



Chapter 1. Background

This chapter sets out background information about the IsmaU project and the role of the Human Rights and Equal Opportunity Commission (the Commission). It provides a basic demographic and historical overview of Arab and Muslim Australians as well as information on current federal and state anti-discrimination laws on racial and religious discrimination and vilification. Finally, a brief outline details the Commission's previous research and findings relating to religious discrimination and vilification and anti-Arab and anti-Muslim prejudice.

1.1 The IsmaU project

Dr William Jonas AM, the acting Race Discrimination Commissioner, launched the IsmaU project in March 2003. The Commission saw a need for the IsmaU project following the September 11 attacks in the United States and the Bali bombings of October 2002. Heated public debate surrounding specific national and local events such as the trial, conviction and sentencing of gang-rapists in Sydney in 2001 and 2002 and growing numbers of asylum seekers from the Middle-East and Muslim countries reflected increasing hostility towards diverse communities of Arab and Muslim Australians. While the number of formal complaints of racial discrimination received by the Commission did not increase, in 2002 the Commission heard mounting anecdotal evidence from a range of Arab and Muslim community organisations about a rise in anti-Arab and anti-Muslim prejudice in Australia. The IsmaU project was launched with a view to understanding and accounting for this discrepancy.

The aim of the IsmaU project was to explore whether Arab and Muslim Australians were experiencing discrimination and vilification post-September 11. If so, what was the nature of these experiences and what were their impacts? How were Arab and Muslim Australians responding to such experiences and why weren't they reporting them through official complaint channels? The Commission was also interested in finding out what was being done to address underlying prejudice towards and discrimination and vilification of Arab and Muslim Australians and what else Arab and Muslim Australians thought should be done in this area.

It is important to note that the experiences included in this and subsequent chapters present the different perspectives of Arab and Muslim Australians who participated in the IsmaU project. While participants used terms like discrimination

and vilification to describe their experiences, this does not necessarily amount to unlawful discrimination or vilification as defined in federal or state and territory anti-discrimination legislation. It was not the purpose of this project to verify every allegation of violence, discrimination or vilification. Rather, it was the Commission's aim to listen to Arab and Muslim Australians describe how they perceived and experienced discrimination and vilification in order to gain insight into their understanding of the nature, causes and solutions to anti-Arab and anti-Muslim prejudice.

1.1.1 The role of the Human Rights and Equal Opportunity Commission

The Commission is an independent statutory body established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act). The Commission has specific legislative functions and responsibilities for the protection and promotion of human rights and the elimination of discrimination. In particular, the Commission is required to:

- promote an understanding and acceptance of, and compliance with, the Racial Discrimination Act 1975 (Cth)¹
- develop, conduct and foster research and educational programs and other programs for the purpose of
 - combating racial discrimination and prejudices that lead to racial discrimination,
 - promoting understanding, tolerance and friendship among racial and ethnic groups, and
 - propagating the purposes and principles of the International Convention on the Elimination of All Forms of Racial Discrimination²
- promote an understanding and acceptance, and the public discussion, of human rights and equal opportunity in employment and occupation in Australia³
- undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights and equality of opportunity and treatment in employment and occupation, and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth.⁴

1.1.2 The project reference group

The IsmaU project was advised by a reference group of 17 people, including representatives from government agencies and religious and community organisations from across Australia:

- Father Geoffrey Abdallah, Episcopal Vicar for Youth and Dean of St Maroun's Cathedral, Maronite Catholic Diocese of

Australia

- Mrs Aziza Abdel-Halim AM, President, Muslim Women's National Network of Australia
- Ms Rawan Abdul-Nabi, independent youth representative
- Dr Leela de Mel, Director, Office of Multicultural Interests Western Australia; alternate Ms Anne Rida
- Assistant Commissioner Garry Dobson, Commander Education Services, NSW Police; alternate Commander Alan Clarke
- Mr John Doyle, broadcaster and writer
- Ms Joumanah El Matrah, Coordinator, Islamic Women's Welfare Council of Victoria
- Mr George Green, Assistant Director General, Schools, NSW Department of Education and Training
- Mrs Fatima Hamdan, Chairperson, Al Zahra Islamic Council
- Mr Roland Jabbour, Chairperson, Australian Arabic Council; alternate Mr Laurence Abou-Khater
- Ms Randa Kattan, Executive Director, Australian Arabic Communities Council
- Mrs Maha Krayem Abdo, President, United Muslim Women's Association
- Mr Christopher Kremmer, author and journalist
- Mr Stephen Maguire, Director, Multicultural Affairs Queensland, Department of Premier and Cabinet; alternate Mr Warren McMillan.
- Ms Linda Matthews, Commissioner, South Australian Equal Opportunity Commission; alternate Ms Anne Burgess
- Mr Amjad Mehboob, Chief Executive Officer, Australian Federation of Islamic Councils
- Mr Hasan Sowaid, Manager, Multicultural Affairs and Settlement, Department of Immigration and Multicultural and Indigenous Affairs

The role of the reference group was to provide support and advice to the IsmaU team on the project objectives, the scope and conduct of the consultations and the findings and recommendations.

1.1.3 Methodology

The project had three major components:

- consultations with Arab and Muslim Australians
- an empirical survey using questionnaires and interviews to

learn more about Arab and Muslim Australians' responses to racism and abuse and their experiences and understanding of complaints processes

- documentation of government and non-government strategies that address anti-Arab and anti-Muslim prejudice.

1.1.3.1 National consultations

The consultation process sought to engage Australians who identify as 'Arab' and those who profess the Islamic faith. The consultation process was extensive: a total of 1,426 people participated in 69 consultations in all states and territories between April and November 2003 (see Appendix 1).

Consultations involved group discussions on the following broad questions:

- Have you (or the community group you represent) experienced discrimination and vilification? If so, what are those experiences?
- What is being done to fight anti-Arab and anti-Muslim prejudice and discrimination?
- What more could be done to fight anti-Arab and anti-Muslim prejudice and discrimination?

The consultations were organised with the assistance and cooperation of a range of government and community organisations and individual community members around Australia. Hosts included Arab and Muslim community groups, state anti-discrimination commissions and multicultural affairs agencies, police and educational authorities and individual community members.

Most consultations were conducted in major cities reflecting the demographic concentration of Arab and Muslim Australians in metropolitan areas. However, consultations were also held in rural and regional centres including Shepparton, Wollongong and Alice Springs.

The consultations varied considerably in both number and diversity of participants. Some consultations were more intimate (two people attended the smallest meeting) while others were significantly larger (the largest comprised 250 participants). For a full description of the size, location, date, participants and hosts of specific consultations see Appendix 1.

The most complex and difficult aspect of planning the consultations was to capture opinions that reflected the broad ethnic and religious diversity of Arab and Muslim Australians. When consulting Muslim Australians, the Commission sought to include Muslims from a variety of ethnic backgrounds and ancestries including Lebanese, Turkish, Afghan, Bosnian, Pakistani, Indonesian, Iraqi, Bangladeshi, Iranian and Fijian.⁵ When planning consultations with Australians of Arab background, we relied on Arab community organisations to invite Arab

participants from a variety of national, ethnic and religious backgrounds. IsmaU flyers and invitations were translated into Arabic for wide distribution through these networks in an effort to attract Arabic-speaking participants.

Care was taken to ensure that women, young people and refugees felt comfortable and able to fully participate in consultations. Specific meetings, often small focus group discussions, were convened with Arab and Muslim women, youth and refugees to encourage their participation. Of the 69 consultations, 17 were with women's groups, 14 were with young people aged 29 and under, and six were with refugees.⁶ Women, young people and refugees also attended other, general, consultations.

While most consultations were conducted in English, several were entirely in Arabic. Eritrean, Dari, Farsi, Pashtu, Bosnian, Bahasa Indonesia and Albanian interpreters were also used in select consultations.

Participants' permission to tape each consultation was requested and granted in most cases. Detailed notes were also taken by Commission staff in each consultation. These notes, together with transcripts of tapes (where available), were used to produce summaries of consultations which are published on the Commission's website.

In addition to the consultations, Commission staff held 53 meetings with federal, state and local government officers as well as individual community members who provided independent advice to the IsmaU project team. Although the Commission did not originally call for written submissions, nine written submissions were received from individuals or organisations unable to attend consultations.

1.1.3.2 Independent empirical research

To obtain a more comprehensive picture of the nature and extent of unreported incidents of discrimination and vilification, the Commission asked the Centre for Cultural Research at the University of Western Sydney to conduct in-depth research on Arab and Muslim Australians' experiences of discrimination and vilification and their understanding and use (or non-use) of existing complaints mechanisms. With an independent third party investigating these issues, research participants had greater freedom to be critical of complaint processes and complaint-handling agencies including the Commission. The research focused on Arab and Muslim Australians in New South Wales and Victoria and comprised two major components: self-complete questionnaires and a sub-set of semi-structured interviews. The report setting out the results of the research, *Living with Racism: The experiences and reporting by Arab and Muslim Australians of discrimination, abuse and violence since 11 September 2001* (the UWS report), is available on the HREOC website.⁷

Chapter 1: Background

a) Self-complete questionnaires

1,475 self-complete questionnaires (in Arabic and English) were distributed to individuals and through community organisations and mosques in NSW (685) and Victoria (790) between August and November 2003. The 25 multiple-choice and open-ended questions asked about people's experiences and responses to racism, abuse and violence. Respondents were also invited to participate in follow-up interviews. 186 people returned questionnaires, a response rate of 12.6%, and one third agreed to a follow-up interview.⁸ The majority of survey respondents (68%) were from NSW with the remainder from Victoria. These proportions roughly reflect the number of Arab and Muslim Australians in each state (see Appendices 2 and 3).

b) Semi-structured interviews

34 open-ended semi-structured interviews were conducted with a representative cross-section of survey respondents, with roughly half from each state.⁹ Interviews were conducted in either English or Arabic, as preferred by the interviewee. Interviewers asked participants to expand on survey questions and the following additional questions:

- What meanings do incidents of discrimination and vilification have for the people involved, and for the communities with which they identify?
- What forms of redress or action are people interested in?
- Do people who make formal complaints feel that their reports have been acted upon or will make a difference?
- Do people who make formal complaints understand the law relevant to their complaint and why the complaint was treated in the way it was?

The results of this research are included in this report where relevant.

1.1.3.3 Audit of strategies and initiatives

The Commission is by no means the only agency aware of an increase in anti-Arab and anti-Muslim prejudice and committed to taking action to combat it. Government, non-government and community organisations have initiated programs and strategies to address the causes of prejudice and to support people affected by discrimination and vilification. One objective of the IsmaU project has been to map existing strategies, identify gaps and shortcomings and make suggestions for strengthening the community and government responses in the future.

Many projects and initiatives were brought to the Commission's attention through the consultation process by individual participants or host organisations

and reference group members. In addition, the Commission contacted relevant federal, state and local government agencies and non-government community organisations requesting information about existing projects and initiatives that specifically address anti-Arab and anti-Muslim prejudice. Information received from these organisations has been sampled and summarised in Chapter 4 and is set out more extensively on the Commission's website.¹⁰

1.1.4 Terminology

A number of terms require clarification. These include:

Arab Australian

We have used the term 'Arab Australian' broadly to include people bound by a common language (Arabic) and a common cultural heritage which can be traced back to the Arabic-speaking countries of the Middle East and North Africa. 'Arab Australians' encompasses all those who identify with this group and live in Australia, including those with temporary resident status.

Muslim Australian

In this report, the term 'Muslim Australian' denotes Australians who identify themselves as followers of Islam. All Muslims who live in Australia, including those with temporary resident status, comprise this group.

Discrimination, vilification, racism, abuse, racial violence, prejudice, racial hatred

A number of different words were used by consultation participants to describe their experiences. These words included: discrimination, vilification, racism, abuse, racial violence, intolerance, prejudice and racial hatred. Where this report reflects what we were told at consultations and in the survey and interviews, we have used the language used by the participants and survey respondents. As a result, unless clearly stated otherwise, these words are not used in a strict legal sense. See section 1.3 of this chapter for the specific legal definitions of some of these terms.

Islam and Muslim

Islam commonly refers to the religion of Islam and matters relating to the Islamic faith. The term Muslim refers to a person or community of people who believe in or follow Islam.

Islamic dress

The terms hijab, niqab, chador and burqa describe particular kinds of Islamic dress worn by women. The word 'hijab' comes from the Arabic word 'haya', meaning modesty and applies generally to the modest dress of Muslim women. Consultation

Chapter 1: Background

participants commonly referred to the headscarf as 'hijab' or 'veil'; the 'niqab' as a veil covering the face, the 'chador' as a full length over-garment which covers the head and body, and the 'burqa' as a garment which covers the entire body including the hands, feet and face. Muslim men may also be identified by particular religious dress including the 'sunnah hat' otherwise known as a skull cap. It is important to note that because Muslims are a very diverse group, there are many different terms used to refer to different types of Islamic religious dress depending on country of birth or region.

Islamic leaders

While there is no official religious leader of all Muslims, there are several types of religious leaders in Islam. An 'Imam' is an Islamic religious leader who leads ritual prayer and provides religious, social and welfare guidance to a congregation. A 'Sheikh' is a religious scholar with formal training in a spiritual institution. A 'Mufti' is a jurist who interprets Islamic law and works closely with government authorities in advising on matters relevant to Islam.

Mosque

A mosque is a Muslim place of worship. All Muslims are expected to pray five times a day. Muslims can pray anywhere, but where possible, Muslims pray in mosques ('masjid' in Arabic), especially for Friday lunchtime prayers. Prayers may also be conducted in a 'musallah', meaning prayer room.

1.2 Who are Arab and Muslim Australians?

1.2.1 Arab Australians

'Arab Australian' or 'Australian Arab' is a complex label. To sketch a demographic overview of this group, we have used a combination of statistics relating to country of birth, ancestry and language. Particular care has been taken in interpreting country of birth statistics. Birthplace data used uncritically present an inaccurate picture of the Arab Australian population as nationality is not always synonymous with cultural identity or ethnicity. For example, some Iraqis identify their ethnicity as Kurdish not Arab. Similarly, some Lebanese-born Christians identify as Phoenician. Limiting a definition of 'Arab Australian' to people born in Arab countries would have excluded Arabic-speaking Australians from places like Ethiopia and Eritrea which are not usually defined as 'Arab' countries.

Leaving aside the complexities of how people may define *themselves*, it is important to note that the wider Australian public does not often make such fine distinctions about ethnic identity among people they label as 'Arab' or more broadly 'Middle Eastern'. Some Australians see Persians, Afghans or Turks as 'Arab' and may discriminate against them on the basis of that perception.

While it is our understanding that a definition of 'Arab Australian' should be flexible enough to incorporate self-identification as 'Arab' as well as labelling by external groups or individuals, we have interpreted the term 'Arab Australian' broadly to include people bound by a common language (Arabic) and a common cultural heritage which can be traced back to the Arabic-speaking countries of the Middle East and North Africa. 'Arab Australians' encompasses all those who identify with this group and live in Australia, including those with temporary resident status.

1.2.1.1 History

Arab migration to Australia occurred mainly in the post-WWII period. However, some communities such as the Lebanese and Egyptians are more established than others. The Lebanese comprise the largest group with the longest history of settlement in Australia. The earliest migrants from Lebanon (then a semi-autonomous district in the Ottoman province of Syria) came to Australia in the late 1880s. These pioneer settlers, most of whom were Christians, were variously identified as Turks, Syrians, Lebanese or Syrian-Lebanese.¹¹ The second wave of Lebanese migration to Australia from 1947-1975 was again mainly Christian, gathering pace after the Arab-Israeli war of 1967. The third wave of Lebanese came to Australia after 1976 fleeing the civil war in Lebanon. This group of predominantly Muslim Lebanese were humanitarian entrants who had family connections in Australia willing to sponsor their migration.

Like the Lebanese, most Egyptian migrants came to Australia in the post-WWII period (in two waves from 1947-71 and the late 1980s).¹² Most Egyptian migrants are Coptic Christians who left Egypt in response to pan-Arabist and pan-Islamist policies. In contrast to the longer established groups, the more recent arrivals from Arab or Arabic-speaking countries such as Iraq, Sudan and Somalia have been refugees or humanitarian entrants fleeing war.

1.2.1.2 Arab Australians today

162,283 Australians were born in the 22 Arab League nations (0.8% of Australia's population). Another 120,000 Australian-born people have at least one parent born in an Arab country. Around 200,000 Australians speak Arabic.

Arab Australians are a diverse group. The most common national origin of Arab Australians is Lebanese followed by Egyptian, Iraqi and Syrian. While the longer established groups such as the Lebanese are more numerous, more recently arrived communities tend to be smaller in number and come from a wider range of Middle Eastern and North African countries. Communities with relatively small numbers in Australia are disadvantaged by the limited community infrastructure to help them settle. This is especially a problem for small but fast-growing groups such as Iraqis.¹³

Chapter 1: Background

There is a widespread misconception that all Arab Australians are Muslim. While Muslims are usually the majority in their countries of origin, Arab Australians are predominantly Christian. For example, 55% of Lebanese-born Australians are Christian (the main groups are Maronite and Melkite Catholics) while 41% are Muslim (predominantly Sunni with smaller numbers of Shi'ites, Druze and Alawi).

The majority (85%) of Arab Australians are Australian citizens. Among major Arab immigrant groups, the citizenship take-up rate is highest for longer established groups such as Egyptians (91.6%), Lebanese (91.3%) and Syrians (86.2%). These rates are among the highest for all immigrant groups in Australia (the average is 74%). The fact that Arab Australians have been so willing to become Australian citizens demonstrates their commitment to settling in Australia and also reflects the fact that many Arab countries allow dual citizenship.¹⁴

Most Arab Australians live in New South Wales and Victoria with smaller populations in Western Australia, Queensland and South Australia. A relatively small proportion live in the Northern Territory, Tasmania or the ACT. Arab Australians live mainly in urban areas and are concentrated in specific parts of cities such as Sydney's south-west and Melbourne's north-western suburbs.

Arab Australians are a relatively young population. Those born overseas are more likely to be of working age (25-64 years of age) than other Australians. Second generation Arab Australians (those with a parent born in an Arab country) are a very youthful group: over 75% are aged 24 years or under with a further 14% aged 25-34 years.

It is difficult to classify the socio-economic status of Arab Australians as there are tremendous variations in income, level of education, types of occupation and employment status across different national groups. On the whole, Australians born in Arab nations have very similar levels of education compared to all Australians and they generally work in the same kinds of occupations. However, Arab Australians are slightly disadvantaged economically compared to the average Australian.

Detailed data on Arab Australians, summarised from the 2001 Census of Australia, are set out in Appendix 2.

1.2.1.3 Community structure

As a result of religious, national and political differences among and within Arab Australian communities, there are few organisations which service Arabs as a group. The two main representative bodies are the Australian Arabic Communities Council (AACC) and the Australian Arabic Council (AAC). The Melbourne-based AAC was founded in 1991 in response to stereotyping and discrimination directed against the Arabic-speaking community in Australia

during the Gulf War. Its aims are to challenge negative perceptions of Arabs and Arabic culture within Australia, promote greater participation by the Arab community in Australian society and act as a consultative group to government, media and the wider community on issues affecting Arab Australians. The AAC has representatives in most states.¹⁵ The Sydney-based AACC, founded in 1979 as the Arabic Welfare Interagency, has similar goals of community advocacy. In addition it provides social services (such as settlement and family support services) to Arabic-speaking clients.¹⁶ A range of other community organisations also deliver welfare services, promote culture or religion and provide recreational or educational opportunities to sub-groups within the Arab Australian community.

1.2.2 Muslim Australians

The terms 'Muslim Australians' and 'Australian Muslims' denote Australians who identify themselves as followers of Islam. All Muslims who live in Australia, including those with temporary resident status, comprise this group. Islam is a major world religion with an estimated 1.2 billion followers worldwide. Muslims believe in one God (Allah who is the one, single god of Islam and is considered to be the same god as that worshipped by the Jews and the Christians) who has sent prophets and messengers, from Adam, the first prophet, to Muhammad, the last. Muslims also believe that God provided revelations in the written scriptures including the Torah and the Gospel, and that the Holy Qur'an is the final scripture from God as revealed to the Prophet Muhammad. The Qur'an, together with the stories, sayings and deeds of the Prophet Muhammad (the 'hadith'), sets out the five fundamental practices for Muslims:

- making the shahada – a declaration of belief in Allah as the one and only God and Mohammed as his final messenger
- five-times-daily prayer (salat)
- fasting during the holy month of Ramadan (sawm)
- giving charity (zakat)
- pilgrimage to Mecca (hajj).¹⁷

1.2.2.1 History

Contact between Muslim Macassan fishermen from Southern Sulawesi (now Indonesia) and Indigenous people in northern Australia from around the 1750s is the earliest evidence of a Muslim connection in Australia. However, it was not until the 1860s with the arrival of Afghan cameleers that Muslims settled in greater numbers in Australia. At the peak of exploration and settlement of central Australia, around 3,000 Afghans worked as camel drivers carting water and goods in the difficult terrain.¹⁸ With the end of the camel transport industry in the 1920s and the restrictive effects of the White Australia immigration policy, the number of Afghans dwindled.¹⁹ It was not until policies which restricted the immigration of non-Europeans to Australia were dismantled in the late 1960s that Muslim

migration resumed. The 1960s and 1970s saw the arrival of large numbers of Turkish and Lebanese migrants, who today comprise the majority of overseas-born Australian Muslims.

1.2.2.2 Australian Muslims today

Just over one-quarter of a million Muslims (281,578) live in Australia.²⁰ Muslims are the third largest religious group in Australia behind Christians (who make up 68% of the population) and Buddhists (1.9%).²¹ They constitute a relatively small proportion of the Australian population (1.5%) compared to countries like the United Kingdom (where they comprise 3.1% of the population), France (10%) or Canada (2%).²² Over the last decade, there has been a significant increase in the number of Australian Muslims. The population almost doubled between 1991 and 2001 and has grown 157% since 1986.²³

Australian Muslims are a very young population: almost 50% are aged 24 and under (compared to 35% of non-Muslim Australians). Australian-born Muslims, who make up just over one-third of all Australian Muslims, are particularly youthful. A substantial 86% of the 102,566 Australian-born Muslims are aged 24 and under.

While they share a common religion, Australian Muslims are a culturally and linguistically diverse group. Around two-thirds were born overseas in countries such as Lebanon, Turkey, Afghanistan, Bosnia-Herzegovina, Pakistan, Indonesia, Iraq, Bangladesh, Iran, Fiji, Cyprus, Somalia, Egypt, and Malaysia. Despite the stereotype that all Muslims are of Arab or Middle-Eastern background, less than 20% of Australian Muslims were born in Middle Eastern or Arab countries. A significant number come from Asia, Europe and Africa. They speak a range of languages such as Arabic, Turkish, Persian (Farsi), Bosnian, Bahasa Indonesia, Bengali, Malay, Dari, Albanian, Hindi, Kurdish and Pashtu. Most Australian Muslims are Sunni but there is a significant minority of Shi'ite Muslims and smaller numbers of Bektashis, Ahmadis, Alawis and Druze.²⁴

The vast majority of Australian Muslims live in either New South Wales (50%) or Victoria (33%) with smaller populations in Western Australia (7%), Queensland (5%), South Australia (3%) and the ACT (1%). Within these states and territories, Muslims are concentrated in capital cities. Almost half of Australian Muslims (48%) live in Sydney while another third (31%) live in Melbourne. Thirteen per cent live in other cities while only seven per cent live in regional centres and towns.

Muslims are, on average, economically disadvantaged relative to other Australians. For example, according to the 2001 Census of Australia, 43% of Australian Muslims compared with 27% of all Australians had a weekly income under \$200.²⁵ Muslim Australians are more likely than other Australians to work in blue-collar occupations as production and transport workers or labourers than as managers, administrators or professionals even though they have a very similar educational

profile to other Australians. It is worth noting that socio-economic indicators vary according to birthplace. For example, overseas-born Muslims (particularly those from India, Pakistan, Bangladesh and Egypt) are more likely to be highly educated and employed than Australian-born Muslims.²⁶

Detailed data on Australian Muslims, summarised from the 2001 Census of Australia, are set out in Appendix 3.

1.2.2.3 Community structure

There are a range of organisations providing religious, educational and welfare services to Australian Muslims. There are some 85 mosques around Australia and around 50 *musallahs* (prayer rooms) which cater to Muslims' religious needs.²⁷ There are also 25 Islamic schools attended by 12,000-15,000 students.²⁸

A number of Islamic societies in each state and territory aim to ensure the appropriate provision of welfare services to Australian Muslims. There are over 50 such organisations in NSW alone.²⁹ Most of these associations are connected through state Islamic councils, many of which are represented at a national level by the Australian Federation of Islamic Councils (AFIC). Since the 1970s, AFIC has been the main advocacy body for Muslim Australians at the federal level.

There are an estimated 70 Imams in Australia who serve as religious leaders at mosques and prayer centres. Over the past decade, boards of Imams have been created in some states, bringing together religious leaders from individual mosques to discuss matters of common interest. While there is no single spokesperson representing the interests of all Australian Muslims, the Mufti of Australia, Sheikh Taj al-Din al-Hilali, Imam of the Lakemba Mosque in Sydney, is recognised by many as the spiritual leader of Australian Muslims.

1.3 Legal background

1.3.1 Federal laws

1.3.1.1 Constitutional basis of the *Racial Discrimination Act 1975* (Cth)

The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) was one of the first human rights treaties to be adopted by the United Nations and was ratified by Australia on 30 September 1975.³⁰ In Australian law, the ratification of an international treaty by the Executive does not automatically incorporate the treaty into domestic law and this can only be done as a result of legislation enacted by the federal Parliament. The ICERD was therefore given effect domestically by the enactment of the *Racial Discrimination Act 1975* (Cth) (RDA) relying on the external affairs power of the Australian Constitution.³¹

The fact that the ICERD forms the constitutional basis of the RDA means that it should, as far as possible, be interpreted in the same way as the ICERD.³² This is

important for a number of reasons. For example, the grounds of discrimination included in the RDA (race, colour, descent, or national or ethnic origin) are taken directly from the ICERD.³³ It is also relevant to note that it was not intended that the ICERD include religion as a ground of discrimination.³⁴ As a result, the RDA does not include religion as a ground of discrimination.

1.3.1.2 Discrimination under the *Racial Discrimination Act 1975 (Cth)*

The RDA makes direct and indirect discrimination based on the grounds of race, colour, descent or national or ethnic origin unlawful.

Direct discrimination³⁵ occurs when someone is treated less fairly because of their race, colour, descent or national or ethnic origin than someone of a different race, colour, descent or national or ethnic origin and which has the effect of impairing their ability to exercise their human rights in a wide range of areas of public life. For example, it would be discrimination if a real estate agent would not rent a house to a person because that person is of Arab descent.

Indirect racial discrimination³⁶ occurs when a rule is applied to everyone, but it affects people of a particular race, colour, descent or national or ethnic origin more harshly than other groups, and it is not reasonable. For example, a rule that only people over a certain height can be employed in a particular job could be applied to everyone 'equally'. But it may disadvantage some races more than others. The rule may be indirectly discriminatory if the height requirement is not necessary to do the job and is not a reasonable requirement.

None of the grounds of discrimination used in the RDA (race, colour, descent or national or ethnic origin) are defined in the Act. However, it is important to understand the meanings of these terms because this will affect who is covered by the law.

For example, Courts have decided that to fall within the ground of ethnic origin, the following characteristics are considered essential:³⁷

- a shared history, of which the group was conscious as distinguishing it from other groups, and the memory of which it keeps alive and
- a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

The following characteristics are considered relevant, but not essential by courts:³⁸

- a common geographical origin or descent from a small number of common ancestors
- a common language, not necessarily peculiar to the group;
- a common literature peculiar to the group

- a common religion different from that of neighbouring groups or the general community surrounding it and
- being a minority or an oppressed or a dominant group within a larger community.

Courts in the United Kingdom have decided that Jewish people³⁹ and Sikhs⁴⁰ fall within the meaning of ethnic origin outlined above.

Australian courts have adopted these meanings and have also found that Jewish people comprise a group of people with a common ethnic origin under the RDA.⁴¹ As yet, Australian courts have not been asked to consider whether Muslim people constitute a group with a common ethnic origin under the federal RDA.

However, cases that have considered this issue under different laws have found that Muslims do not share a common racial, national or ethnic origin because while Muslims profess a common belief system, the Islamic faith is widespread covering many nations and languages.⁴² A recent decision of the NSW Administrative Decisions Tribunal noted that

*[t]here are Muslims in every continent and of many different racial and ethnic backgrounds. It is common knowledge for example that there are South Asian, South-East Asian, African, Middle-eastern and European communities of Muslims. Many African-Americans, most famously Muhammed Ali, are Muslims, and that 'while Muslims are all adherents to Islam, they do not share common racial, national or ethnic origins.'*⁴³

If a person believes that they have been discriminated against because they are of a particular national origin (such as Lebanese or Turkish) rather than religious belief, then they are likely to be covered by the grounds in the RDA and can make a complaint to the Commission.

If such a complaint were made to the Commission, the President, on behalf of the Commission, would investigate the circumstances and, when appropriate, assist the parties – the person making the complaint (the complainant) and the person against whom the complaint is made (the respondent) – to resolve their dispute. This is called conciliation. If the complaint cannot be resolved, the President must terminate the complaint and the person making the complaint can have the dispute heard by the Federal Court of Australia or the Federal Magistrates Court. The Federal Court and Federal Magistrates Court can make legally enforceable decisions about whether or not discrimination has occurred.

However, if a person feels they have been discriminated against solely because they are of the Islamic faith then, on the basis of the current case law, it is unlikely

that they are covered by the grounds in the RDA.

1.3.1.3 Racial hatred under the *Racial Discrimination Act 1975 (Cth)*

In 1995, the RDA was amended by the *Racial Hatred Act 1995 (Cth)* to make it against the law to use words, sounds, images or writing

- in public
- that are reasonably likely to offend, insult, humiliate or intimidate another person or a group of people, and
- are used because of the race, colour or national or ethnic origin of the other person or group of people.⁴⁴

In considering the kinds of actions that are reasonably likely to offend, insult, humiliate or intimidate another person, recent decisions of the Federal Court of Australia have held that the action in question must have 'profound and serious effects, not to be likened to mere slights'.⁴⁵

The RDA contains very broad grounds which exempt from liability anything said or done 'reasonably and in good faith' in relation to:

- an artistic work or performance
- an academic publication, discussion or debate
- a fair and accurate report on a matter of public interest
- a fair comment on a matter of public interest, provided the comment is an expression of the person's genuine belief.

The Explanatory Memorandum⁴⁶ (EM) to the amendments introduced in 1995 made specific reference to the grounds that are covered. It states:⁴⁷

The term 'ethnic origin' has been broadly interpreted in comparable overseas common law jurisdictions (cf King-Ansell v Police [1979] 2 NZLR per Richardson J at p.531 and Mandla v Dowell Lee [1983] 2 AC 548 (HL) per Lord Fraser at p.562). It is intended that Australian courts would follow the prevailing definition of 'ethnic origin' as set out in King-Ansell. The definition of an ethnic group formulated by the Court in King-Ansell involves consideration of one or more of characteristics such as a shared history, separate cultural tradition, common geographical origin or descent from common ancestors, a common language (not necessarily peculiar to the group), a common literature peculiar to the group, or a religion different from that of neighbouring groups or the general community surrounding the group. This would provide the broadest basis for protection of peoples such as Sikhs, Jews and Muslims.

The term 'race' would include ideas of ethnicity so ensuring that many people of, for example, Jewish origin would be covered. While that term connotes the idea of a common descent, it is not necessarily limited to one nationality and would therefore extend also to other groups of people such as Muslims.

So far, there have been no cases brought under these more recent provisions to test whether they provide coverage to Muslim people by including them under the ground of race or ethnic origin under the federal RDA.

It is important to note that while the EM makes specific reference to Muslim people, this does not necessarily determine the issue. It would still be up to a court to decide if Muslim people are included in the term race or ethnic origin. While a court may take into account what is in an EM,⁴⁸ it will be unlikely to influence a court's decision if the EM is at odds with the clear intention of the legislation.⁴⁹ At this stage, on the basis of the case law, it is uncertain whether a court would find that Muslim people constitute a group with a common race or ethnic origin under the racial hatred provisions of the RDA.

1.3.1.4 Religion under the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*

Under the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* (HREOC Act), religion is dealt with in two ways.

a) Acts or practices of the Commonwealth that are inconsistent with the right to freedom of religion

First, the Commission is given the function to inquire into and attempt to conciliate allegations that an act or practice of the Commonwealth⁵⁰ is inconsistent with any human right.⁵¹ 'Human rights'⁵² mean the rights and freedoms recognised in the international instruments which are declared or scheduled to the HREOC Act.⁵³

Two such instruments have particular relevance to the freedom of religion and belief:⁵⁴

- the *International Covenant on Civil and Political Rights*⁵⁵ (ICCPR) and
- the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*⁵⁶ (Religion Declaration).

The freedom to hold and manifest religions and other beliefs is guaranteed by article 18 of the ICCPR. Article 18 guarantees to everyone 'the right to freedom of thought, conscience and religion'. It prohibits coercion which would impair

the exercise of this right. It states that freedom to manifest religion or belief may only be subject to those limitations which are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. It allows for parents and legal guardians to determine the religious and moral education of their children.

The ICCPR also provides that:

- advocacy of religious hatred which amounts to incitement to discrimination, hostility or violence must be prohibited by law (article 20)
- everyone is entitled to equality before the law and equal protection of the law without discrimination on the ground of religion among other grounds (article 26) and
- minority groups are entitled to profess and practice their own religion (article 27).

The Religion Declaration is a comprehensive statement of the right to freedom of religion and belief and elaborates on the ICCPR guarantees. The freedom is not to be inhibited by discrimination on the ground of religion or other beliefs (article 2). Some of the elements of the freedom to manifest one's religion or belief are listed in article 6 and include the freedom to assemble for worship, freedom to use the articles and materials related to the rites or customs, freedom to write and disseminate publications and freedom to teach the religion.

b) Discrimination in employment or occupation based on religion

Under the HREOC Act, the Commission is also given the function to investigate and attempt to conciliate complaints of discrimination in employment or occupation on a number of specified grounds including religion.⁵⁷ This part of the HREOC Act⁵⁸ has its basis in the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO Convention 111). ILO Convention 111 defines discrimination to mean any distinction, exclusion or preference made on the basis of, amongst others, religion,⁵⁹ that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.⁶⁰ The definition of discrimination in s 3 of the HREOC Act relevant to this particular function is based on the definition of discrimination in article 1 of ILO 111.

However, the definition of discrimination in s 3 of the HREOC Act also recognises that a distinction, exclusion or preference will not amount to discrimination when it is:

- based on the inherent requirements of a particular job; or
- in connection with employment as a member of the staff of an

institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, and is a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

If a complaint as described under (a) or (b) above were made to the Commission, the President, on behalf of the Commission, would investigate the circumstances and, when appropriate, assist the parties to resolve their dispute through conciliation. If the complaint cannot be resolved, and the President finds that the complaint is substantiated, he then must provide a report to the federal Attorney-General concerning his findings, reasons and any recommendations. This report must be tabled in the federal Parliament. The findings of the President are not enforceable and the respondent can ignore them if it wishes to do so. This is an important distinction from complaints of discrimination and racial hatred made under the RDA which can lead to an enforceable decision of the Federal Court or Federal Magistrates Court.

1.3.2 State and territory laws

1.3.2.1 Race Discrimination

Anti-discrimination laws in all Australian states and territories make race discrimination against the law.⁶¹ These laws generally also make discrimination on the basis of ethnic origin or ethnicity against the law.⁶²

However, the laws in NSW and Tasmania are different to the other state and territory laws and the RDA because, in addition to the ground of ethnic origin (and in Tasmania, the ground of religion), those laws also specify that it is unlawful to discriminate against a person on the basis of their 'ethno-religious' origin.⁶³ In NSW, this ground has been considered specifically in relation to a complaint made by a Muslim person that he had been discriminated against because he was denied Halal food in a prison.⁶⁴ The complainant argued the case solely on the basis that he was a Muslim and that this was sufficient to come within the ground of ethno-religious origin. The NSW Administrative Decisions Tribunal found that it was insufficient for the complainant merely to assert his Muslim faith in order to come within that ground and that there 'must be some evidence that there exists a close tie between that faith and his race, nationality or ethnic origin for him to be regarded as a member of an 'ethno-religious' group.'⁶⁵

1.3.2.2 Racial vilification

What is commonly referred to as racial vilification is unlawful in all Australian states and territories except the Northern Territory.⁶⁶ In all but South Australia⁶⁷ and Western Australia,⁶⁸ these laws are contained in anti-discrimination legislation. Western Australia provides only criminal remedies, and Tasmania only civil remedies,⁶⁹ while the rest provide both civil and criminal remedies.⁷⁰

The key elements of the state and territory provisions are as follows:

- there must be a public act
- which incites hatred towards, serious contempt for or severe ridicule of another person or group
- because of the race, colour or national or ethnic origin of that person or group.

Like the RDA, each of the state and territory legislation in relation to racial vilification contains exceptions to what would otherwise be unlawful conduct.⁷¹

1.3.2.3 Religious discrimination

Discrimination on the basis of religion is unlawful in the ACT, Western Australia, Queensland, the Northern Territory, Tasmania and Victoria.⁷²

In the ACT and Western Australia, the term used is 'religious conviction'.

In Queensland, the Northern Territory, Tasmania and Victoria, the terms used are 'religious belief or activity' (the Tasmanian legislation also includes religious affiliation). Furthermore, in Queensland⁷³ and Victoria,⁷⁴ these terms include the absence of religious belief as well as any refusal to participate in religious activity.

In NSW, discrimination on the ground of religion is not unlawful, however (as noted previously) discrimination on the ground of ethno-religious origin is. As set out above, a recent decision of the Administrative Decisions Tribunal indicates that in order to establish a complaint under the ethno-religious ground, a person cannot rely solely on their religion, such as Islam.⁷⁵

South Australian anti-discrimination law does not cover religious discrimination.

1.3.2.4 Religious vilification

Vilification based on 'religion' is against the law in Queensland, while vilification based on 'religious belief or activity' is against the law in Victoria and Tasmania (the Tasmanian provisions also cover vilification based on 'religious affiliation').⁷⁶

1.4 Overview of laws protecting people because of their race or religion

Summarising the analysis above, the coverage provided by Federal, State and Territory anti-discrimination laws is as follows:

- It is unlawful to discriminate against someone because of their race, descent or national or ethnic origin under federal law and under all state and territory anti-discrimination laws. For example, a person with a

particular background (such as Arab background or someone of Lebanese or Turkish origin) who believes they have been discriminated against because of their race, descent or national or ethnic origin, wherever that happened in Australia, can make a complaint under the RDA or the particular law of the state or territory.

- It is unlawful to express racial hatred towards or vilify a person because of their race or national or ethnic origin under federal law and under state and territory anti-discrimination laws (except for the Northern Territory and Western Australia). For example, a person with a particular background (such as Arab background or someone of Lebanese or Turkish origin) who believes that what has been said or done amounts to racial hatred or vilification, wherever that has happened in Australia, can make a complaint of racial hatred under the RDA or of vilification under the particular law of the State or Territory.
- It is unlawful to discriminate against someone because of their religion in the ACT, Western Australia, Queensland, the Northern Territory, Tasmania and Victoria. Therefore, a person who believes they have been discriminated against solely because of their religion has no legally enforceable rights if the alleged discrimination happened in NSW or South Australia.
- It is unlawful to vilify a person because of their religion in Queensland, Tasmania and Victoria. Therefore, a person who believes they have been vilified solely because of their religion has no legally enforceable rights if the alleged discrimination happened in the ACT, NSW, South Australia, Western Australia or the Northern Territory.
- It is not unlawful under federal law to discriminate against someone, or vilify them, solely on the basis of their religion. However, if a person believes that they have been discriminated against on the basis of their religion in their employment or occupation, or if they believe their human rights in relation to religious belief have been breached by the Commonwealth, then under the HREOC Act, the President, on behalf of the Commission, has the power to inquire into and attempt to conciliate such a complaint. If the complaint cannot be resolved, and the President finds that the complaint is substantiated, he then must provide a report to the federal Attorney-General concerning his findings, reasons and any recommendations. This report must be tabled in the federal Parliament. The findings of the President are not legally enforceable and the respondent can ignore them if it wishes to do so.

1.5 Previous research

Since 1991, the Commission has undertaken several projects which have addressed the prejudices, discrimination and vilification faced by Arab and Muslim Australians. The Commission has also investigated the broader area of the human right to freedom of religion and belief in Australia.

1.5.1 National Inquiry into Racist Violence (1991)

In 1989-90, the Race Discrimination Commissioner convened a National Inquiry into Racist Violence in Australia. The Inquiry looked broadly at the incidence of racist violence against individuals and organisations and the current and prospective government strategies to deal with it. A wide range of individuals and groups gave evidence and made submissions to the Inquiry, including Arab and Muslim Australians.

The inquiry heard evidence that during the 1991 Gulf War, Arab and Muslim Australians, particularly women, were afraid to leave their homes or allow their children to leave their homes. There were also widespread reports of Muslim women having their hijabs pulled off in the street and incidents of vandalism and arson against mosques, schools, offices and restaurants belonging to Arab or Muslim Australians. Community leaders submitted that media misrepresentation aggravated tensions in the community and contributed to an increase in hostile acts against Australians of Arab background or Muslim faith.

The inquiry's report, *Racist Violence*, published in 1991, argued that the Gulf War was simply the trigger for the violence which was experienced at the time and pointed to deeper, long-term underlying tensions as the root cause of racist violence against Arab and Muslim Australians. The inquiry recommended that a new criminal offence of racist violence and intimidation should be introduced into the Commonwealth *Crimes Act* and that the RDA should be amended to make incitement to racial hostility unlawful. In 1995, in response to the inquiry's recommendations, the RDA was amended to make racial hatred unlawful as outlined above in section 1.3.1.3.

1.5.2 Review of the Racial Discrimination Act (1995-96)

In 1995, to mark the 20th anniversary of the RDA, the Race Discrimination Commissioner undertook a review of the Act and called for public submissions on a series of questions about its reach and effectiveness. These questions included whether the RDA should be extended to cover ethno-religious background like the NSW *Anti-Discrimination Act* and whether the RDA should be amended to make religious discrimination unlawful. Of the submissions which answered these questions, a number were in favour of an extension to cover ethno-religious background including the submissions from the Executive

Council of Australian Jewry and a group of 250 Western Australian Muslims. Others, including the federal Department of Immigration and Multicultural Affairs and the NSW Ethnic Communities Council favoured a fuller extension of the Act to include religious discrimination.

1.5.3 National inquiry into freedom of religion and belief (1997-98)

In 1997, the Human Rights Commissioner launched a national inquiry into religious freedom in Australia. The inquiry received 254 submissions from a range of individuals and organisations including representatives of the Anglican, Presbyterian, Methodist, Muslim, Jewish, Coptic and Lutheran faiths.

The inquiry's report, *Article 18: Freedom of religion and belief*, was published in 1998. Its primary recommendation was for the enactment of a federal Religious Freedom Act which, among other provisions, would make both discrimination and vilification on the grounds of religion and belief unlawful. The recommendation was rejected by the federal government.⁷⁷

In April 1999, the Minister for Foreign Affairs asked the Joint Standing Committee on Foreign Affairs, Defence and Trade to inquire into Australia's efforts to promote and protect freedom of religion, particularly the extent that religious freedom is recognised in the region and around the world. The report, *Conviction with Compassion: A Report on Freedom of Religion and Belief* was published in November 2000. The report recommended that the Australian Government table a response to recommendations made in HREOC's Article 18 report and that it continues to support and encourage HREOC's work in relation to freedom of religion. It also recommended that the Australian Government coordinate a review of Commonwealth, State and Territory legislation to ensure maximum domestic protection of freedom of religion and ensure greater uniformity of human rights law and practice in Australia.

1.5.4 E-race forum on Islamophobia (2003)

The need for a more specific focus on discrimination and vilification against Arab and Muslim Australians became increasingly apparent to the Commission during 2001 and 2002 in the wake of the September 11 attacks in the United States and the Bali bombings of October 2002. Among the initiatives taken by the acting Race Discrimination Commissioner in response to the reported backlash against Australian Arabs and Muslims was further research on whether the federal RDA can protect people discriminated against or vilified as Muslims. The research was published in February 2003 on the Commission's 'E-race forum' website. The research paper, *Islamophobia – is it racism?* concluded that because Muslims do not constitute an group with a common ethnic origin, it is unlikely that they are protected by the RDA when they experience religious discrimination.⁷⁸

Endnotes

- 1 RDA s 20(1)(b).
- 2 RDA s 20(1)(c).
- 3 HREOC Act ss 11(1)(g), 31(c).
- 4 HREOC Act ss 11(1)(h), 31(d).
- 5 The Commission did not attempt to recruit participants by religious group, although Muslims of certain ethnic origins are more likely to belong to certain groups than others. For example, Iraqi refugees in Australia are more likely to be Shi'ite than Sunni Muslims.
- 6 The Commission aimed to convene more consultations with refugee men and women of Arabic-speaking or Muslim background but found it difficult to attract participants. Community workers also found it difficult to invite refugees to attend IsmaU consultations on specific days as many had no fixed addresses and are in only sporadic contact with community workers. Community settlement workers also expressed the view that refugees, particularly those holding temporary protection visas, were reluctant to complain about discrimination for fear of bringing attention to themselves and jeopardising their chances of obtaining a permanent visa.
- 7 http://www.humanrights.gov.au/racial_discrimination/isma/research/index.html
- 8 In the UWS report, the authors estimate that about 1,000 of the 1,475 reached the hands of distinct eligible individuals and that on this basis, they secured a response rate of just under 20%. They note that '[g]iven the length of the questionnaires (4 pages in the English version, 6 in the Arabic version), the fact that most were not addressed to individual recipients, and the impossibility therefore, of individual follow-up, the response rate of about 20% is well within the conventionally acceptable range. It is likely that some of the very same phenomena that we were investigating in relation to under-reporting of racism, that is wariness of the state and lack of trust in its authorities, militated against higher response rates for the survey. Certainly, interviewers reported repeated instances where (especially Arabic-speaking) respondents had changed their mind about volunteering for interviews. These participants explained that, despite their respect for the researchers and their appreciation of the research, and notwithstanding the anonymity, the level of state surveillance and intervention in their lives left them fearful of negative repercussions.' Independent advice provided by the Survey Research Centre of the School of Population Health at the University of Western Australia supports the claim that a 10-20% response rate for the self-administered survey is reasonable given the specific constraints of the survey methodology, particularly the lack of follow-up strategies. The Survey Research Centre also advised that as the survey was not random, as it was distributed through Arab and Muslim community organisations, this may have impacted on the likelihood that certain kinds of individuals would respond to the written survey.
- 9 Pseudonyms were assigned to each interviewee and these pseudonyms have been referenced in this report and in the UWS research report, *Living with Racism* available at: http://www.humanrights.gov.au/racial_discrimination/isma/research/index.html
- 10 http://www.humanrights.gov.au/racial_discrimination/isma/strategies/index.html
- 11 G. Hage, 'The Lebanese' in J. Jupp (ed), *The Australian People: an encyclopaedia of the nation its people and their origins*, Cambridge University Press, 2001, pages 554-571.
- 12 A. Ham, 'Egyptians' in J. Jupp (ed), *The Australian People: an encyclopaedia of the nation its people and their origins*, Cambridge University Press, 2001, pages 274-275.
- 13 *New Country, New Stories: discrimination and disadvantage experienced by people in small and emerging communities*, Human Rights and Equal Opportunity Commission, 1999.
- 14 T. Batrouney, 'From White Australia to Multiculturalism' in G. Hage (ed), *Arab-Australians Today: Citizenship and Belonging*, Melbourne University Press, 2002, page 55.
- 15 Information from the Australian Arabic Council, 17 November 2003.
- 16 Information from the Australian Arabic Communities Council, 5 February 2004.
- 17 A. Saeed, *Islam in Australia*, Allen & Unwin, 2003, pages 39-114.
- 18 *Ibid*, page 4.
- 19 B. Cleland, *The Muslims in Australia: A Brief History*, Islamic Council of Victoria, 2002.
- 20 The number of Muslims is believed to be an under-estimate as 15% of Australians did not report their religion in the 2001 census, some of whom would be Muslim.
- 21 *The People of Australia: Statistics from the 2001 Census*, Department of Immigration and Multicultural and Indigenous Affairs, 2003, Table 9: Religious Affiliation.

- 22 T. Batrouney, 'From White Australia to Multiculturalism' in G. Hage (ed.), *Arab-Australians Today: Citizenship and Belonging*, Melbourne University Press, 2002, page 39.
- 23 Australian Bureau of Statistics, *Census of Australia: 1986, 1991, 1996 and 2001*.
- 24 A. Saeed, *Islam in Australia*, Allen & Unwin, 2003, page 2. Some of these groups are not considered Muslim by the mainstream Muslim community.
- 25 Australian Bureau of Statistics, *Census of Australia, 2001*, data provided through ABS consultancy service, 2003. See also: Appendix 2.
- 26 A. Saeed, *Islam in Australia*, Allen & Unwin, 2003, page 2.
- 27 Australian Federation of Islamic Councils website: <http://www.afic.com.au/sm02.htm>
- 28 A. Saeed, *Islam in Australia*, Allen & Unwin, 2003, page 151.
- 29 Australian Federation of Islamic Councils website: <http://www.afic.com.au/sm02.htm>
- 30 Ratification is the process by which a State confirms that it intends to be bound by a treaty.
- 31 In the case of *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, the High Court upheld the constitutional validity of the RDA as a valid exercise of the power conferred by section 51(29) of the Constitution on the basis that the RDA gives effect to ICERD.
- 32 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *De L v Director General of Community Services* (1996) 187 CLR 640, 675; *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359, 372, 394, 406-407.
- 33 See: article 1(1) ICERD. Note also that the wording of the prohibition of racial discrimination in s 9(1) of the RDA is almost identical to the meaning given to 'racial discrimination' in article 1(1) of ICERD.
- 34 Egon Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination' (1966) 15 *International and Comparative Law Quarterly* 996, 999; Natan Lerner, *Group Rights and Discrimination in International Law* (Martinus Nijhoff Publishers, 1991), 123; *Toben v Jones* (2003) 199 ALR 1, [92]-[98] (Allsop J).
- 35 RDA s 9(1).
- 36 RDA s 9(1A).
- 37 See: *Mandla v Dowell-Lee* (1983) 1 All ER 1062; *Macabenta v Minister of State for Immigration and Multicultural Affairs* (1998) 159 ALR 465, 471; *Jones v Scully* [2002] FCA 1080.
- 38 *ibid.*
- 39 *Seide v Gillette Industries Ltd* [1980] IRLR 427.
- 40 *Mandla v Dowell-Lee* (1983) 1 All ER 1062.
- 41 Footnote relevant Aust decisions.
- 42 See, for example: the UK decisions of *Tariq v Young* (Employment Appeals Tribunal 247738/88, EOR Discrimination Case Law Digest No 2); *Nyazi v Ryman's Limited* (1988) EAT 86; and *JH Walker Ltd v Hussain & Ors* [1996] IRLR 11. See also: A discussion of the term 'ethno-religious' (a ground of discrimination in the *Anti-Discrimination Act 1977* (NSW)) and the Muslim faith in *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131.
- 43 *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131, [18].
- 44 RDA s 18C.
- 45 *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356-57 [16]; *Jones v Toben* [2002] FCA 1150, [92]; *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 [70] (French J).
- 46 An Explanatory Memorandum is a document issued by a Minister which explains the aims of a new piece of legislation.
- 47 Explanatory Memorandum, Racial Hatred Bill 1994 (Cth), 2-3.
- 48 *Acts Interpretation Act 1901* (Cth) s 15AB(2)(e).
- 49 *Re Bolton; ex parte Bean* (1987) 70 ALR 225, 227-228, per Mason CJ, Wilson and Dawson JJ: 'The words of a Minister must not be substituted for the text of the law... It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the court remains clear. The function of the court is to give effect to the will of parliament as expressed in the law.'
- 50 This includes acts or practices done on behalf of the Commonwealth or by an authority of the Commonwealth,
- 51 HREOC Act s 11(1)(f).
- 52 See: HREOC Act s 3(1).
- 53 They are: International Covenant on Civil and Political Rights, Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, Declaration on the Rights

Chapter 1: Background

- of the Child, Declaration on the Rights of Mentally Retarded Persons, Declaration on the Rights of Disabled Persons and the Convention on the Rights of the Child.
- 54 The Convention on the Rights of the Child (CRC) also provides that States parties shall respect the right of the child to freedom of thought, conscience and religion (article 14.1) and that the State shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child (article 14.2).
- 55 Opened for signature 16 December 1966, 999 United Nations Treaty Series 171; entered into force 23 March 1976 except article 41 which came into force 28 March 1979; ratified by Australia 13 August 1980 except article 41 which was ratified by Australia 28 January 1993.
- 56 The Religion Declaration was adopted unanimously by the 37th Session of the United Nations General Assembly in November 1981. Australia supported the adoption of the Declaration. On 8 February 1993, following consultations with state and territory governments, the Declaration was declared to be a 'relevant international instrument' for the purposes of the HREOC Act. The Attorney-General's declaration became effective on 24 February 1993.
- 57 HREOC Act s 31(b).
- 58 HREOC Act Part II Division 4.
- 59 In 1989 the *Human Rights and Equal Opportunity Commission Regulations 1989* declared a number of additional grounds of discrimination for the purposes of the HREOC Act with effect from 1 January 1990. Section 4(a) of the Regulations sets out these additional grounds which include the following: age, medical record, criminal record, impairment, marital status, mental, intellectual or psychiatric disability, nationality, physical disability, sexual preference and trade union activity. ILO Convention 111 article 1.
- 60 *Anti-Discrimination Act 1977* (NSW) Part 2; *Equal Opportunity Act 1995* (Vic) s 6(i); *Anti-Discrimination Act (1991)* (QLD) s 7(g); *Equal Opportunity Act 1984* (SA) Part 4; *Equal Opportunity Act 1984* (WA) s 36; *Discrimination Act 1991* (ACT) s 7(1)(g); *Anti-Discrimination Act 1992* (NT) s 19(1)(a); *Anti-Discrimination Act 1998* (Tas) s 16(a).
- 62 Anti-discrimination statutes in NSW, WA, Tasmania, the ACT and the Northern Territory refer to ethnic origin (*Anti-Discrimination Act 1977* (NSW) s 4; *Equal Opportunity Act 1984* (WA) s 4(1); *Anti-Discrimination Act 1998* (Tas) s 3; *Discrimination Act 1991* (ACT) s 4; *Anti-Discrimination Act 1992* (NT) s 4). The statutes in force in Victoria and Queensland refer to 'ethnicity or ethnic origin' (*Equal Opportunity Act 1995* (Vic) s 4; *Schedule to the Anti-Discrimination Act (1991)* (QLD)). South Australia's legislation mentions neither term, instead defining race as encompassing 'nationality, country of origin, colour or ancestry' (*Equal Opportunity Act 1984* (SA) s 5). The legislation in South Australia that makes racial vilification a criminal offence (the *Racial Vilification Act 1996* (SA)) uses the terms 'nationality, country of origin, colour or ethnic origin' (s 3).
- 63 'Ethno-religious' origin is included in the definition of 'race' in section 4 of the *Anti-Discrimination Act 1977* (NSW). It also appears in the legislative definition of race in Tasmania's *Anti-Discrimination Act 1998* (Tas) s 3. NSW differs from Tasmania, though, in that no other protection on the ground of religion is afforded in NSW. In Tasmania, separate provisions covering religious activity, belief or affiliation also exist in addition to the inclusion of 'ethno-religious origin' as a facet of race: *Anti-Discrimination Act 1998* (Tas) ss 16(o) and 16(p).
- 64 *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131.
- 65 *ibid.*, [21]. The Tribunal adjourned the proceedings so that the complainant could bring such evidence before the Tribunal. However the case was subsequently settled without this issue being decided.
- 66 The *Anti-Discrimination Act 1992* (NT) does not specifically include vilification as a form of prohibited conduct. The Act's definition of discrimination does include 'harassment on the basis of an attribute' which may cover more overt cases of vilification: *Anti-Discrimination Act 1992* (NT) s 20(1)(b).
- 67 See: The *Racial Vilification Act 1996* (SA) s 4, which makes racial vilification a criminal offence and the *Wrongs Act 1936* (SA) s 37, which provides a remedy in tort for acts of racial victimisation.
- 68 In Western Australia the *Criminal Code 1913* (WA) ss 76-80 imposes criminal sanctions for racial vilification.
- 69 Section 19 of the *Anti-Discrimination Act 1998* (Tas) proscribes racial and religious vilification.
- 70 In New South Wales, s 20C of the *Anti-Discrimination Act 1977* (NSW) prohibits racial vilification and s 20D provides that racial vilification may in serious cases amount to a criminal offence. In Victoria, racial vilification is unlawful under the *Racial and Religious Tolerance Act 2001* (Vic) s 7,

and particularly serious incidents may be treated as criminal matters under s 24. In Queensland, s 124A of the *Anti-Discrimination Act 1991* (Qld) makes vilification on grounds of race, religion, sexuality or gender identity unlawful, and serious incidents may amount to a criminal offence under s 131A. In the ACT, s 66 of the *Anti-Discrimination Act 1991* (ACT) makes racial vilification unlawful, and s 67 provides that serious incidents of racial vilification may be treated as criminal acts.

- 71 The exceptions specific to the vilification provisions are as follows: *Anti-Discrimination Act 1977* (NSW) s 20C(2); *Discrimination Act 1991* (ACT) s 66(2); *Anti-Discrimination Act 1991* (QLD) s 124A(2); *Wrongs Act 1936* (SA) s 37(1); *Anti-Discrimination Act 1998* (Tas) s 55; *Racial and Religious Tolerance Act 2001* (Vic) ss 11-2. The provisions under the *Criminal Code 1913* (WA) which impose criminal sanctions for racial hatred offences are subject to the range of general criminal defences.
- 72 *Discrimination Act 1991* (ACT) s 7(1)(h); *Equal Opportunity Act 1984* (WA) s 53; *Anti-Discrimination Act (1991)* (QLD) s 7(i); *Anti-Discrimination Act 1992* (NT) s 19(1)(m); *Anti-Discrimination Act 1998* (Tas) ss 16(o) and 16(p); *Equal Opportunity Act 1995* (Vic) s 6(j).
- 73 *Anti-Discrimination Act (1991)* (QLD), Schedule.
- 74 *Equal Opportunity Act 1995* (Vic) s 4.
- 75 *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131.
- 76 *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Anti-Discrimination Act 1998* (Tas) s 19; *Racial and Religious Tolerance Act 2001* (Vic) ss 8, 25.
- 77 Hon. Daryl Williams AM QC MP, Attorney-General, House of Representatives, *Hansard*, 9 February 1999, Question No. 293, p 2273.
- 78 View the research paper and readers' comments at http://www.humanrights.gov.au/racial_discrimination/Erace/islamaphobia/index.html