia.

Freedom of religion under international human rights law

Freedom of religion is protected under Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR):

“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.”¹

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18 (1) ('ICCPR').

While freedom of religion or belief is a non-derogable right (a right that cannot be suspended, even in a state of emergency), the freedom to manifest one's religion may be subject to limits under Article 18(3) of the ICCPR:

"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."

Article 20 of the ICCPR provides "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".² However, Australia has a reservation to Article 20 to not introduce further laws on this issue.

Freedom of Religion under Australian Law

Protections under the Constitution

Freedom of religion has limited protection under the Australian Constitution. Section 116 of the Constitution provides:

"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for an office or public trust under the Commonwealth."

Section 116 essentially limits the Commonwealth Parliament from enacting laws that establish a 'state religion' or prohibit the free exercise of religion. However, this protection is limited as it only applies to the Commonwealth, not states and territories, and does not apply to all government action, but only to legislation or actions taken under legislation.

Protections under anti-discrimination law

Case study: Jake

Jake is a student at a Catholic high school. He believes that he is being treated unfairly because he is not Catholic. Jake was not allowed to attend overseas trips with school, and his nomination for the Student Representative Council was removed by the school.

We advised Jake that a discrimination complaint would be unlikely to succeed, as religion is not a protected attribute in discrimination law.

We note there is no evidence to suggest that anti-discrimination laws encroach on religious freedom. We submit that religious freedom could be better protected under anti-discrimination law.

There is limited protection against discrimination on the basis of religion at the Commonwealth level. The *Fair Work Act 2009* (Cth) prohibits discrimination on the basis of

² ICCPR art 20.

religion in modern awards, enterprise agreements, adverse action and termination.³ While section 351 of the *Fair Work Act* prohibits discrimination on the basis of religion in employment, this law is only in effect where a state or territory law that prohibits religious discrimination is in place. This means in states such as NSW, where religion is not a protected attribute under state discrimination law, complainants who have suffered religious discrimination have no access to effective remedies.

Case study: Ali

Ali is a young Muslim man in prison. He was given external leave to undertake studies at an educational institution. At the educational institution, Ali regularly prayed in outdoor areas. He was told that he was not allowed to pray there. When he continued to pray, Ali's education leave was cancelled, and he was not allowed to continue his studies. This caused significant distress to Ali and his family.

We advised Ali that he would not be able to successfully make a discrimination complaint, as the law does not protect a person from discrimination on the basis of their religion.

The *Australian Human Rights Commission Act 1986* (Cth) only protects against religious discrimination if it has the effect of impairing equality of opportunity or treatment in employment or occupation.⁴ However, there are no enforceable remedies for complainants under this scheme.

Being subject to discrimination has a negative impact on individuals' health and wellbeing. Research on the link between religious discrimination and health indicates that religious discrimination increases the risk of anxiety and depression.⁵ Additionally, individuals experiencing discrimination in employment may suffer financial distress as a result of not being hired or dismissed.

KLC, CLCNSW and NACLC recommend that religion should be a standalone protected attribute in Commonwealth discrimination law, to increase protection of the right to freedom of religion. Religion should be defined broadly to include both having a religion or belief and not having a religion or belief.

Recommendation:

We recommend that:

Religion be a protected attribute under federal anti-discrimination law. Religion should be defined broadly to include both having a religion or belief and not having a religion or belief.

³ *Fair Work Act 2009* (Cth) ss 153, 195, 351, 772.

⁴ *Australian Human Rights Commission Act 1986* (Cth) s 3(1).

⁵ VicHealth, *How Does Freedom of Religion and Belief Affect Health and Wellbeing? Building Health by Supporting Diversity and Reducing Discrimination* (2011).

Vilification on the ground of religion

Section 18C of the *Racial Discrimination Act 1975* (Cth) protects against vilification done because of race, colour or national or ethnic origin.⁶ Religious groups that are found by the court to be a recognised ‘racial’ group can use section 18C to complain of religious vilification. For example, members of the Jewish faith, a recognised ethno-religious group, can use section 18C to complain about anti-Semitic comments or conduct. However, persons of other faiths that are not recognised ethno-religious groups, such as Christians, Muslims and Hindus, are not afforded any protection against religious vilification by federal anti-discrimination laws.

Case Study -Zeinab

Zeinab is Muslim and wears the hijab. One day, while waiting in line at a café, a fellow customer started yelling at her. The customer said, “go back to your country, terrorist”. When Zeinab went back to the café the following week, the same customer was there and yelled at her again, saying “If you love Islam...I’ll fucking show you”, calling Zeinab a “fucking murderer”, saying “maybe you have a knife to kill me because Muslims kill people”, and telling Zeinab to “fuck off”.

Zeinab was very intimidated and shaken by this incident and reported it to the police. We advised Zeinab that she was unable to take action under section 18C, as it doesn’t protect Muslims against religious vilification.

Protections against religious vilification should be introduced at the federal level, in order to protect people from harm and distress caused by religious hatred.

Recommendation:

We recommend that:

Protections against religious vilification be introduced at the federal level.

Balancing freedom of religion and the right to equality and non-discrimination

Religious exemptions

Permanent exemptions from Commonwealth discrimination law exist for religious organisations for the protected attributes of age, sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities. The exemptions permit religious organisations to

⁶ *Racial Discrimination Act 1975* (Cth) s 18C.

discriminate against individuals where it is necessary to avoid injury to the sensitivities or susceptibilities of the adherents of a religion.⁷

The *Sex Discrimination Act 1984* (Cth) ('SDA') permits religious bodies to discriminate against people on the basis of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in:

- the ordination or appointment of priests, ministers of religion or members of any religious order;
- the training or education of people seeking ordination or appointment as priests, ministers or of religion; and
- the training or education of people to participate in religious observance or practice.⁸

Section 37(1)(d) of the SDA permits bodies established for religious purposes to discriminate against people on the basis of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in relation to acts or practices that conform to the doctrines, tenets or beliefs of that religion; or are necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Section 38 of the SDA permits educational institutions established for religious purposes to discriminate against employees and contract workers on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy, where:

- the educational institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; and
- the person who discriminates does so in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Many religious organisations, including schools, receive public funding for performing a service on behalf of government. A vast range of social and welfare services are managed by faith-based organisations. While the law prohibits religious organisations receiving public funding from discriminating in the provision of aged care, religious organisations providing services in education, adoption, employment assistance and child welfare services are free to discriminate against prospective employees, employees and people accessing these services.

Religious exemptions remove protections against discrimination for a large number of people who access or are employed by government funded services. For example, 1,324,133 students attended non-government schools in 2017.⁹ Approximately 20% of all students attend Catholic schools¹⁰, and between 2018 and 2027 the Federal government will invest

⁷ *Age Discrimination Act 2004* (Cth) s 35; *Sex Discrimination Act 1984* (Cth) ss 37, 38.

⁸ *Sex Discrimination Act 1984* (Cth) s 37.

⁹ Australian Bureau of Statistics, *4221.0 Schools, Australia 2017 – Summary of Findings* (2 February 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4221.0main+features22017>>.

¹⁰ ABC News, *Here's how Australia's Schools are Funded – and we promise not to mention Gonski* (30 May 2017) <<http://www.abc.net.au/news/2017-05-30/school-funding-explained-without-mentioning-gonski/8555276>>.

\$145.3 billion in funding for non-government schools.¹¹ Religious educational institutions are also a significant employer in Australia. For example, the Catholic Education Office employs more than 10,000 people in the Sydney Archdiocese,¹² while the Sydney Anglican School Corporation employs 1,350 staff.¹³

Religious organisations which receive public funding or perform a service on behalf of government should not be exempt from anti-discrimination laws. These exemptions send a message that discrimination is acceptable in our community, which contributes to the entrenchment of systemic discrimination against vulnerable groups of people. It allows the right to freedom of religion to prevail over other rights protected by international human rights law, including the right to live free from discrimination.

KLC, CLCNSW and NACLC accept the religious exemptions in sections 37(1)(a)-(c) of the SDA. However, our view is that the religious exemptions in section 37(1)(d) and section 38 of the SDA should be removed. These blanket exemptions are broad, and require no analysis of reasonableness, necessity, proportionality or legitimacy of aims. One fundamental right (freedom of religion) should not be automatically privileged above other fundamental rights (right to non-discrimination and equality) by the granting of a permanent blanket exception.

Removing these religious exemptions and introducing religion as a protected attribute would ensure that freedom of religion is not privileged over and above other rights, yet is still adequately protected.

Recommendation:

We recommend that:

All religious exemptions (with the exception of section 37(1)(a)-(c) of the *Sex Discrimination Act 1984* (Cth)) be removed from federal anti-discrimination law.

Religious organisations which receive public funding or perform a service on behalf of government should not be exempt from anti-discrimination laws.

The prohibition on discrimination in the provision of goods, services and facilities should be maintained

KLC, CLCNSW and NACLC strongly oppose any exemptions for the provision of goods and services to same-sex couples on the basis of religion. Current discrimination legislation already prohibits the denial of goods and services to people on the basis of their sexual orientation. Section 22 of the SDA makes it unlawful to discriminate against a person on the basis of their sexual orientation in the provision of goods, services and facilities. As

¹¹ Department of Education and Training, *School Funding*, <<https://www.education.gov.au/funding-schools>>.

¹² Catholic Education Office, *Employment* (2018) <<https://sydcatholicschools.nsw.edu.au/employment/>>.

¹³ The Anglican Schools Corporation, *Report 2017*, 6
<http://www.tasc.nsw.edu.au/resources/PDFs/Publications/%202017_Synod_Report.pdf>.

discrimination law provides a major basis for legislative protection of human rights in Australia, it is essential that the Expert Panel give significant weight to the rights that it safeguards.

Recommendation:

We recommend that:

Section 22 of the *Sex Discrimination Act 1984* (Cth), which prohibits discrimination on the basis of sexual orientation in the provision of goods, services and facilities be maintained.

Promoting freedom of religion and other rights in a national Human Rights Act

Australia is party to the key international human rights conventions, and has an obligation to adopt laws and other measures to give effect to the human rights enshrined in these treaties in domestic law. However, Australia is yet to give comprehensive protection to human rights in domestic law. Currently, human rights in Australia are protected through a myriad of federal, state and territory laws, policies and practices, and through the common law. KLC, CLCNSW and NACLC are concerned that the current legal framework makes it difficult for ordinary Australians to identify their rights and freedoms, and to understand the extent to which their rights are recognised at law. The complex interactions of the various sources of law also make it difficult to concisely articulate how these legal rights work. This hinders the promotion of respect for fundamental human rights.

KLC, CLCNSW and NACLC believe that it would assist ordinary Australians' understanding of their rights and responsibilities to set these out in one single document.

Moreover, Australian law currently adopts a bottom-up approach, addressing the protection of each right individually. This is an unsatisfactory approach in which some fundamental rights are adequately protected whilst others are not protected at all. KLC and CLCNSW believe that this creates too much ambiguity and leaves too many gaps. KLC, CLC NSW and NACLC recommend that the most appropriate way to ensure freedom of religion is protected under Australian law is for the enactment of a national human rights act.

Enacting a national Human Rights Act would allow more concise classification and better protection of human rights and freedoms, including freedom of religion. A national Human Rights Act would also recognise that human rights are indivisible, and would not privilege some rights over others.

Additionally, we note that there is broad support for a national Human Rights Act. The National Human Rights Consultation in 2009 found that the majority of those attending community roundtables favoured a Human Rights Act, and 87% of those who presented

submissions to the Committee expressing a view on the question were in support of such an Act.

Recommendation:

We recommend that:

The federal government introduce a Human Rights Act.

If you wish to discuss our submission, please contact us at legal@unsw.edu.au;
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Yours faithfully,

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