

ARTICLE 18

Freedom of religion and belief



Human Rights and Equal Opportunity Commission

ã Commonwealth of Australia 1998.

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**Human Rights and
Equal Opportunity Commission**



July 1998

The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I present *Article 18*, the report of the inquiry into freedom of religion and belief in Australia.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris Sidoti'.

Chris Sidoti
Human Rights Commissioner

Abbreviations

CEDAW	Convention on the Elimination of Discrimination Against Women 1979
CERD	International Convention on the Elimination of All Forms of Racial Discrimination 1969
Commission	Human Rights and Equal Opportunity Commission
CROC	Convention on the Rights of the Child 1989
ICCPR	International Covenant on Civil and Political Rights 1966
ILO 111	International Labour Organisation Discrimination (Employment and Occupation) Convention 1958
Religion Declaration	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981

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Executive Summary

Introduction

This report addresses the human right to freedom of religion and belief in Australia. The right is contained in article 18, *International Covenant on Civil and Political Rights*. It includes the freedom to have or adopt a religion or belief of one's choice including theistic, non-theistic and atheistic beliefs. Discrimination and vilification on the basis of religion and belief discourages participation in the community and may infringe the right to freedom of religion and belief.

1 A federal Religious Freedom Act

The Commission received submissions detailing experiences of discrimination and vilification on the basis of religion and belief which infringe the rights of individuals and groups. On the basis of those submissions the Commission recommends the enactment of a federal *Religious Freedom Act* (Recommendations 2.1-2.6).

Discrimination on the basis of religion and belief

To ensure the enjoyment of religion and belief the individual must be free from discrimination on the ground of religion and belief in all areas of public life including employment, education, the provision of goods and services and accommodation. The proposed *Religious Freedom Act* would contain provisions making discrimination on the ground of religion and belief unlawful subject to exemptions for discrimination based on the inherent requirements of the job and for discrimination in certain circumstances in connection with employment at an institution which is conducted in accordance with the doctrines, tenets or teachings of a particular religion or creed (Recommendation 4.1).

Incitement to hatred on the basis of religion and belief

Vilification, insults, threats or abuse against a person on the basis of religion or belief impair that person's right to freedom of religion and belief. Submissions detailed experiences of this type of vilification in Australia. The proposed *Religious Freedom Act* would also include provisions making vilification on the basis of religion and belief unlawful. The proposed provisions would be based on the racial vilification provisions contained in the *Racial Discrimination Act 1975* (Cth). This behaviour will be made unlawful subject to exemptions for acts done reasonably and in good faith in areas including the performance of an artistic work, scientific or academic debate or making a fair and accurate report of a matter in the public interest (Recommendations 5.1 - 5.4).

2 The right to manifest a religion or belief

The freedom of religion and belief extends to the right to manifest one's religion or belief in worship, observance, practice and teaching. The right to manifest a belief is subject only to limitations provided by law which are necessary to protect the public safety, order, health, or morals or the fundamental rights and freedoms of others.

Major concerns were raised regarding the need for legislation to protect the right to manifest religion and belief. The Commission has concluded that the current law is inadequate to protect the right to manifest Indigenous beliefs and religious beliefs concerning autopsies and medical procedures such as blood transfusions. It recommends the development of appropriate laws and guidelines which properly accommodate the right to manifest these beliefs and practices (Recommendations 3.1 - 3.11).

Submissions on paganism argued that some State and Territory laws prohibiting witchcraft and fortune-telling infringe the right to practise or manifest a religion or belief of choice. The Commission has concluded that those laws should be repealed as they infringe the right to manifest the beliefs of some pagans (Recommendations 3.13 - 3.14).

A few submissions argued that Australian law unnecessarily infringes the rights of people to manifest beliefs relating to polygamy and marriageable age. The Commission has concluded however that human rights law does not provide a clear direction for dealing with these alleged infringements and it makes no recommendation for any change to existing law.

List of Recommendations

Recommendations on a federal Religious Freedom Act

- R2.1** The Commonwealth Parliament should enact a *Religious Freedom Act* which, among other things, recognises and gives effect to the right to freedom of religion and belief.
- R2.2** The *Religious Freedom Act* should affirm the right of all religions and organised beliefs as defined to exist and to organise and determine their own affairs within the law and according to their tenets.
- R2.3** The *Religious Freedom Act* should cover the full range of rights and freedoms recognised in ICCPR article 18 and Religion Declaration articles 1, 5 and 6 including but not limited to
- freedom to hold a particular religion or belief
 - freedom not to hold a particular religion or belief
 - freedom to manifest religion or belief in worship, observance, practice and teaching
 - freedom from coercion which would impair religion or belief
 - the right of parents and guardians to organise family life in accordance with their religion or beliefs
 - freedom from discrimination on the ground of religion or belief (detailed in chapter 4).
- R2.4** In accordance with ICCPR article 18.3 the *Religious Freedom Act* should permit only those limitations on the right to manifest a religion or belief which are prescribed by law and necessary to protect public safety, health or morals or the fundamental rights and freedoms of others (detailed in chapter 3).
- R2.5** For the purposes of the *Religious Freedom Act*, ‘religion and belief’ should be given a wide meaning, covering the broad spectrum of personal convictions and matters of conscience. It should include theistic, non-theistic and atheistic beliefs. It should include minority and non-mainstream religions and belief systems as well as those of a more traditional or institutionalised nature. Religion or belief should be defined as a particular collection of ideas and/or practices
- that relate to the nature and place of humanity in the universe and, where applicable, the relation of humanity to things supernatural
 - that encourage or require adherents to observe particular standards or codes of conduct or, where applicable, to participate in specific practices having supernatural significance

- that are held by an identifiable group regardless of how loosely knit and varying in belief and practice
- that are seen by adherents as constituting a religion or system of belief.

The definition should not apply to all beliefs but only to those that clearly involve issues of personal conviction, conscience or faith. This definition would not cover beliefs which are caused by mental illness or which are motivated by criminal intent.

- R2.6** The obligations in the *Religious Freedom Act* should apply to individuals, corporations, public and private bodies and all other legal persons who may be subject to Commonwealth legislation.

Recommendations on Indigenous heritage

- R3.1** The current legislative regime protecting Indigenous cultural heritage should be enhanced in line with the recommendations made by the Hon. Elizabeth Evatt in *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.
- R3.2** Adequate minimum standards should be established by the Commonwealth and the States and Territories to ensure consistent treatment and protection for Indigenous heritage throughout Australia.
- R3.3** Proposed changes to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) should ensure that the Heritage Act is enhanced as an effective federal avenue of last resort to protect Indigenous religious and spiritual heritage.
- R3.4** Australia should continue to support the completion and adoption of the *Draft United Nations Declaration on the Rights of Indigenous Peoples* to provide better protection for the right of Indigenous Australians to religious freedom.

Recommendations on Indigenous burials

- R3.5** A Working Group should be established to develop national standards on the preservation of traditional burials and associated rituals.
- R3.6** The Working Group should be convened by the Aboriginal and Torres Strait Islander Commission and include representatives of relevant State and Territory agencies, Indigenous organisations and traditional Indigenous communities.
- R3.7** In developing the national standards, consideration should be given where appropriate to the proposed national standards on protection of Aboriginal heritage in Australia (See R3.2).

R3.8 When the national standards are finalised, they should be referred to the Standing Committee of Attorneys-General with a view to their being incorporated into relevant State and Territory legislation.

Recommendations on autopsies

R3.9 The Standing Committee of Attorneys-General should establish a Working Group to develop and encourage the adoption in State and Territory legislation of best practice standards on the rights of family members and other persons in relation to decisions concerning autopsies. The standards should include provision for

- due consideration to be given to the cultural and spiritual beliefs of family members regarding autopsy decisions
- procedures for the deceased person's next of kin to have his or her wishes taken into account in matters including whether an autopsy occurs and the manner in which it is undertaken
- rights of review for family members in relation to autopsy decisions with flexibility in time limits
- involvement where appropriate of religious and cultural organisations including Indigenous organisations.

R3.10 The Department of Health or equivalent agency in each State and Territory should review training programs for health workers and other professionals involved in autopsies and other procedures relating to human bodies to ensure issues of cultural and religious sensitivity are adequately addressed in those programs.

Recommendation on medical procedures

R3.11 The Standing Committee of Attorneys-General should establish a Working Group to give further consideration to changes proposed by the Jehovah's Witnesses to the laws governing parental consent to medical treatment of children. The Working Groups should include legal, medical and ethical experts and a representative of the Commission. It should develop and encourage the adoption in State and Territory legislation of best practice standards on the medical treatment of children.

Recommendation on female genital mutilation

R3.12 The federal Attorney-General through the Standing Committee of Attorneys-General should encourage the development of legislation in Queensland and Western Australia specifically prohibiting female genital mutilation.

Recommendations on anti-witchcraft and fortune telling laws

- R3.13** The federal Attorney-General through the Standing Committee of Attorneys-General should encourage Queensland and Victoria to repeal legislation criminalising the practice of witchcraft, fortune-telling, sorcery and enchantment.
- R3.14** The federal Attorney-General through the Standing Committee of Attorneys-General should encourage Queensland, Western Australia, South Australia, the Northern Territory and Tasmania to repeal legislation criminalising the practice of fortune-telling.

Recommendation on coercion in religious belief and practice

- R3.15** The federal Attorney-General's department should convene an inter-faith dialogue
1. to examine the question of methods of coercion in religious belief and practice and how they should be dealt with
 2. to consider whether legal limitations should be imposed on religious groups regarding coercive tactics
 3. to formulate an agreed list of minimum standards for the practice of religious groups.

Recommendation on discrimination on the ground of religion and belief

- R4.1** The proposed *Religious Freedom Act* should make unlawful direct and indirect discrimination on the ground of religion and belief in all areas of public life, in accordance with ICCPR articles 2 and 18 and Religion Declaration article 4, subject to two exemptions.
1. A distinction, exclusion or preference in respect of a particular job based on the inherent requirements of the job should not be unlawful. Preference in employment for a person holding a particular religious or other belief will not amount to discrimination if established to be a genuine occupational qualification.
 2. A distinction, exclusion or preference 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, being a distinction, exclusion or preference required by those doctrines, tenets, beliefs or teachings made in good faith and necessary to avoid injury to the religious susceptibilities of adherents of that particular religion or that creed should not be unlawful provided that it is not arbitrary and is consistently applied.

Recommendations on incitement to hatred on the basis of religion and belief

- R5.1** The federal Attorney-General through the Standing Committee of Attorneys-General should encourage the States and Territories to repeal laws creating the offence of blasphemy or to abolish the common law offence of blasphemy, as appropriate.
- R5.2** The Commonwealth should withdraw Australia’s statement of interpretation relating to ICCPR article 20.
- R5.3** The proposed *Religious Freedom Act* should proscribe the advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence as required by ICCPR article 20. The Act should exempt from the proscription of religious vilification, acts done reasonably and in good faith
- in the performance, exhibition or distribution of an artistic work
 - in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest or
 - in making or publishing a fair and accurate report of any event or matter of public interest.
- R5.4** The process and remedies available for contravention of the religious vilification provision should be civil remedies similar to those provided for in the racial hatred provisions of the *Racial Discrimination Act 1975* (Cth).

1 The inquiry into religious freedom in Australia

Both at the international level and national level, diversity of cultures and of religions can be a source of knowledge and understanding, an impetus and challenge to development and improvement, a broadening of human horizons and an enrichment of human life. On the other hand, cultural and religious diversity can, as history abundantly demonstrates, be a source of national disharmony and disunity and international distrust, ill-will and dispute and the cause of, or excuse for, national or international conflict and even war.

Clearly enough, both at the international and on the domestic scene, the key to real success ... lies in mutual and genuine understanding, tolerance and respect of and for different cultural and religious traditions, practices and beliefs.¹

1.1 Introduction

Australia is a diverse multicultural society. People from many different cultural and religious backgrounds live together in relative harmony and peace. As a nation, we Australians pride ourselves on our tolerance and easy-going acceptance of other cultures and beliefs.

Australia is home to people who hold and practise a variety of beliefs and religions. However many of us fail to understand, appreciate and accept the diversity and values of the beliefs and religions of others. As Sir William Deane pointed out in relation to Indigenous beliefs

The cultures and traditions of the original inhabitants of our continent stretch back into the Dreamtime of 60,000 years ago. When the first Europeans arrived in 1788 to establish a militarily run penal settlement, they made little sustained effort to understand the nature or the content of those cultures and traditions, or the strength of the bonds between the Indigenous peoples and their land or territory. Nor was there any real understanding of the extent to which the Indigenous belief in the supernatural enriched the lives of the Aborigines, provided continuity with the past while explaining the present, identified and regulated relationships, provided the context and content of aspirations and regulated almost all aspects of life and conduct.²

More than two centuries years later we are still grappling with the same issues of tolerance, respect and understanding. Archbishop Keith Rayner, Primate of the Anglican Church of Australia, acknowledged this when he stated

The trouble with many of us religious people is that we wrongly equate our limited and finite understanding of truth with the truth itself. I believe that there is an absolute truth; but none of us has fully grasped it. Yet we absolutise our perception of truth, so that we begin to think of anyone who differs from us as being opposed to the truth itself.³

1.2 The role of the Commission

True tolerance requires effort, commitment and the acknowledgement that those of other faiths also have real insights into truth.

Allowing people the freedom to believe in religions or beliefs of their choice lies at the heart of a tolerant and just society. Belief systems are fundamental to the expression of personal values. Religious, non-religious or atheistic beliefs are tenaciously and consciously held. These beliefs are central to the individual's conception of the meaning of human existence. The importance and fundamental significance of religion and belief is evidenced by the fact that some of the most terrible massacres and battles in history have resulted from a clash of religious ideologies.

... the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom, thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations.⁴

This report documents the personal experiences of Australians who have suffered discrimination or intolerance because of their religion or beliefs. These experiences reveal that Australians face the continuing challenge of creating a society in which everyone is truly free to hold a religion or belief of his or her choice and in which cultural and religious diversity is a source of advantage, benefit and good rather than a cause of disharmony and conflict.

1.2 The role of the Commission

The Human Rights and Equal Opportunity Commission (the Commission) is an independent statutory authority of the Commonwealth 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 the understanding, acceptance and public discussion of human rights and equal opportunity in employment and occupation⁵
- inquire into acts or practices of the Commonwealth that may be inconsistent with or contrary to any human right and all acts and practices that constitute discrimination in employment and occupation⁶
- advise on laws that should be made by the Parliament or action that should be taken by the Commonwealth on matters relating to human rights and equality of opportunity and treatment in employment and occupation⁷
- advise on what action, in the opinion of the Commission, Australia needs to take to comply with the provisions of the ICCPR, the Declarations annexed to the Act or any relevant international instrument declared under the Act.⁸

Three international instruments are of particular relevance to the freedom of religion and belief.

The ICCPR

The *International Covenant on Civil and Political Rights* (ICCPR) was adopted by the United Nations General Assembly in 1966. Australia ratified the ICCPR on 13 August 1980. The ICCPR provides for the right to freedom of religion or belief (article 18), the right to equality before the law and to human rights and fundamental freedoms without discrimination on the basis of religion or belief (articles 2 and 26) and the right to freedom from religious hatred (article 20).

The Religion Declaration

The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (Religion Declaration) is the most comprehensive international statement of the right to freedom of religion and belief. It 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. The Declaration elaborates the right to freedom of thought, conscience, religion and belief as defined in ICCPR articles 18 and 20. The full text of the Declaration is set out in Appendix 1.

Discrimination (Employment and Occupation) Convention

The International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111) prohibits discrimination on the ground of religion in employment and occupation. Discrimination means any distinction, exclusion or preference made on the basis of religion that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. The Convention recognises that distinctions made on the basis of the inherent requirements of the job are not considered discriminatory. The HREOC Act also contains an exception for any distinction, exclusion or preference made 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, being a distinction, exclusion or preference made in good faith to avoid injury to the religious susceptibilities of adherents of that religion or that creed.⁹

Impetus for this Inquiry

On 24 February 1993 the Attorney-General declared the Religion Declaration to be a relevant international instrument for which the Commission had responsibility. This served as an impetus to the Commission to review the status of religious freedom in Australia. Also motivating a thorough review was the receipt of complaints alleging discrimination on the basis of religion.

When Commissioner Chris Sidoti commenced his term as Human Rights Commissioner in 1995 he announced that as part of his responsibility for the Religion Declaration and its effective implementation in Australia he would undertake a review of religious freedom in Australia. This report is the culmination of that review.

1.3 The review process

The discussion paper

The first step in the process of conducting a review of religious freedom in Australia was the production of a discussion paper on freedom of religion in Australia. On 18 February 1997 the Human Rights Commissioner, Chris Sidoti, released a discussion paper, *Free to Believe?: the right to freedom of religion and belief in Australia*, for public comment. The discussion paper briefly reviewed the relevant international human rights law and the legislative and constitutional framework for freedom of religion in Australia.

The discussion paper was launched at the offices of the Human Rights and Equal Opportunity Commission in Sydney before an audience of religious and community leaders. The launch was attended by Abdelfattah Amor, the United Nations Special Rapporteur on the Question of Religious Intolerance.

The discussion paper sought to generate discussion and elicit views on Australia's compliance with the provisions of the Religion Declaration. To assist the preparation of community submissions, the Commission posed a number of questions, illustrated by way of case studies. A list of the questions is contained in Appendix 2. The questions were designed to prompt discussion on certain topics although submissions were not intended to be confined to these topics.

Almost 2,500 copies of the discussion paper were distributed to major religious bodies and organisations, national and State religious community councils, national and State ethnic communities councils, Indigenous land councils, non-government human rights organisations, employer groups, employee associations, the major political parties, State and Territory equal opportunity commissions, the Attorney-General, individual members of the House of Representatives Standing Committee on Legal and Constitutional Affairs, the Senate Legal and Constitutional Legislation Committee and the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade and interested members of the public.

Submissions were accepted during 1997 and into 1998.

Submissions

The Commission received 255 submissions in response to the discussion paper. Of those submissions, 147 were from individuals and the remainder from both religious and non-religious organisations. A list of submissions is set out in Appendix 3.

The submissions indicate that the discussion paper was generally well received. The content and tone of the paper received favourable comment and many submissions commended the Commission for initiating work in this area.

[T]his Discussion Paper is especially timely at this point in Australia's history, in view of current cultural and social debates. Those who are responsible for initiating the Paper are to be congratulated for their admirable motives in working to improve equity and inclusiveness in a nation of great diversity and potential disharmony.¹⁰

The discussion paper was not without criticism however. It was felt by some, for example, that the right to freedom from religion was not given proper treatment in the paper.¹¹

Workshop on religion and human rights

As the Commission's review of submissions, research and drafting were coming to a conclusion a workshop was conducted to obtain further advice on five core issues. Some 75 religious and non-religious organisations were invited to send a representative to address the questions

- the meaning of 'belief' as distinct from 'religion'
- exemptions from the proposed proscription of religious discrimination
- an appropriate model for federal religious vilification legislation
- enhancing awareness about religious beliefs regarding medical treatment
- measures needed to protect individuals from coercion in respect of religion and belief.

The half day workshop was held at the Commission's premises in Sydney on 28 April 1998 and was attended by some 40 people. The list of participants is set out in Appendix 4.

1.4 This report

The major recommendation flowing from the Commission's review of religious freedom in Australia is that the Commonwealth should enact a federal *Religious Freedom Act*. The proposed Act would protect the freedom of religion and belief and make discrimination on the ground of religion or belief and certain public acts of religious vilification unlawful.

This report details the Commission's analysis, findings and recommendations in the following four chapters. Chapter 2 details the international and domestic protections for freedom of religion. It describes the legislative protections for religion and belief in Australia and in other comparable jurisdictions. Chapter 3 evaluates a number of expressions of religion or belief which raise difficult issues concerning the individual's right to practise a belief and the permissible limits that the state can impose on that right. Chapter 4 describes experiences of discrimination in employment, accommodation, goods and services and education. It concludes that there is a need for comprehensive federal legislation proscribing discrimination on the basis of religion or belief. Chapter 5 describes experiences of vilification on the basis of religion or belief. It concludes that there is a need for federal legislation proscribing religious vilification.

Notes

- 1 Sir William Deane, Governor General of Australia, 'Religion and cultural diversity: global challenges and local responsibilities', Address for the opening of the 1997 Religion and Cultural Diversity Conference Melbourne, 28 July 1997, in (1997) 19(1) *Migration Action* pages 3-4.
- 2 Id, page 3.
- 3 Dr Keith Rayner, 'Religion, Racism and Tolerance', (1995) 8 *Without Prejudice* 28.
- 4 Preamble, *Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief*, GA Resolution 36/55, November 1981, UN Doc. A/36/684. A declaration under section 47 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) in relation to this Declaration came into effect on 24 February 1993. The Declaration is set out in full at Appendix 1.
- 5 HREOC Act sections 11(1)(g), 31(c).
- 6 Id, sections 11(1)(f), 31(b).
- 7 Id, sections 11(1)(j), 31(e).
- 8 Id, section 11(1)(k).
- 9 Id, section 3(1).
- 10 Zelda Bailey *Submission R/46*.
- 11 See, for example, Zelda Bailey *Submission R/46*; D Tribe, Secular Response, *Submission R/119*; M Thomas *Submission R/187*; K Cornish, Atheist Foundation of Australia, *Submission R/203*; R Dahlitz, Council of Australian Humanist Societies, *Submission R/223*; L Vick, Rationalist Society of Australia, *Submission R/235*.

2 Freedom of religion and belief

The opportunity lies before us to work together to create a society rooted in the values we treasure. But this society can only be built on a sure foundation of mutual respect, openness and trust. This means finding ways to live our lives of faith with integrity and allowing others to do so too. Our different religious traditions offer us many good resources for this and teach us the importance of good relationships characterised by honesty, compassion and a generosity of spirit. These will be the foundations of a strong, cohesive and dynamic society into the future.¹

2.1 Introduction

Australians claim predominantly to be Christians. In the 1996 national population census 70% of a national population of almost 18 million people described themselves as Christian or as members of a Christian denomination.

Although the great majority of Australians describe themselves as Christian, there are significant religious minorities. Islam is now the second largest religion in Australia. In the 1996 census 1.1% of the population or 200,885 Australians described themselves as Muslim. Large numbers of immigrants from Asia, especially from Vietnam, Cambodia and China, have made Buddhism the third largest religion with 1% of the Australian population or 199,812 people. Judaism came to Australia with the first European settlers. In the 1996 census 0.4% of the population or 79,805 Australians described their religion as Judaism. Hindus constituted 0.3% of the population, that is 67,279 people.

Many Aboriginal and Torres Strait Islander people maintain their traditional religious beliefs and practices. Many who have adopted other religions continue a close association with traditional customs and attach great significance to places and sites of cultural and religious importance to their communities.

New religious movements in Australia number in the several hundred. Most have their origins overseas. They range in size from small and exclusive groups to organisations with thousands of members.²

In 1996, 16.8% of the population described themselves as having no religion, an increase from 12.9% in the 1991 census.

Contemporary Australia is a multi-racial, multi-cultural and multi-religious society. This chapter surveys the extent to which the right to freedom of religion and belief is protected and promoted in Australia. It provides a brief comparison of the level of protection in Australian law with that in some other countries. It concludes with a review of Australia's international human rights commitments which inform the Commission's findings and recommendations on freedom of religion and belief.

2.2 Freedom of religion and belief in Australian law

The Australian legal system purports to treat Australia's many different religious communities equally. There is no established or state sponsored religion or church and religious law is not imposed by civil authority.

This section discusses the extent to which the right to freedom of religion and belief is currently protected and promoted in Australian law by examining the Australian Constitution and relevant federal, State and Territory laws.

Defining 'religion'

A threshold question for the purpose of this report is the meaning of 'religion'. This is a complex question as there is no universally accepted definition. In many respects it is a fluid concept, evolving over time and varying between different cultures and different political systems. It can also vary according to the context in which 'religion' is defined. There are both legal and non-legal definitions. This report is concerned essentially with the legal definition of 'religion'. However, it would be fair to say that legal interpretations have been influenced by sociological and other non-legal formulations.

Emile Durkheim enunciated what is generally regarded as the classic sociological definition of 'religion'.

[A] unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden - beliefs and practices which unite into one single moral community called a Church, all those who adhere to them.³

The definition of 'religion' in the Shorter Oxford English Dictionary has frequently been referred to in legal decisions since the middle of the sixteenth century.

Recognition on the part of man of some higher unseen power as having control of his destiny, and as being entitled to obedience, reverence and worship; the general mental and moral attitude resulting from this belief, with reference to its effect upon the individual or the community; personal or general acceptance of this feeling as a standard of spiritual and practical life.

More recently in Australia the meaning of religion has been the subject of consideration by the High Court. In a 1983 decision involving the Church of Scientology the High Court considered the threshold issue of defining 'religion'.⁴ The judges proposed a number of different tests of 'religion' but no definition secured majority support. The narrowest test was proposed by Acting Chief Justice Mason and Justice Brennan and required two elements:

- belief in a supernatural Being, Thing or Principle
- the acceptance of canons of conduct to give effect to that belief (though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion).⁵

Justices Wilson and Deane held that no single characteristic could yield a formalised legal criterion to define 'religion'. They referred instead to the following indicia or guiding principles:

- a particular collection of ideas and/or practices involving belief in the supernatural
- ideas that relate to the nature and place of humanity in the universe and the relation of humanity to things supernatural
- ideas accepted by adherents requiring or encouraging the observation of particular standards or codes of conduct or participation in specific practices having supernatural significance
- adherents constituting an identifiable group or identifiable groups, regardless how loosely knit and varying in beliefs and practices these adherents may be
- adherents themselves seeing the collection of ideas and/or practices as constituting a religion.⁶

Justice Murphy also did not propound a definitive 'test'. He said that, because so many different belief systems have been accepted as religions, any attempt to define religion exhaustively will encounter difficulty. In his view there was 'no single acceptable criterion, no essence of religion'.⁷ He rejected Chief Justice Mason and Justice Brennan's first criterion of belief in a supernatural Being, Thing or Principle as no longer essential to a definition of religion. Justice Murphy held, in part, that any organisation which claims to be a religious organisation and which offers a way to find meaning and purpose in life is a religious organisation.⁸

The scope of 'religion or belief'

Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 1.1 of the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (Religion Declaration) both use the expression 'freedom of thought, conscience and religion'. The phrase 'or belief' is also used in these instruments.

In its initial draft stages, the title of the Religion Declaration referred only to religion and not to other beliefs. However, various sections of the international community expressed concern about the title on the basis that it gave special protection to religion. Eventually the words 'or belief' were added to ensure protection for non-religious beliefs. The drafting history of the Religion Declaration indicates broad agreement that 'religion or belief' encompasses theistic, non-theistic and atheistic beliefs.⁹

The United Nations Human Rights Committee in its General Comment on ICCPR article 18 has described the right to freedom of thought, conscience and religion as 'far-reaching' and 'profound'.

2.2 Freedom of religion and belief in Australian law

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.¹⁰

The Committee has adopted a broad interpretation of 'freedom of religion or belief' covering freedom of theistic, non-theistic and atheistic beliefs and freedom not to subscribe to any of these beliefs.¹¹ The Committee has made it clear that minority and non-mainstream religions are no less entitled to the protection of article 18 than traditional religions.

Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.¹²

The Committee has pointed out that the ICCPR 'does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice'.¹³ These freedoms, the Committee has emphasised, 'are protected unconditionally'.¹⁴ However, the Committee's comments regarding the unconditional protection of freedom of religion and belief do not apply to manifestation of religion or belief which may be made subject to limitations for defined purposes under both the ICCPR and the Religion Declaration.

United Nations Rapporteurs have also taken the view that 'religion or belief' encompasses theistic, non-theistic and atheistic beliefs.¹⁵

The Human Rights Committee in its General Comments also considered conscientious objection in relation to the performance of military service in the context of the right to freedom of religion and belief. While this arguably related more to manifestation, it could also be seen as giving some guidance on the matters that may fall within the scope of 'religion or belief'.

Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.

The approach of the Human Rights Committee on this matter is consistent with the European Commission on Human Rights which has interpreted 'belief' in article 9 of the European Convention on Human Rights as extending to pacifist beliefs.¹⁶

In accordance with the views expressed by relevant international authorities, the Commission has taken a similarly broad approach to the definition of 'religion' and 'belief' for the purposes of this report. While favouring a broad interpretation of 'belief', the Commission is of the view that there are some limits to its breadth for the purpose of article 18. Article 18 does not, for example, protect beliefs which are the result of mental illness.¹⁷

The Human Rights Committee has also recognised that the definition of 'religion or belief' should be subject to certain limits. This was illustrated in *M.A.B.; W.A.T. and A.Y.T. v Canada*, a 1993 communication to the Committee.¹⁸ The authors of the communication were Canadians associated with the 'Assembly of the Church of the Universe'. Their beliefs and practices included the care, cultivation, possession, distribution, maintenance, integrity and worship of the 'Sacrament' of the Church. While they referred to the 'Sacrament' as 'God's tree of life', it is more commonly known as marijuana. The authors came into conflict with Canada's *Narcotic Control Act*. They submitted that the actions of the Canadian authorities violated a number of their rights under the ICCPR including the right to freedom of thought, conscience and religion in article 18. The Committee concluded that the beliefs and practices of this organisation did not fall within the scope of article 18. The Committee said that the expression 'religion or belief' does not encompass a belief which consists primarily or exclusively of the worship and distribution of a narcotic drug.

While it is difficult to extract general principles from this decision, the Committee made it clear that the scope of 'religion or belief' is not without limits. It imposed an element of objectivity by demonstrating that a situation does not automatically fall within 'religion or belief' simply by assertion such as through the use of language such as 'church', 'sacrament' and so forth.

The Constitution

The Commonwealth Constitution does not provide a complete guarantee of protection for the right to freedom of religion and belief. There is however some measure of constitutional protection. Section 116 of the Constitution provides

[T]he 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 any office or public trust under the Commonwealth.¹⁹

This section only restricts the legislative power and in one respect only the executive power of the Commonwealth. It does not apply to the States.

[T]he Constitution does not touch the States - and it is the States and Territories which have the most responsibility for the social regulation that is likely to have some impact on the practice of religion'.²⁰

The constitutional guarantee in Section 116 is not a source of personal rights in the sense of providing individuals with an avenue for legal redress where their rights are violated.

There have been a number of constitutional cases before the High Court of Australia concerning the establishment and free exercise provisions of Section 116. The religious observance and public office provisions have not yet been judicially considered.

In 1981 the High Court held that a law which provided for financial aid to the educational activities of church schools was not a law for establishing a religion, even though the law might indirectly assist the practice of religion.²¹ The majority rejected the argument that any law which tended to support, aid or recognise a religion was in breach of Section 116 and that the Commonwealth should for that reason avoid any involvement with religion. The Court took the narrower view that a religion is only 'established' for the purpose of Section 116 when it becomes identified with the civil authority as a national institution.

However, Justice Murphy took a different approach from that of the majority and argued that Section 116 should be interpreted as not simply limiting the legislative power of the Commonwealth but as fundamentally guaranteeing the right of every Australian to freedom of and from religion. He took the view that even non-preferential aiding or sponsoring of religion should be prohibited. His approach was more in accordance with the way in which the United States Constitution has been interpreted.

In an earlier decision the High Court considered the prohibition in Section 116 of Commonwealth laws preventing the free exercise of religion.²² The case involved a declaration made by the Governor-General under the *National Security (Subversive Associations) Regulations* during World War II that certain organisations including the Jehovah's Witnesses were prejudicing the defence of the Commonwealth by propagating doctrines which undermined the efficient prosecution of Australia's war effort. The declaration was made and the Jehovah's Witnesses worship hall in Adelaide was seized under the regulations.

The High Court held that the laws authorising the making of the declaration and the seizure of the premises were not in breach of Section 116. The Court said that Section 116 did not preclude laws prohibiting actions which although undertaken in pursuit of religious convictions were prejudicial to the war effort. Central to this decision was the view that an individual's freedom to act upon his or her religious beliefs is constrained by the right of other members of society to protection against 'unsocial actions or actions subversive of the community itself'.²³

In a more recent decision the High Court took a more robust approach to the interpretation of Section 116. The Court seemed to favour a wider view, interpreting Section 116 as providing fundamental guarantees rather than merely imposing restrictions on the powers of the legislature.

[T]he guarantees in s.116 of the constitution would lose their character as a bastion of freedom if religion were so defined as to exclude from its ambit minority religions out of the main streams of religious thought.²⁴

This approach would be consistent with the trend towards greater cognisance of human rights which the High Court has demonstrated in a number of recent decisions (not all of them dealing with religion).

Notwithstanding these recent trends, the wording of Section 116, coupled with the weight of judicial opinion, leaves little doubt that its scope is limited. In particular, it does not amount to a constitutional guarantee of the right to freedom of religion and belief.

Federal laws

The Australian Constitution gives the Commonwealth power to make laws with respect to 'external affairs'.²⁵ This head of power enables the Commonwealth to make a law implementing an international treaty ratified or acceded to by Australia provided the law gives effect to the terms of the instrument in a reasonably appropriate and proportional way.²⁶

Australia has ratified or otherwise indicated its support for a number of international instruments in the area of human rights. Some of them clearly foreshadow that they will be implemented through domestic legislation. ICCPR article 2 requires Australia 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised' in the ICCPR, 'to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the ... Covenant' and 'to ensure that any persons whose rights or freedoms ... are violated ... have an effective remedy'. The Religion Declaration article 7 provides

The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.

The Commonwealth has enacted various laws to help give effect to these instruments. Relevant Commonwealth laws include the *Human Rights and Equal Opportunity Commission Act 1986* and the *Racial Discrimination Act 1975*. Both Acts provide some limited protection against discrimination on the basis of religion or belief. These two Acts and several other relevant pieces of legislation are discussed in detail in Chapter 4.

State and Territory laws

Section 116 of the Commonwealth Constitution does not affect the legislative powers of the States and Territories. In the absence of any legal impediment at the State or Territory level, State and Territory governments could establish a state church or religion,

2.3 Comparative law

oppress religious beliefs and practices or require a religious test as a qualification for public office.²⁷

Tasmania is the only State to provide for religious freedom in its constitution. Section 46 of the *Constitution Act 1934* (Tas) provides

- (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
- (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.

This provision has never been judicially considered and its scope remains unclear. However, as a guarantee of protection it is limited to the extent that it can be overridden by an Act of State Parliament or is inconsistent with an Act of Commonwealth Parliament.²⁸

The level of protection for the right to freedom of religion or belief under State law has been judicially considered in South Australia, one of the States which does not have a constitutional guarantee for this right. The Full Court of the Supreme Court of South Australia has confirmed there is no legal remedy available to any person who believes his or her right to freedom of religion or belief has been violated by that State's Parliament or Government.²⁹

A number of States and Territories in Australia have enacted legislation prohibiting discrimination on the ground of religion. These are detailed in Chapter 4.

2.3 Comparative law

Introduction

Over the last two centuries the right to freedom of religion and belief has won broad acceptance all over the world. This right is today recognised not only in major international human rights instruments but also in regional human rights treaties and in the constitutions of many countries throughout the world.³⁰

This section briefly examines the right to freedom of religion and belief from a global perspective by looking at some of the legal protections operating at both national and regional levels.

Regional arrangements

A number of important regional human rights instruments provide for the protection of freedom of religion and belief. The Asia-Pacific region is alone in not having a regional human rights treaty or regional machinery for the promotion and protection of human rights.

Europe

The Council of Europe was the first regional organisation to make a binding commitment to promote and protect human rights. The instrument for achieving this was the 1950 *European Convention of Human Rights* (the Convention). Under the Convention the European Commission and the European Court of Human Rights can investigate allegations of violations of human rights and make orders binding on State members. The Convention is incorporated into the domestic legislation of most European countries. The Convention deals with both freedom of religion and religious discrimination.

Article 9 Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or belief shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14 Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Americas

The Organisation of American States (OAS) was established in 1948 and currently consists of 35 members. These member states are bound by the *American Declaration of the Rights and Duties of Man* (1948) (the American Declaration) and the *American Convention on Human Rights* (1978). Religion and spirituality feature quite prominently in the American Declaration. The opening paragraph refers to '... the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness'. The Preamble states

Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to preserve, practise and foster culture by every means within his power.

Article III of the American Declaration enshrines the right to religious freedom.

Every person has the right freely to profess a religious faith, and to manifest and practise it both in public and in private.

The *American Convention on Human Rights* also contains positive guarantees of religious freedom.

2.3 Comparative law

Article 12 Freedom of conscience and religion

1. Everyone has the right to freedom of conscience and religion. This includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
2. No one shall be subject to restrictions that might impair his freedom to maintain or change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights and freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own conviction.

As in the European system, the Americas also have a human rights commission and court - the Inter-American Commission on Human Rights, founded in 1959, and the Inter-American Court of Human Rights, established in 1978. The Court, which has litigious jurisdiction and advisory competence, is an autonomous juridical institution of the OAS whose purpose is to interpret and apply the 1978 Convention.

Africa

The Organization of African Unity, a regional political organisation of 50 African states, was established in 1961. Its members are bound by the *African Charter on Human and People's Rights* (the African Charter) which was adopted in 1981. The African Charter established the African Commission on Human and Peoples' Rights. The African Charter provides for both religious freedom and the prohibition of religious discrimination.

Article 2

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 8

Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Common law countries

Domestic protection of the right to religious freedom varies significantly from country to country depending on such factors as political stability, the nature and history of the relationship between state and church and the degree of religious pluralism found in the particular country.³¹

United States of America

The legal system of the United States has traditionally placed very strong emphasis on the separation of church and state. The First Amendment of the United States Constitution provides that Congress may neither establish a religion nor prohibit its free exercise.

The US Supreme Court has held that, under the establishment clause, federal, state and local government may not, directly or indirectly, demonstrate any preference for any church or any religious belief. Furthermore, it has held that all levels of government must demonstrate a 'compelling interest' of the 'highest order' before interfering with any kind of religious conduct. In 1990 the US Supreme Court partly abandoned the so-called 'compelling interest test'.³² This development aroused a significant amount of hostility among religious groups throughout the country. Congress restored the test in the 1993 *Religious Freedom Restoration Act*.

In addition, under Article VI of the United States Constitution neither the federal government nor state governments can require an office holder to belong to or adhere to any particular religious faith. Governments cannot impose any religious requirements on political office holders, electors or public employees.

The *Civil Rights Act* of 1964 prohibits religious discrimination in areas such as accommodation and education. It also requires employers to make reasonable attempts to accommodate the religious beliefs and practices of employees.

Canada

The Canadian *Charter of Rights and Freedoms* (the Canadian Charter) took effect in 1982 as an amendment to Canada's Constitution. Article 2(a) of the Canadian Charter protects the fundamental right to freedom of conscience and religion and article 2(b) provides for freedom of thought, belief, opinion and expression. Article 15(1) provides that every individual has the right to equal protection and benefit of the law without discrimination based on religion. The Charter is directly enforceable in the courts.

The Canadian *Human Rights Act 1985* prohibits discrimination on the ground of religion in all federal or federally-regulated organizations. The provinces and territories have similar laws forbidding discrimination in their areas of jurisdiction. Complaints of discrimination are handled by the Canadian Human Rights Commission and a number of provincial commissions.

Canada's legal system gives specific recognition to multiculturalism, which has significant implications for freedom of religion and belief. Article 27 of the Canadian Charter provides that it shall be interpreted in a manner consistent with the multicultural heritage of Canadians. In addition, the *Multiculturalism Act 1988* declares that multiculturalism is a fundamental characteristic of Canadian identity and heritage.

New Zealand

Three provisions in the New Zealand *Bill of Rights Act 1990* deal with freedom of religion. Section 13 states that everyone has the right to freedom of thought, conscience, religion and belief, including the right to adopt and to hold opinions without interference. Section 15 protects the right to manifest that religion or belief in worship, observance, practice or teaching. A special protection of minority religious rights is provided in section 20. Because the *Bill of Rights Act 1990* has legislative rather than constitutional status it does not necessarily override inconsistent legislation.

The New Zealand *Human Rights Act 1993* prohibits discrimination on the ground of religion or belief within the areas of employment, accommodation, education and goods and services. Limited exemptions exist for employment by religious bodies.

United Kingdom

The United Kingdom does not have a written constitution or Bill of Rights or any comprehensive statement of legal protection for religious freedom. The legal basis for religious freedom in the United Kingdom is to be found in the common law system in a number of precedents established by British courts.³³

However, the British Government has recently introduced legislation to incorporate the *European Convention of Human Rights* into domestic law to improve the protection of basic human rights. This measure will have the effect of making the rights contained in the Convention binding on domestic courts. It will provide positive guarantees of the right to freedom of religion, conscience and belief, the right to manifest one's religion or belief and a prohibition on religious discrimination.³⁴

Summary

The degree of legal protection of freedom of religion and belief varies throughout the world. It is significant to note that all regions of the world have regional human rights systems providing protection for religious freedom except our own, the Asia-Pacific. It is also significant that a large number of countries, including the United States and Canada, provide positive guarantees of the right to freedom of religion and belief in their constitutions. Constitutional entrenchment clearly provides a stronger level of protection because it binds the legislature and makes it much more difficult for governments to undermine these rights.

2.4 International human rights law

Introduction

Since it was established in 1945, the United Nations has striven to encourage member states, including Australia, to promote and respect human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.³⁵

The *United Nations Charter* (1945) (the UN Charter) does not contain detailed guarantees of freedom of religion. However, it clearly establishes religious discrimination as a prohibited ground of differentiation and also employs the general formula of 'human rights and fundamental freedoms for all'.³⁶

Article 1.3 of the UN Charter provides that the chief purpose of the organisation is

to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, *and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion* (emphasis added).

Universal Declaration of Human Rights

In 1948, three years after the adoption of the UN Charter, the United Nations General Assembly adopted the *Universal Declaration of Human Rights* (Universal Declaration), the foundation upon which modern international human rights law has been built.³⁷

The adoption of the Universal Declaration was preceded by sustained activity by churches and other groups around the world representing the concerns of religious groups seeking to secure adequate safeguards for freedom of religion and conscience. Consequently, the need to protect religious freedom features prominently in the Universal Declaration. The preamble, for instance, states

... disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and *belief* and freedom from fear and want has been proclaimed as the highest aspiration of the common people (emphasis added).

Article 2 provides

Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, *religion*, political or other opinion, national or social origin, property, birth or other status (emphasis added).

2.4 International human rights law

More specifically, article 18 provides

Everyone has the right to freedom of thought, conscience and religion; this right includes the right to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

International Covenant on Civil and Political Rights

The right to freedom of religion and belief has also been proclaimed in the *International Covenant on Civil and Political Rights* (ICCPR).

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 stipulates that freedom to manifest religion may only be subject to those limitations which are prescribed by law and 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.

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. 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.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

In addition the ICCPR provides

- 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 practise their own religion (article 27).

Australia acceded to the First Optional Protocol to the ICCPR with effect from 25 December 1991. This permits the Human Rights Committee, established in 1977 under the auspices of the United Nations, to receive and consider communications from individuals alleging violations by Australia of rights contained in the ICCPR. There

have been several communications to the Committee concerning Australia but none relate to articles concerning religious freedom. Accession to the First Optional Protocol may also have implications for Australian domestic law. The High Court has referred already to Australia's obligations under the ICCPR and the effect of the First Optional Protocol in developing domestic Australian law.³⁸

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

The Religion Declaration is the most comprehensive international statement of the right to freedom of religion and belief,³⁹ elaborating 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.

The full text of the Declaration is set out in Appendix 1.

Convention Concerning Discrimination in Respect of Employment and Occupation

International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111) prohibits discrimination on the ground of religion in employment and occupation.⁴⁰ However, the Convention recognises that any distinction made on the basis of the inherent requirements of the job is not discriminatory.

Other relevant international instruments

The *International Covenant on Economic, Social and Cultural Rights*, the *UNESCO Convention against Discrimination in Education* and the *Convention on the Rights of the Child* also contain clauses which seek to counter religious discrimination and intolerance. The *Convention on the Rights of the Child* stipulates the child's right to enjoy his or her human rights and fundamental freedoms without discrimination on the ground of religion among others (article 2.1) and that the child has a right to freedom of thought, conscience and religion (article 14.1). Like the ICCPR, this Convention provides for the role of parents in the child's religious education. Article 14.2 provides

States Parties 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.

2.5 Submissions to the Inquiry

Submissions expressed a range of views on the degree to which the right to freedom of religion and belief is enjoyed in Australia and whether changes are needed to provide greater protection.

A submission from Dr Juliet Sheen provided some insightful comments on these issues.

I consider that federal legislation is needed to protect the rights to freedom of religion and belief in Australia ... Neither the Constitution nor current federal and State legislation adequately covers the range of protections and issues envisaged under the 1991 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, nor the full coverage of Articles 18 of the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.

Legislation is important because it provides an essential underpinning to government and non-government initiatives to promote equality in rights and opportunities. Positive legislation legitimises all efforts to promote respect, tolerance and understanding for the people of many religions and beliefs which make up Australia's multiracial and multicultural community. Where particular legislation is absent - and especially where gaps in rights-affirming legislation highlight that absence - discrimination and intolerance are seen to be more than just tolerated, but to be warranted and excusable. This situation cannot be allowed to continue in Australia.⁴¹

Reverend Ray Cleary spoke of the historical oppression of minority religions and other groups by mainstream churches. He said that while the church

... has contributed to the cultural and religious openness, tolerance and cohesion of Australia, it must also take its share of responsibility for the oppression of minority groups in the past. In particular, we are mindful of the damage done to the cultural life of Indigenous Australians, both wittingly and unwittingly, by the Church or by government through the agency of the Church.

Coercion in matters of religious belief and action is unjust and offends against the dignity of the human person, to which religious freedom is essential.⁴²

Dr David Millikan spoke of the development of new religious movements and the need to ensure that they respect other people's right to freedom of religion as well as their own.

I believe that people are at their best and at their worst in Religion. We need to recognise that religious faith is one of the most potent agents for good and for evil in the lives of people. This is clear particularly in the world of cults and New Religious Movements. Not all of them by any means are evil, but the capacity they have for inflicting pain and havoc in people's lives is enormous. We are moving into a situation in Australia where it is important for us to begin to develop the capacity to discern between the two situations ... I understand that this is an enormously complex issue - but I am convinced that it is not going to go away.⁴³

A number of submissions focussed specifically on the right to freedom from discrimination on the basis of religion or belief. The Uniting Church Board for Social Responsibility submitted that there is unjust religious discrimination in society and that there should be national legislation prohibiting discrimination on the grounds of religion and belief.

Given that it is the national Government who has the power to enter into international human rights treaties, and who has done so, it is appropriate that there be national legislation to protect human rights in this way. A citizen's enjoyment of human rights should not depend on which state or territory they happen to be in at a particular time.

Any legislation needs to be based on an assumption that human rights is not about uniformity, but about respect for differences. Human rights are most likely to be respected, in general, in a society which welcomes and allows differences rather than in a society that requires uniformity.

On the other hand, we also recognise that clients of community services and the students in church schools are entitled to expect that their identity and human rights will be respected, and it is appropriate for society to provide legislative support for this.⁴⁴

Not all submissions favoured legislation to guarantee the right to freedom of religion and belief. The Festival of Light argued that such legislation was unnecessary, expressing the view that 'Australians have arguably more religious freedom than any other nation'.⁴⁵

Findings and recommendations

Australia has ratified or otherwise signified its support for a number of international human rights instruments which provide for the right to freedom of religion and belief.

- Section 116 of the Australian Constitution provides only limited protection of the right to freedom of religion and belief. It restricts only the legislative powers of the Commonwealth. It does not apply to the States. It is not a positive guarantee of freedom of religion and, apart from the prohibition of a religious test, it does not apply to executive and judicial powers and activities.
- Tasmania is the only Australian State to provide for the right to freedom of religion and belief in its constitution. The mainland States could therefore, if they saw fit, establish a state church or religion, oppress religious beliefs and practices or require a religious test as a qualification for any public office.
- Relevant federal, State and Territory laws do not provide comprehensive guarantees of the freedom of religion and belief.
- The level of protection afforded to the right to freedom of religion and belief in Australia is relatively weak compared to a number of other comparable countries.

Findings and recommendations

- Australia does not fully satisfy its international human rights obligations relating to freedom of religion and belief as set out in the ICCPR and the Religion Declaration.
- The Commonwealth has power under the Constitution to pass legislation to ensure greater protection of the right to freedom of religion and belief as set out in the ICCPR and the Religion Declaration.
- It is also open to the Commonwealth to put to the people a referendum proposing that the right to freedom of religion and belief be guaranteed through an amendment to Section 116 of the Constitution. However, the Commission is of the view that the enactment of Commonwealth legislation is a more appropriate way of addressing the issue at this stage. This would enable a period of reflection and debate within the community and would provide an opportunity to observe the operation of the legislation prior to taking the further step of proposing constitutional entrenchment.

The Commission recommends

- R2.1** The Commonwealth Parliament should enact a *Religious Freedom Act* which, among other things, recognises and gives effect to the right to freedom of religion and belief.
- R2.2** The *Religious Freedom Act* should affirm the right of all religions and organised beliefs as defined to exist and to organise and determine their own affairs within the law and according to their tenets.
- R2.3** The *Religious Freedom Act* should cover the full range of rights and freedoms recognised in ICCPR article 18 and Religion Declaration articles 1, 5 and 6 including but not limited to
- freedom to hold a particular religion or belief
 - freedom not to hold a particular religion or belief
 - freedom to manifest religion or belief in worship, observance, practice and teaching
 - freedom from coercion which would impair religion or belief
 - the right of parents and guardians to organise family life in accordance with their religion or beliefs
 - freedom from discrimination on the ground of religion or belief (detailed in chapter 4).
- R2.4** In accordance with ICCPR article 18.3 the *Religious Freedom Act* should permit only those limitations on the right to manifest a religion or belief which

are prescribed by law and necessary to protect public safety, health or morals or the fundamental rights and freedoms of others (detailed in chapter 3).

R2.5 For the purposes of the Religious Freedom Act, ‘religion and belief’ should be given a wide meaning, covering the broad spectrum of personal convictions and matters of conscience. It should include theistic, non-theistic and atheistic beliefs. It should include minority and non-mainstream religions and belief systems as well as those of a more traditional or institutionalised nature. Religion or belief should be defined as a particular collection of ideas and/or practices

- that relate to the nature and place of humanity in the universe and, where applicable, the relation of humanity to things supernatural
- that encourage or require adherents to observe particular standards or codes of conduct or, where applicable, to participate in specific practices having supernatural significance
- that are held by an identifiable group regardless of how loosely knit and varying in belief and practice
- that are seen by adherents as constituting a religion or system of belief.

The definition should not apply to all beliefs but only to those that clearly involve issues of personal conviction, conscience or faith. This definition would not cover beliefs which are caused by mental illness or which are motivated by criminal intent.

R2.6 The obligations in the *Religious Freedom Act* should apply to individuals, corporations, public and private bodies and all other legal persons who may be subject to Commonwealth legislation.

Notes

- 1 J Baldock ‘The Challenge of Religious Diversity to all Religious Groups, G Bouma (ed) *Many religions, all Australian: religious settlement, identity and cultural diversity*, The Christian Research Association, Adelaide, 1996, page 191.
- 2 R Kohn, ‘Cults and the New Age in Australia’, Gary Bouma (ed) *Many religions, all Australian: religious settlement, identity and cultural diversity*, The Christian Research Association, Adelaide, 1996, page 156.
- 3 E Durkheim, *The Elementary Forms of Religious Life*, 1915, trans. J W Swain, Free Press, New York, 1975, page 62.
- 4 *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 154 CLR 120. The Court was asked to decide whether the Church of Scientology was a ‘religious or public benevolent institution’ for the purposes of the *Pay-Roll Tax Act 1971* (Vic). The Court held that the beliefs, practices and observances of the Church of Scientology did, in fact, constitute a religion in Victoria.
- 5 *Id*, page 136.
- 6 *Id*, page 174.

Chapter 2 Notes

- 7 Id, page 150.
- 8 Id, page 151.
- 9 D J Sullivan, 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination', 82 *American Journal of International Law* 487, page 491 n.17 (1988).
- 10 General Comment No. 22 (1993) paragraph 1 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.3, 1997, page 36.
- 11 General Comment No.22 (1993) paragraph 2.
- 12 Ibid.
- 13 Id, paragraph 3.
- 14 Ibid.
- 15 For example, T C Van Boven, *Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, UN Doc. E/CN.4/Sub.2/1989/32 1989, paragraph 5; E Odio Benito, *Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion or Belief*, UN Doc. E/CN.4/Sub.2/1987/26 1986, paragraph 13, reprinted in *Human Rights Study Series No.2*, UN Sales No. E.89.XIV.3, 1989; A Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Doc. E/CN.4/Sub.2/200/Rev.1, page 1 n.1, UN Sales No.60.XIV.2 (1960) reprinted in (1978) 11 *New York University Journal of International Law and Policy* page 227.
- 16 Francis Jacobs and Robin White, *The European Convention on Human Rights*, Clarendon Paperbacks, Oxford, 2nd edition, 1996, page 211.
- 17 A lengthy submission complained that the enforced and involuntary treatment of people with beliefs identified as deluded, hallucinatory or disordered may constitute a breach of the freedom to believe. However, the Commission is of the view that, while this type of activity may be a violation of human rights, in some circumstances, it does not give rise to any issue under ICCPR, article 18 and it is more appropriately addressed through other legal avenues. See R Gosden *Submission R/26*. Also for identical arguments, R Winkle *Submission R/27*, J Slaughter *Submission R/28* and *Anonymous Submission R/193*.
- 18 Communication No. 570/1993, Inadmissibility Decision of April 8 1994.
- 19 Section 116 is modelled on section 3 of Article VI and the First Amendment to the United States Constitution.
- 20 Dr Reid Mortensen *Submission R/244*.
- 21 *Attorney-General (Victoria); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 (the DOGS case).²⁴ This case involved a challenge by the Council for the Defence of Government Schools to a federal government decision to provide funding to private schools. The funding was provided by the Commonwealth to the States as an appropriation by the Parliament under Section 96 of the Constitution. The funds were grants to the States on condition that they be paid by the States to non-government schools to finance their educational programs, including the erection of school buildings.
- 22 *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116.
- 23 Id, page 155 (per Starke J).
- 24 *Church of the New Faith v Commissioner for Payroll Tax (Vic.)* (1983) 154 CLR 120, pages 131-132.
- 25 Constitution Section 51(xxix).
- 26 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, pages 646, 674, 688; *R v Poole; Ex parte Henry (No. 2)* (1939) 61 CLR 634; *Airlines of New South Wales v New South Wales (No. 2)* (1965) 113 CLR 54, pages 82, 102, 118, 126, 141; *Commonwealth v Tasmania* (the Franklin Dam case) (1983) 158 CLR 1; *State of Victoria v Commonwealth of Australia*; *State of South Australia v Commonwealth of Australia*; *State of Western Australia v Commonwealth of Australia* (1996) 138 ALR 129. Some judges have suggested that is not enough for a challenged law to give effect to treaty obligations; that the law must, of itself, also deal with a subject of 'international concern' to be valid under Section 51(xix): see, for example, Justice Stephen in the Franklin Dam case at page 216. See also L Zines, *The High Court and the Constitution*, Butterworths, Sydney, 3rd edition, 1992, Chapter 13.

- 27 A proposed constitutional amendment to extend Section 116 to cover the States was defeated at a referendum in 1988.
- 28 The limited nature of the legal guarantees provided by the Tasmanian Constitution arises in part from the fact that it is contained in an ordinary Act of the Tasmanian Parliament. This contrasts with the Commonwealth Constitution which is contained in a statute of the British Parliament, the *Commonwealth of Australia Constitution Act 1900*.
- 29 *Grace Bible Church Inc v Reedman* (1984) 54 ALR 571. See also Dr Reid Mortensen *Submission R/242*.
- 30 W Cole Durham Jr 'Perspectives on Religious Liberty: A Comparative Framework', in J van der Vyver and J Witte (ed), *Religious Human Rights in Global Perspective: Legal Perspectives*, Martinus Nijhoff Publishers, The Hague, 1996, pages 1-44.
- 31 Many countries provide a constitutional protection of religious liberty. They include Austria, Belgium, Brazil, Bulgaria, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Mexico, Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovenia, Spain, Sweden and Switzerland.
- 32 In *Employment Division v Smith* 494 US 872 (1990) the US Supreme Court stated that government no longer had to demonstrate a compelling interest unless a law was specifically targeted at a religious practice or infringed upon an additional constitutional right such as free speech.
- 33 Boyle and Sheen, *Freedom of Religion and Belief: A World Report*, Routledge, London and New York, 1997, pages 314-322.
- 34 The Human Rights Bill 1997 (UK) incorporating the European Convention on Human Rights was originated in the House of Lords on 3 November 1997 and passed by that House on 5 February 1998. An amended version of the bill is now before the House of Commons.
- 35 The Commission received several submissions indicating some community suspicion about the role, objectives and influence of the United Nations. See, for example, P Boyd *Submission R/128*; E Seaton *Submission R/130*; Mrs Hardy *Submission R/143*; Pastor John Porter, Manningham Christian Centre, *Submission R/207*; Rev. S Slucki *Submission R/214*; T Sullivan, Nanango Christian Faith Centre, *Submission R/216*; Peter and Jenny Stokes, Salt Shakers, *Submission R/217*; M Milne, Frankston Community Church, *Submission R/219*; Roslyn Phillips, Festival of Light, *Submission R/231*; J Swan *Submission R/233*; Church and Nation Committee, Presbyterian Church of Victoria, *Submission R/234*.
- 36 M McDougal, H Lasswell and L Chen, *Human Rights and World Public Order*, Yale University Press, New Haven, 1980, page 673.
- 37 P Alston, 'The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time More for Reflection Than for Celebration', in J Berting (ed), *Human Rights in a Pluralist World: Individuals and Collectives*, Meckler Ltd, London, 1990, page 1.
- 38 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, page 42.
- 39 The Declaration was adopted unanimously by the 37th Session of the United Nations General Assembly in November 1981. Australia supported the adoption of the Declaration.
- 40 For the purpose of ILO 111 discrimination on the ground of religion means any distinction, exclusion or preference made on the basis of religion that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation: article 1(a).
- 41 Dr Juliet Sheen *Submission R/245*.
- 42 Rev. Ray Cleary, Social Responsibilities Committee, The Anglican Diocese of Melbourne, *Submission R/50*.
- 43 Rev. Dr David Millikan *Submission R/2*.
- 44 Uniting Church in Australia, Board for Social Responsibility *Submission R/228*.
- 45 Roslyn Phillips, Research Officer, Festival of Light, *Submission R/231*.

3 Religious expression

3.1 Introduction

Article 18 of the *International Covenant on Civil and Political Rights* protects not simply the freedom to believe but also the freedom to manifest that belief in practice and expression. The right to freedom of thought, conscience and religion includes freedom

... either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

The manifestation of religion or belief may take many forms. Article 6 of the *UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief* sets out some key elements of the right including

- worshipping and assembling, and maintaining places for this purpose
- establishing and maintaining charitable or humanitarian institutions
- practising religious rites and customs
- writing and dissemination of religious publications
- teaching of religion and belief
- soliciting voluntary financial support
- training and appointment of religious leaders in accordance with the requirements and standards of the religion or belief
- observing religious holidays and ceremonies
- communicating with individuals and communities on matters of religion and belief.

The wording of article 6 is illustrative rather than exhaustive. Expressions of religion or belief not specified may also be covered. Article 6 makes clear that the religious community's joint or shared expression of its beliefs is protected equally with the individual's right. Many of the activities listed can, in reality, only be organised by groups or communities of people who share a belief system.

The freedom of a church, other belief society or individual to manifest a religion or belief, however, is not unqualified as the freedom to believe is. It may be subject to limitations imposed by the government in the public interest. ICCPR article 18.3 prescribes the scope of the permissible limitations on the freedom to manifest a religion or belief.

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 (emphasis added).¹

3.2 Indigenous heritage protection

The United Nations Human Rights Committee has given some guidance on the interpretation of this limitations clause.

Limitations may be applied only for those purposes for which they are prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.²

Also important in the context of religious expression is the fact that Australia is a multicultural society which embraces a diversity of religious traditions and beliefs. Successive Australian governments have committed themselves to policies of multiculturalism. In the 1989 *National Agenda for a Multicultural Australia* the then Commonwealth Government identified as one of the key dimensions of multicultural policy

... the right of all Australians, within carefully defined limits, to express and share their individual cultural heritage, including their language and religion.³

The scope of the state's power to restrict or influence religious expression must be consistent with both the right to manifest religion or belief and the permitted limitations on that right. In determining the scope of permissible limitations clauses, states should proceed from the need to protect the rights guaranteed under the ICCPR, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26, notably including religion.

Consideration of the right to express religion and belief and of the circumstances in which that right should be limited or restricted raises some very complex and sensitive issues. In Australia limitations on the expression of religion and belief may be identified in a wide range of laws and community norms. It is not possible within the scope of this report to give a detailed analysis of all the relevant laws and practices. However, this chapter considers a number of key issues identified in submissions. They include Indigenous beliefs, marriage laws, burials and medical procedures such as autopsies and blood transfusions. These issues are examined in terms both of the right to express one's religion and belief freely and of the extent of existing and permissible limitations on that right.

3.2 Indigenous heritage protection

There can be no reconciliation without justice. Justice for indigenous people can only be brought about by the acceptance, recognition and appreciation of the spiritual connections that indigenous people have to traditional lands.⁴

This report does not examine in detail all Indigenous beliefs, traditions and spiritual issues which pertain to the right to freedom of religion and belief. The focus is limited to the protection of Indigenous sites and objects of religious significance and later to burial beliefs.

Aboriginal beliefs and spirituality are intrinsically linked to the land generally and to certain sites and objects of significance in particular. Their preservation is fundamental to the spiritual and religious life of Indigenous peoples. The UN Special Rapporteur for Indigenous Peoples, Erica-Irene Daes, has stated

The profound, highly complex and sensitive relationship that indigenous peoples have to their lands, territories and resources must be taken into account in protecting the integrity of their environment from degradation ... it includes social, economic, cultural and spiritual dimensions which must not be overlooked ... Cultures that have flourished as an integral part of their environment, cannot continue to tolerate disruption.⁵

As W E H Stanner has noted, it is linguistically and conceptually difficult to convey the fundamental importance of the links between Australian Indigenous spirituality and place.

No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word 'home', warm and suggestive though it might be, does not match the Aboriginal word that may mean 'camp', 'hearth', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre' and much else all in one. Our word 'land' is too spare and meagre. We can scarcely use it except with economic overtones unless we happen to be poets.⁶

The significance of sacred sites and land to the spiritual lives of Aboriginal and Torres Strait Islander peoples is often overlooked and undervalued by the general community and governments. Evidence of this oversight was noted by the UN Special Rapporteur on Religion and Belief, Abdelfattah Amor, during his visit to Australia in 1997. Mr Amor observed that information on Aboriginal and Torres Strait Islander beliefs was not included in statistics provided to him on Australia's religious diversity.

Aboriginals are not identified in the table of religions in Australia. Part of this population may, of course, be included in the Christian religion. However, the Aboriginals have their own beliefs, which are manifested by their sacred ties to the Earth and which have to be taken into account as part of Australia's religious diversity.⁷

Mr Amor noted the importance of land and sacred sites to Aboriginal and Torres Strait Islander religion and belief.

The land and sacred sites hold a fundamental significance for the Aboriginals, insofar as their beliefs are identified with the land. A basic question is therefore the recognition of an Aboriginal religion intrinsically related to the land within the framework of an Australian society essentially based on Judeo-Christian and western values. In the view of the Aboriginals, maintaining the integrity of the land takes on a religious dimension, which therefore has to be preserved.⁸

3.2 Indigenous heritage protection

In Australia heritage protection legislation provides some limited and indirect protection for the religious beliefs of Aboriginal and Torres Strait Islander peoples. The federal *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the Heritage Act) and separate legislation in each State and Territory provide the legislative framework for the protection of sites with heritage or cultural significance for Indigenous peoples.

The Heritage Act

The purpose of the Heritage Act is to preserve and protect from injury or desecration areas and objects that are of particular significance to Aborigines and Torres Strait Islanders in accordance with their tradition. The Heritage Act was introduced in 1984 to enable the Commonwealth to protect significant Indigenous areas and sites when State or Territory law fails to do so. Under the Heritage Act Aborigines and Torres Strait Islanders can ask the federal Minister to make a declaration to protect an area or object under threat of injury or desecration. Declarations range from emergency declarations of up to 48 hours to long term declarations of 20 years or more. Of the four long term declarations made since 1984, only one remains in force.

The history of Boobera Lagoon demonstrates the difficulty of proving the religious significance of sites and successfully having a declaration made under the Act for protection. The Gamiliraay community near Boggabilla on the NSW-Queensland border claim that Boobera Lagoon is a sacred site which is a significant resting place of Gurriya, the Rainbow Serpent. The area of significance covers the entire lagoon and the land bordering it and is considered to be the most important Aboriginal site in the area. Aboriginal people do not swim in the water out of respect for the Rainbow Serpent and the shores hold shell middens, an area with stone tool remnants and ancient traditional camping grounds.⁹

This site has been disturbed for many years by water-skiing and the large numbers of tourists which this activity brings. Other concerns relate to access to the foreshore by campers, cattle agistment and a travelling stock route which all damage the land and disturb the water of the lagoon. The site was registered as a Declared Aboriginal Place in 1984 under NSW law but recreational activities on the lake have continued.¹⁰

The Gamiliraay community sought an emergency declaration under the Heritage Act in 1992 to halt water-skiing and power boating on the lake which the community believe desecrates the site. That and three subsequent temporary applications were declined. A mediator was appointed to assist in the resolution of the problem and an application was made for permanent protection in 1994. Hal Wooten AC, QC reported to the Minister for Aboriginal Affairs on 20 April 1996.¹¹ The report acknowledged the difficulty of the essential dilemma in this situation.

Putting aside the more emotional arguments that are being used ... one cannot but feel considerable sympathy for the waterskiers, and recognise that loss of Boobera Lagoon as a waterskiing site would cause them considerable pain. But Aboriginal people have a longstanding and prior right, the denial of which has caused them

considerable anguish over a long period, and which will continue indefinitely if the waterskiing continues. Although the waterskiers may have been largely unaware of it, their attachment to the Lagoon has been built up, and their current enjoyment of it continues, at the expense of Aboriginal feelings for the spiritual significance of the Lagoon and their traditional responsibility to look after it.¹²

The report recommended a strategy for the future management of Boobera Lagoon which included the prohibition for 10 years of waterskiing and powerboating on Boobera Lagoon and the prohibition of livestock, camping and the use of vehicles within 100 metres of the high water level.¹³

However, the report's recommendations have not been adopted and there is still no protection against the threats of injury and desecration which are said to occur as a result of water-skiing activity and foreshore camping or through the use by local landowners of the travelling stock route.¹⁴ An internet tourist site for the area of Goondiwindi, Queensland, describes Boobera Lagoon as a 'stretch of water ideal for water-skiing and swimming'.¹⁵ This is a telling insight into the lack of knowledge, recognition and respect for Aboriginal religious beliefs.

Submissions on heritage protection legislation

A number of submissions to the Commission expressed concern at the ineffective protection of Aboriginal land rights and heritage in Australia.

The Chaplaincy Team of the University of Queensland referred to the considerable debate about matters affecting the rights of Indigenous people to practise their religion. The Team said that many people did not recognise the significance of land and sacred sites to Aboriginal people. It identified a need for effective laws dealing with the preservation of and access to sacred sites for Indigenous people which provide for extensive consultation with Indigenous people and which protect their interests as well as the commercial interests of others.¹⁶

Dr Juliet Sheen commented

Aboriginal sacred and significant sites are poorly protected by inconsistent state-based laws. A safety net exists - though infrequently used - in the form of the federal government's capacity to order the protection of such sites.¹⁷

The inadequacy of the protection of Indigenous cultural heritage in Australia was recognised by UN Special Rapporteur Amor on his visit to Australia. He commented on the problems of the complexity of the existing legislation and the inconsistent protection that various State, Territory and federal laws provide. He observed

One criticism which is often put forward is the inability of these laws derived from a Western legal system to take account of Aboriginal values. A basic difficulty arises from the fact that, under some laws, Aboriginals have to prove the religious significance of sites and their importance ...¹⁸

Evatt Review of the *Heritage Act*

Dissatisfaction with the effectiveness of the Heritage Act led to a comprehensive review of the Act in 1996 by the Hon Elizabeth Evatt AC.¹⁹ The review recognised the conviction of Aboriginal people that the Heritage Act had failed to protect their cultural and spiritual heritage. Ms Evatt undertook the review in accordance with the following policy goals:

- to respect and support the living culture, traditions and beliefs of Aboriginal people and to recognise their role and interest in the protection and control of their cultural heritage
- to retain the basic principles of the Heritage Act, as an Act of last resort and to ensure that the Heritage Act can fulfill its role as a measure of last resort by encouraging States and Territories to adopt minimum standards for the protection of Aboriginal cultural heritage as part of their primary protection regimes
- to provide access to an effective process for the protection of areas and objects significant to Aboriginal people
- to provide a process which operates in a consistent manner, according to clear procedures, in order to avoid unnecessary duplication, delays and costs
- to ensure that Aboriginal people participate in decisions about the protection of their significant sites and that their wishes are taken fully into account
- to ensure that heritage protection laws benefit all Aboriginal people, whether or not they live in traditional life style, whether they are urban, rural or remote, so as to protect the living culture/tradition as Aboriginal people see it now
- to resolve some of the difficulties of developers by better procedures which ensure early consideration of heritage issues in the planning process, effective consultation with Aboriginal people and genuine mediation.

Ms Evatt reported in 1996.²⁰ She identified four categories of problems with the Act.

- *Uncertainty and delays.* The procedures for making declarations under the Act are not spelled out in detail. The Heritage Act is intended to operate as a last resort but the interaction between Commonwealth and State/Territory laws is not clearly established. It is unclear how much consultation there should be with State and Territory governments. This has led to delay and uncertainty in dealing with applications.
- *Fair procedures not spelled out.* The Heritage Act establishes a reporting process to the Minister but does not specify how the reporter should ensure that interested parties are treated fairly. This has led to several Federal Court challenges which have laid down complex procedures for the Minister and the reporter to follow. Procedures have also exposed Aboriginal religious beliefs to intensive scrutiny.

- *Impeding development.* Intervention under the Heritage Act can cause delays and costs after development planning processes are completed and a project is already approved.
- *Lack of Aboriginal involvement and respect for custom.* Aboriginal people consider that the Heritage Act has not protected their heritage and has deferred too much to ineffective State and Territory processes which do not recognise their role in the identification, management and protection of heritage. The Act does not respect cultural restrictions on the disclosure of information necessary for the protection of Aboriginal heritage and confidentiality is not protected. The Act does not adequately recognise or provide for the involvement of Aboriginal people in negotiations and decision-making about their cultural heritage. Aboriginal people want the Heritage Act to be maintained and strengthened.²¹

The Evatt Report made a number of detailed recommendations about the procedures and processes of the Heritage Act and its interaction with State and Territory legislation. The recommendations were endorsed by the Aboriginal and Torres Strait Islander Commission and the Aboriginal and Torres Strait Islander Social Justice Commissioner. They were also endorsed by the UN Special Rapporteur on Religion and Belief.

... More protective legislation is required, incorporating Judge Evatt's recommendations ... in order to prevent any impairment of religion and to ensure that discretionary power in the hands of the authorities is shared with the Aboriginals.²²

Parliamentary Committee report

The Heritage Act was subsequently reviewed by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund which presented its report to Parliament on 2 April 1998.²³ The report responded to a reference by the Senate on 26 March 1997 to consider the urgent need for amendments to the Heritage Act

... consistent with the report of the Review of the Act by Justice Elizabeth Evatt, in order to avoid or minimise the repetition of any further incidents, such as the Hindmarsh Island Bridge situation, in which the spiritual and cultural beliefs of the Aboriginal and Torres Strait Islander people are not able to be properly considered under existing legislative arrangements.²⁴

The report made a number of findings including the need to

- maintain Commonwealth legislation as an accessible 'last resort'
- require States and Territories to provide blanket (or presumptive) protection of Indigenous heritage to qualify for accreditation under the Act
- ensure that disclosure of culturally sensitive information is not necessary to establish the significance of a site.²⁵

The Heritage Protection Bill

On the day the Committee tabled its report, the Government introduced the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 intended to replace the Heritage Act.

The Bill proposes to minimise Commonwealth involvement in Aboriginal cultural heritage protection. States and Territories will be accredited by the Commonwealth after meeting certain minimum standards. The Commonwealth would then have no role in the protection of Aboriginal heritage except in relation to unaccredited regimes or in cases where the protection of an area or object might be in the 'national interest'.

The Bill has been widely criticised. Elizabeth Evatt was quoted as stating that with this Bill the Federal Government was abdicating its responsibility to preserve Aboriginal heritage by handing back its protection power to the States without adequate minimum standards. She said that this was contrary to her findings that most State and Territory regimes do not adequately protect cultural heritage.²⁶

The Aboriginal and Torres Strait Islander Commission also criticised the Bill on a number of similar grounds including the fact that 'national interest' is not defined and may be limited to decisions which affect export income or employment rather than allowing a broader definition which might include the protection of significant areas and sites. The ATSIIC Chairman, Gatjil Djerrkura, was reported as saying

This Bill significantly erodes this sole remaining option under the Howard government's own agenda by withdrawing Commonwealth involvement in indigenous heritage, except in cases involving the 'national interest'.²⁷

The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund reviewed the Bill in light of the recommendations made in its previous report. The Committee conducted two days of hearings and received 28 submissions from interested parties. It reported its findings in its twelfth report in May 1998.²⁸

The Committee recommended specific changes to the Bill including that it should

- provide for blanket, or presumptive, protection of Indigenous heritage and for States and Territory legislation to have this protection in order to achieve accreditation
- define 'national interest' comprehensively (but not exhaustively) so as to include the protection of Indigenous heritage
- provide a more detailed and comprehensive Commonwealth Standard by which States and Territories may qualify to adopt their own heritage protection regimes subject to the Commonwealth's last resort function.²⁹

These suggested amendments would resolve in some measure the main flaws of the Bill but it is arguable that they do not go far enough. In particular the retention of any form of a 'national interest' criterion for Commonwealth intervention may be a step

away from the fundamental purpose of the legislation and the Commonwealth's national responsibility to provide a remedy of last resort for all Indigenous heritage which is not protected adequately by State or Territory legislation. The minority report of the Committee rejected the Bill on this ground.

The Minority emphasises the point entailed jointly by evidence from Ms Elizabeth Evatt, Professor Garth Nettheim, and Mr Mick Dodson, that:

- the combination of an inadequate accreditation regime;
- together with a 'national interest' criterion for submitting heritage protection applications to the Commonwealth for accredited jurisdictions; entails
- that, in practice, the Bill would establish a heritage protection regime that could not be used as a last resort in the overwhelming majority of cases.³⁰

Despite the Committee's concerns about the Bill the government has proceeded with the original Bill and ensured its passage through the lower house without amendment. It is now to be considered by the Senate.³¹

Comment

In addition to article 18, the ICCPR specifically addresses minority religious, and other, rights in article 27.

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

Indigenous Australians are a minority but more than that they have distinct rights as First Peoples. The history of colonisation has led to Aboriginal and Torres Strait Islanders becoming a minority in their own country and these peoples are at least entitled to the legal protection afforded to minorities by ICCPR article 27.³²

In 1994 the Human Rights Committee established by the ICCPR adopted a General Comment to the effect that States Parties are obliged to take positive measures where necessary to ensure that minorities can enjoy their human rights.

Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group.³³

In addition the Human Rights Committee stated that cultural rights for Indigenous peoples may involve a right to a particular way of life associated with the use of land resources including fishing and hunting. The enjoyment of these rights may require positive legal measures to ensure that members of the minority can effectively participate in decisions which affect them.³⁴

At present there is no international instrument which protects specifically Indigenous rights. The *Draft United Nations Declaration on the Rights of Indigenous Peoples* (Draft Declaration) has been developed by the Working Group on Indigenous Populations over approximately eight years. Indigenous representatives from all over the world participated in the deliberations.³⁵ It recognises the fundamental importance of protecting the cultural and religious rights of Indigenous peoples.³⁶ Article 12 of the Draft Declaration provides

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13 of the Draft Declaration provides

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

The Draft Declaration is extremely important to ensuring an appropriate international legal framework is created to protect Indigenous rights.

Findings and recommendations on Indigenous heritage protection

- The protection of Aboriginal and Torres Strait Islander heritage property is fundamental to the continuation of the cultural and spiritual beliefs of Indigenous Australians. Failure to implement an adequate protection regime for Indigenous heritage breaches international law.
- Current Australian protection of Indigenous heritage is inadequate and fails to meet Australia's commitment under articles 18 and 27 of the ICCPR.

The Commission recommends

- R3.1** The current legislative regime protecting Indigenous cultural heritage should be enhanced in line with the recommendations made by the Hon Elizabeth Evatt in *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

- R3.2** Adequate minimum standards should be established by the Commonwealth and the States and Territories to ensure consistent treatment and protection for Indigenous heritage throughout Australia.
- R3.3** Proposed changes to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) should ensure that the Heritage Act is enhanced as an effective federal avenue of last resort to protect Indigenous religious and spiritual heritage.
- R3.4** Australia should continue to support the completion and adoption of the *Draft United Nations Declaration on the Rights of Indigenous Peoples* to provide better protection for the right of Indigenous Australians to religious freedom.

3.3 Marriage laws

There is no universal definition of marriage. The concept of marriage varies both within and between countries and cultures. In the Australian context, marriage is best described as a relationship between two people which constitutes the basis of a family unit. Even though marriage is no longer the only socially acceptable way of starting a family, it is still the most common. Marriage has significant personal, social and, for many, religious consequences. It also has legal consequences. The principal federal laws regulating marriage relationships are the *Marriage Act 1961* (Cth) (the Marriage Act) and the *Family Law Act 1975* (Cth).

The Marriage Act sets 18 years as the marriageable age for both males and females.³⁷ If either of the parties is not of marriageable age at the time of the marriage the marriage is not valid.³⁸ However, the Act provides that in 'exceptional and unusual' circumstances a court may authorise the marriage of a person no more than two years below marriageable age.³⁹

In making a decision on whether to authorise a marriage where one of the parties is below the age of 18 years the court may, where appropriate, take into account the cultural background and the religious persuasion of the child and his or her family. In its 1992 report *Multiculturalism and the Law*, the Australian Law Reform Commission expressed the view that current laws cater adequately for different cultural traditions relating to the age of marriage.

The Commission acknowledges that it is traditional in some communities for girls to marry before they are 18. Girls generally mature earlier than boys. However, marriage is an important relationship and has long term consequences. Postponing marriage until she is 18 would give a girl the opportunity to complete her school education and to gain some extra maturity before taking on the responsibilities of marriage. The existing law gives a couple who wish to marry before one of them has turned 18 the opportunity to have their circumstances considered objectively. It gives the court enough flexibility to make its decision taking into account the particular circumstances of the case. Among the circumstances that should be taken

3.3 Marriage laws

into account, if applicable, are the cultural traditions of the couple. The Commission is of the view that there are no grounds for extending the circumstances in which it is appropriate for a court to give consent to a person to marry before he or she is 18. It does not recommend that the existing law be changed.⁴⁰

Submissions to this Inquiry did not express significant concern about this issue. In fact there was only one submission which dealt specifically with the age of marriage. Dr Prince Roman argued that current laws on the age of marriage are unnatural and contrary to the spirit of human rights and freedom of religion.

Then there is the question of marriageable age. Modern societies generally ignore puberty and impose arbitrary ages of consent which inevitably cause more social problems than they prevent.⁴¹

Dr Roman suggested that the age of consent for marriage should be as low as 14 years.

Comment

International human rights law provides limited guidance on this issue. While it recognises the concept of 'marriageable age' it does not take a prescriptive approach to what constitutes marriageable age. ICCPR article 23 provides

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the full and free consent of the intending spouses.

The *Convention on the Elimination of Discrimination Against Women* (CEDAW) article 16.1 obliges states to eliminate discrimination against women in all matters relating to marriage and family relations and in particular to ensure, on a basis of equality of men and women,

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; ...

The Religion Declaration makes no direct reference to marriage or the age of marriage.

The reference to 'full and free consent' in the ICCPR and CEDAW affirms the rejection by international human rights law of any element of compulsion in entering a marriage. In addition, these instruments clearly contemplate that the parties must be of sufficient age and maturity to provide that level of consent.

The *Convention on the Rights of the Child* (CROC) does not specifically address the question of marriageable age. Article 1 defines a child as being a person under the age of 18 years. Article 1 also provides that this is subject to laws which allow for an age of majority which is below 18 years. It therefore preserves national laws prescribing the age of marriage.

CROC article 30 provides

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

The provisions in the Marriage Act which allow court authorisation of a marriage of a person no more than two years below the marriageable age of 18 are consistent with the international treaty provisions relevant to this issue.

Findings on marriage laws

Submissions generally supported the view that young people below the age of 16 (and in many cases those in the 16 to 18 age range) generally will not have attained the degree of maturity and life experience required for a decision with consequences as significant and far reaching as marriage. The clear consensus is that these are the formative years of a person's life and that they should be devoted to preparation for rather than assumption of the full responsibilities of adulthood. This position is consistent with provisions in CROC relating to the age of majority and to the child's evolving maturity and development.

Current laws regarding the age of marriage do not demonstrate any clear violation of international human rights law. On the contrary they indicate acceptance of the obligation under international human rights law to protect children from exploitation and abuse. Submissions do not indicate major concerns about violations of the right to freedom of religion or belief arising from these laws. Accordingly, the Commission does not recommend any changes to existing law concerning marriage.

3.4 Polygamy

According to Australian law a marriage that takes place in Australia is not valid if either of the parties is, at the time of the marriage, lawfully married to someone else.⁴² It is also a criminal offence for a person who is already legally married to enter into a marriage with another person.⁴³ Similarly, it is an offence for a person to enter into a marriage with someone who is already married where that person knows or has reasonable grounds to believe that the other person is married.⁴⁴

However, the law takes a somewhat different approach to a marriage that takes place outside Australia. A polygamous marriage validly contracted overseas is deemed to be a marriage for the purpose of proceedings under the *Family Law Act 1975* (Cth).⁴⁵

Accordingly, the parties to the marriage may take proceedings under the Act for dissolution of marriage, custody of or access to children and so on. In some circumstances polygamous marriages contracted outside Australia may also be

3.4 Polygamy

recognised for other purposes of Australian law such as inheritance and accident compensation.

The Australian Law Reform Commission in *Multiculturalism and the Law* pointed out some anomalies in the way Australian law treats marriages and de facto relationships. Some laws make a second marriage a criminal offence but afford a de facto relationship the same treatment as a valid marriage even where one or both parties are already married or in another de facto relationship.⁴⁶ These anomalies raise broader legal issues governing recognition of de facto relationships. They do not in themselves provide a human rights justification for permitting and recognising polygamous marriages.

Dr Prince Roman argued in his submission to this Inquiry that laws prohibiting the practice of polygamy violate both the Religious Declaration and Section 116 of the Commonwealth Constitution.

Today, in our human rights and anti-discrimination re-orientation, polygamy is not only still a dirty word but also criminal, because Christian society says so. Muslims (and others) are, therefore considered to be sinful and criminal, a world apart. This neither accords in appearance with either constitutional or international law, although I believe both to be so narrowly interpreted at present that the intention of both is hindered, seriously.⁴⁷

Dr Roman argued that the laws should be changed to allow men to take up to four wives in accordance with Islamic tradition. However, submissions generally were not supportive of changes to current laws to allow for the legalisation or broader recognition of polygamous marriage in Australia.

Comment

International human rights law provides some guidance on the issue of polygamy. Many international treaties relating to families, marriage and the rights of parties to marriage use language which contemplates marital arrangements consisting of two parties only. This is evidenced by expressions such as 'both spouses'. Some fundamental principles of international law add further weight to the view that polygamy should not be legalised in Australia. Of particular relevance here is the principle of gender equality, enshrined in the ICCPR, CEDAW and other instruments. Gender equality is also firmly entrenched in Australia's domestic law. Polygamous arrangements often involve men but not women being permitted multiple marriage partners. They do not sit easily with human rights principles. On the other hand, ICCPR article 27 provides for the right of religious and other minorities to practise their own culture and religion.

In the context of religious freedom, the distinction needs to be made between those practices which are an essential part of adherence to a religion or constitute a religious obligation and those practices which are merely permissible under the teachings of a religion. For people who subscribe to Islamic beliefs, polygamy is regarded as permissible but it is certainly not a prescribed or mandatory practice.⁴⁸ Laws prohibiting

polygamy therefore do not offend the fundamental requirements or tenets of Islamic faith. It is difficult to sustain the proposition that these laws offend the right to freedom of religion and belief.

The importance of this distinction gains added weight in the context of article 18.3 of the ICCPR. Article 18.3 allows limitations on the manifestation of religion or belief where they are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others. Clearly it is difficult to argue that laws necessary to protect fundamental rights and freedoms and the other important social interests listed in article 18.3 should be overridden by practices which are permissible but not essential or fundamental to religion or belief.

Findings on polygamy

There is no clear basis under international law for the legalisation of polygamy and no significant support from submissions. Indeed human rights law would prohibit polygamy unless the equal rights of men and women are ensured. The Commission does not recommend changes to existing law.

3.5 Burials

Most religious groups have particular customs regarding the handling and burial of human bodies.

Indigenous beliefs

In traditional Indigenous societies death often involves an elaborate series of rituals. According to Indigenous Australian beliefs the body must be reunited with the land from which it originated and so the place of the burial is of particular importance.

Many traditional Indigenous communities have their own particular burial rituals. In some cases these rituals are very different from those of Western culture. For example, in some Indigenous communities the body is not buried but instead left in the bush. These differences may lead to conflicts with existing legislation, which is written primarily to accommodate Western burial customs and traditions. These conflicts are alleviated to some degree by exemptions in relevant State and Territory legislation allowing for burials outside cemeteries with the consent of the Minister.⁴⁹ These provisions have been used to accommodate traditional Indigenous beliefs.

Local Government Minister Paul Omodei yesterday approved a rare traditional funeral in WA's far north ... [name deleted], who died on Wednesday in his early 70s, asked for his body to be returned to the place of his birth in the Roe River area of the spectacular Prince Regent nature reserve, in the West Kimberley. The site is 300 km from the nearest cemetery ... [name deleted]'s body will be placed in a tree-bough shelter until his family returns in the next dry season to complete the second phase of mourning and burial procedures, in accordance with the

Finding and recommendations on burials and Indigenous beliefs

traditions of [name deleted]'s Ngarinyin tribal group. It will be put in a cave near the place from where he believed his spirit emerged ...⁵⁰

The provisions of international human rights law of most relevance to traditional Indigenous burial are those which deal with the right of groups of people to practise their own culture. This is a theme which strongly pervades international law and finds expression in a number of treaties binding on Australia.

ICCPR article 27 provides

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

There is a similar provision relating to children in CROC article 30.

Provisions relating to Indigenous spiritual and religious traditions, customs and ceremonies are also found in the *Draft United Nations Declaration on the Rights of Indigenous Peoples*.

The current arrangements which require the family of the deceased to seek special approval before proceeding with a traditional burial are unlikely to violate these provisions in the ICCPR and CROC. They do not in themselves prohibit the expression of Indigenous culture and belief, especially if the discretions under those laws are exercised in a sensitive and appropriate manner. However, the legislation in most jurisdictions contains little in the way of guidance on the way in which these discretions should be exercised. The Commission considers this unsatisfactory in ensuring adequate protection for sacred rituals of this type. Ministerial decisions on matters of this significance should be subject to clear guidelines aimed at achieving appropriate accommodation of Indigenous beliefs and traditions. There should also be a degree of consistency across jurisdictions in the standards applied to these decisions.

Finding and recommendations on burials and Indigenous beliefs

- In most States and Territories, preservation of traditional Indigenous burials and associated rituals is subject to ministerial discretion.

The Commission recommends

- R3.5** A Working Group should be established to develop national standards on the preservation of traditional burials and associated rituals.
- R3.6** The Working Group should be convened by the Aboriginal and Torres Strait Islander Commission and include representatives of relevant State and Territory agencies, Indigenous organisations and traditional Indigenous communities.

- R3.7** In developing the national standards, consideration should be given where appropriate to the proposed national standards on protection of Aboriginal heritage in Australia (R3.2).
- R3.8** When the national standards are finalised, they should be referred to the Standing Committee of Attorneys-General with a view to their being incorporated into relevant State and Territory legislation.

Non-Indigenous burials

Non-Indigenous religious groups such as Muslims also have special needs regarding burials.

Muslims bury the body as quickly as possible, preferably before sundown on the day of death. The body is cleaned and shrouded in a winding cloth and traditionally is buried in the earth only in that wrapping. The body must be buried lying on the right side with the face towards Mecca.⁵¹

In most metropolitan areas in Australia council cemeteries provide a Muslim burial section where people can be buried in the Islamic tradition. In Sydney, for example, Islamic burials may be carried out in Rookwood cemetery and at Liverpool.⁵²

However, there are some problems with Muslim burial requirements in small communities, such as Young in NSW. The Young Council does not have segregated religious areas in its cemetery and burial plots cannot be reserved. Every person buried in Young takes the next available space in the row. This policy saves space and is more efficient for the local Council but it creates problems for the local Muslim community in burying the body facing Mecca.

Discussions between the Council and the Muslim community have resulted in a proposal to allow Muslim burials to occur at the end of each row where the grave may be dug in the required direction. This proposal appears to satisfy the Muslim community's immediate requirements although it would prefer to have its own burial ground.⁵³

The lack of accommodation of Muslim burial requirements was not raised as an issue of concern in the submissions received by the Commission. The Commission considers the agreement between Young Council and the local Muslim community a good example of the satisfactory resolution of conflicting religious and cultural customs through understanding and compromise on both sides.

3.6 Autopsies

For many Australians, autopsies are a fairly standard clinical procedure with no great sensitivity or religious significance attached to them. However, for some religious groups autopsies raise issues of serious concern.

3.6 Autopsies

Buddhists see death as part of a process of continual transformation which usually results in rebirth. The Buddhist tradition emphasises the importance of a peaceful and calm atmosphere both during and after death. According to Buddhist beliefs the body should be left undisturbed for a period of up to three days after death as the soul makes its transition.⁵⁴

In 1995 the Commission received a letter from the Canberra Buddhist Community describing the events following the death of a visiting Tibetan Lama in 1993. The letter stated that under current Australian law and practice it had not been possible to ensure that the body was given the respect traditionally due to a Buddhist practitioner and teacher. According to the letter the incident had caused great distress to both his Australian students and the international Buddhist community in general. The Community argued

In a multicultural society such as Australia it is important that provisions are made to ensure that people are able to practise their religion, and most vitally that they are able to die in accordance with their own truth. At present this is not always possible.⁵⁵

Dying and dead people have rights; these should be given precedence until the dying process is complete. After death, the spiritual needs of the dead person, and the need to minimise distress to their family and spiritual communities should be given equal weight with other public interests such as establishing the cause of death.⁵⁶

The Community submitted that greater sensitivity should be afforded to the spiritual beliefs of the dead person and to the wishes and feelings of the family.

We suggest that carrying out autopsies may have become too much of a standard practice in the West ... While we appreciate that autopsies may be necessary in the case of suspicious deaths, it should be recognised that death is a normal and natural process ... We suggest that in addition to the public interest in investigating the cause of death, including both the rights of the dead person to have their body handled in accordance with their beliefs and minimising distress to the family and the persons spiritual and ethnic communities.⁵⁷

Jewish law prohibits cutting or dissecting the body. It also requires that the body be buried in consecrated ground and that burial take place as soon as possible after death.

In the eyes of the Jewish religion, an autopsy, except in exceptional circumstances, is an act of desecration and, as such, is inimical to our deepest principles and feeling.⁵⁸

Some Islamic traditions require burial before sunset on the day of death. Requiring an autopsy may make this impossible.

Present law

Several States and Territories have recently amended their legislation concerning autopsies to give greater rights to the family and in some instances other people closely

associated with the deceased. In New South Wales the *Coroners Amendment Act 1980* (NSW) was amended in 1997 to provide, among other things, a right for the deceased's next-of-kin to have decisions regarding post-mortems reviewed by the Supreme Court. The amending Act does this by inserting section 48A into the principal Act.

48A Objection to post mortem examination by senior next of kin

- (1) A deceased person's senior next of kin may, by notice in writing, request a coroner or an assistant coroner not to direct a post mortem examination of the remains of the deceased person.
- (2) If such a request is made, an assistant coroner must not make any further decision concerning the performance of the post mortem examination but must refer the matter to a coroner.
- (3) If the coroner decides that the post mortem examination is necessary or is desirable in the public interest, the coroner must immediately cause written notice of that decision to be given to the senior next of kin who made the request.
- (4) The notice must:
 - (a) indicate the earliest time at which the post mortem examination may be performed, and
 - (b) state that the senior next of kin may apply to the Supreme Court for an order that no post mortem examination of the remains of the deceased person be performed.
- (5) Unless the coroner believes the post mortem examination must be performed immediately, the post mortem examination must not be performed until 48 hours after the senior next of kin has been given notice of the decision.
- (6) Within 48 hours after the notice has been given to the senior next of kin, the senior next of kin may apply to the Supreme Court, in accordance with rules of court, for an order that no post mortem examination of the remains of the deceased person be performed.
- (7) The making of the application to the Supreme Court operates to stay the operation of the coroner's order for the performance of the post mortem examination.
- (8) The Supreme Court may make an order that:
 - (a) no post mortem examination, or
 - (b) a partial post mortem examination,
 be performed if it is satisfied that it is desirable in the circumstances.⁵⁹

Variations on these provisions can be found in some other jurisdictions where legislation provides certain rights for next of kin and other family members.⁶⁰

Recent amendments to the Australian Capital Territory's legislation implement a wider range of reforms than those in New South Wales. The *Coroners Act 1997* (ACT) contains

3.6 Autopsies

numerous provisions which give more rights to the associates of the deceased and take greater cognisance of spiritual and cultural sensitivities related to autopsy procedures.

Section 20 provides that a Coroner may, at the request of a member of the immediate family of the deceased or a representative of that person, dispense with an autopsy if satisfied that the manner and cause of the death are sufficiently disclosed.

The definition of 'immediate family' for the purposes of the Act is

- (a) a person who was the spouse of the deceased, or a parent, grandparent, child, brother or sister, or guardian or ward, of the deceased; and
- (b) if the deceased was an Aboriginal person or Torres Strait Islander - a person who, in accordance with the traditions and customs of the Aboriginal or Torres Strait Island community of which the deceased was a member, had the responsibility for, or an interest in, the welfare of the deceased.⁶¹

Section 23 enables an immediate family member or representative to make an application to the coroner for permission to

- view the body of the deceased
- inspect the scene of death
- attend the autopsy
- have a further autopsy done either by the same or another medical practitioner.

If the coroner refuses permission, the applicant may apply to the Chief Coroner for a reconsideration of the decision.⁶² In contrast with the NSW provisions, no time limits attach to the new ACT procedures.

Section 28 aims to ensure that due consideration is given to cultural and spiritual matters. It requires the coroner, when making orders on the conduct of an autopsy, to have regard to

the desirability of minimising the causing of distress or offence to persons who, because of their cultural attitudes or spiritual beliefs, could reasonably be expected to be distressed or offended by the making of that decision.

The Act allows family members or other persons to seek a review of a decision not to conduct a post mortem examination. Applications for review can be directed in the first instance to the Chief Coroner and then to the Supreme Court.⁶³

Part IV of the Act sets out procedures which must be followed in relation to deaths in custody. It includes a provision giving partial effect to Recommendation 38 of the Royal Commission into Aboriginal Deaths in Custody.

The Commission notes that whilst the conduct of a thorough autopsy is generally a prerequisite for an adequate coronial inquiry some Aboriginal people object, on cultural grounds, to the conduct of an autopsy. The Commission recognises that there are occasions where as a matter of urgency and in the public interest the Coroner may feel obligated to order that an autopsy be conducted notwithstanding

the fact that there may be objections to the course from members of the family or community of the deceased. The Commission recommends that in order to minimise and to resolve difficulties in this area the State Coroner or the representative of the State Coroner should consult generally with Aboriginal Legal Services and Aboriginal Health Services to develop a protocol for the resolution of questions involving the conduct of inquiries and autopsies, the removal and burial of organs and the removal and return of the body of the deceased. It is highly desirable that as far as possible no obstacle be placed in the way of carrying out traditional rites and that relatives of a deceased Aboriginal person be spared further grief. The Commission further recommends that the Coroner conducting an inquiry into a death in custody should be guided by such protocol and should make all reasonable efforts to obtain advice from the family and community of the deceased in consultation with relevant Aboriginal organisations.⁶⁴

Section 69 of the Act provides that the Coroner shall not conduct a hearing into a death in custody unless satisfied that a member of the immediate family has been notified or reasonable efforts have been made to notify an immediate family member. Where the deceased was an Aboriginal or Torres Strait Islander the Coroner must also notify the local Aboriginal Health Service.

Another example of autopsy laws recognising the concerns of Aboriginal people can be found in Tasmania's legislation. It removes the Coroner's jurisdiction in cases where the human remains are those of an Aboriginal person and requires that the matter be transferred to an Aboriginal organisation approved by the Attorney-General.⁶⁵

However, legislation cannot provide the complete answer to people's concerns about the conduct of autopsies. In addition to legal questions, there are more general questions about sensitivity on the part of people involved in these procedures, including an awareness of relevant religious and cultural issues.

In its 1984 report *Discrimination and Religious Conviction* the New South Wales Anti-Discrimination Board recommended

the Department of Health should conduct training programs for health workers, social workers, coroner's court and morgue officers, and police involved in procedures relating to death and funerals; these programs should include information about the relevant religious practices of minority religious groups and should emphasise the need for sensitivity in accommodating the religious practices of the deceased and their relatives.⁶⁶

Submissions received by the Commission raise questions about the level and effectiveness of training on issues of religious and cultural sensitivity given to professionals involved in autopsies and other procedures and arrangements with respect to bodies.⁶⁷ They indicate a need for stronger action along the lines of the NSW Anti-Discrimination Board's 1984 recommendation.

Comment

In terms of the right to freedom of religion and belief, autopsy procedures may significantly affect members of the deceased's family and certain religious institutions. These procedures also potentially affect the rights of any individual who may be subject to an autopsy after his or her death. A person's right to freedom of religion and belief may well be impaired by the inability to feel secure that post mortem procedures will be conducted in a manner consistent with that religion or belief.

The 1997 amendments to the *Coroners Act 1980* (NSW) provide a mechanism for people to give voice to their concerns about the conduct of autopsies arising from their religious and cultural beliefs, traditions and practices. In this respect, they encourage greater compliance with international human rights law. However, to be truly effective, they must be sufficiently accessible to those who may wish to utilise them. Accessibility includes, among other things, both cost and time factors. In this regard, consideration may need to be given to whether the 48 hour time limit for application to the Supreme Court is long enough. On the other hand, it would clearly be undesirable to allow lengthy or indefinite delays between death and final disposition of the body. In addition, the Supreme Court may not be the most appropriate body for handling these applications. The role may be better located in a lower court or tribunal.

The wider reforms contained in the *Coroners Act 1997* (ACT) also have considerable merit in terms of strengthening the rights of family members and other persons, giving them greater access to and participation in post mortem arrangements. The provision which seeks to implement Recommendation 38 of the Royal Commission into Aboriginal Deaths in Custody is to be particularly commended.

Findings and recommendations on autopsies

- The state has legitimate needs to carry out post mortem examinations in certain circumstances.
- Submissions have raised serious questions as to whether current practices achieve the appropriate balance between the interests of the state and the rights of individuals affected by autopsy procedures.
- For this reason, subject to the reservations noted above, the Commission supports reforms recently enacted or proposed in a number of States and Territories. However, there is a need for more concerted action in some jurisdictions as well as a more consistent approach across jurisdictions.
- The Commission supports broader training and education measures to address issues of religious and cultural sensitivity on the part of professionals working in this area.

The Commission recommends

- R3.9** The Standing Committee of Attorneys-General should establish a Working Group to develop and encourage the adoption in State and Territory legislation of best practice standards on the rights of family members and other persons in relation to decisions concerning autopsies. The standards should include provision for
- due consideration to be given to the cultural and spiritual beliefs of family members regarding autopsy decisions
 - procedures for the deceased person's next of kin to have their wishes taken into account in matters including whether an autopsy occurs and the manner in which it is undertaken
 - rights of review for family members in relation to autopsy decisions with flexibility in time limits for review flexibility
 - involvement where appropriate of religious and cultural organisations including Indigenous organisations.
- R3.10** The Department of Health or equivalent agency in each State and Territory should review training programs for health workers and other professionals involved in autopsies and other procedures relating to human bodies to ensure issues of cultural and religious sensitivity are adequately addressed in those programs.

3.7 Medical interventions

Various religious groups have conscientious objections to specific forms of medical treatment. Examples include some eastern religions which have objections to the use of drugs, Christian Scientists' opposition to medical examination and treatment based on the concept of disease and opposition by Jehovah's Witnesses to blood transfusions.

The common law has long recognised the right to bodily integrity. This means in essence that a person who enters into physical contact with or uses force against another person, without the consent of that person, commits an assault against that person and may be subject to criminal charges as well as a civil claim for trespass. In the medical area, this means that practitioners are not entitled to impose treatment on an unwilling patient.⁶⁸ However, this does not apply in emergency situations where a person's life is in danger and it is not practicable to obtain their consent. In such circumstances a medical practitioner may administer treatment without fear of legal repercussions. These principles are reflected in Australian law.

This report does not examine all forms of medical treatment that may infringe upon religious freedom or belief. Generally speaking, these issues did not feature prominently in submissions. However, the question of blood transfusions has been an issue of

continuing concern in practice and in law. A decision not to authorise a transfusion can have far-reaching and irreversible consequences. In many instances a transfusion will return a person to full health and failing to transfuse will result in death.

Blood transfusions for adults unable to give consent

Where the person requiring a blood transfusion or other medical treatment is an adult capable of giving or withholding consent the law will generally respect that person's religious beliefs and will not intervene to impose treatment.⁶⁹ However, the situation becomes more complex when the person concerned is incapacitated and unable to give or withhold consent at the time. Particular dilemmas arise where the person has previously indicated in general terms that he or she does not wish to be given medical treatment involving blood products. Jehovah's Witnesses sometimes carry signed cards stating that in the event of injury or illness they are not to be given a blood transfusion.

This issue was recently the subject of legal and public attention in a case in Victoria involving a young couple who were Jehovah's Witnesses. The wife had signed a consent form stating that in accordance with her religious beliefs she was not to be given any blood products. She had given her pastor a power of attorney entitling him to make decisions on her behalf in the event that she was unable to, including decisions relating to medical treatment. Following the birth of her child in hospital the woman suffered massive internal bleeding. Her doctors considered a blood transfusion necessary to save her life but she was unconscious and unable to give her consent to the procedure. Accordingly, her husband sought and obtained an order from the Guardianship and Administration Board effectively overturning the power of attorney given to her pastor and enabling him to consent to a blood transfusion.⁷⁰

Comment

As illustrated by this recent Victorian case, the question of blood transfusions gives rise to agonising personal and ethical dilemmas for which international human rights law provides no immediate or obvious solutions. In human rights terms, it raises issues not just about the right to freedom of religion and belief in ICCPR article 18 but also some fundamental questions about the right to life in ICCPR article 6. Article 6.1 provides

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Determining the scope of article 6.1 and reconciling it with article 18 in the context of blood transfusions and medical procedures involves consideration of some very complex issues. These include whether the right to life is discretionary or mandatory. If it is discretionary it can be waived by the person who holds the right. If it is mandatory it is inalienable and cannot be waived. It is also not clear whether laws preventing the administration of medical treatment in this context would amount to an 'arbitrary' deprivation of life for the purpose of article 6.1. The word 'arbitrary' in that article has

been subject to different and conflicting interpretations by leading international law commentators which leaves its precise scope somewhat uncertain.

In the absence of clear direction from international human rights law on this issue, the Commission does not make any specific recommendations with regard to legal avenues for securing blood transfusions or other medical treatment for a person facing serious illness or injury in circumstances where the person is unable to give clear and unequivocal consent at the time.

However, decisions made under existing laws should take account of the religious beliefs and sensibilities of the patient and any views or wishes he or she may have expressed on the matter. These matters should be the subject of appropriate legal or ethical guidelines for professionals involved in these practices.

Blood transfusions for children without parental consent

Where the person requiring a blood transfusion is a child other issues arise. Governments and courts have ultimate responsibility for the rights and well-being of children and, under international human rights law, children have the right to live and to receive the medical treatment they require for life.⁷¹ In all Australian States and Territories legislation provides that a medical practitioner may give essential medical treatment to a child without the consent of the parents or even contrary to the wishes of the parents, but only when there is an immediate risk of the child dying without it.⁷² In other circumstances courts can make orders for persons other than the parents to make the decision.

The Jehovah's Witnesses' submission raised the issue of blood transfusions and freedom of religion.⁷³ It argued that legislation allowing doctors to give blood transfusions to children without the consent of the parents is contrary to the principles of the Religion Declaration.

Legislation founded on religious discrimination exists in every State of Australia. This legislation ("the blood laws") allows doctors, in some cases a single doctor, to force blood transfusion upon children of Jehovah's Witnesses without consent and against the wishes of the parents. There is no opportunity to obtain a second opinion, or to have another doctor treat the patient using tested procedures that do not require the use of blood.

The Jehovah's Witnesses described involuntary blood transfusions as very severe infringements of their religious rights.

Jehovah's Witnesses view a forced blood transfusion as the moral equivalent of rape. They consider such action an assault on their physical, religious and emotional person. They feel violated. Where a blood transfusion is forced upon their child, Jehovah's Witnesses will do all they can to comfort and console the child (or family member). They will continue to love and care for the child. But it will still leave a permanent emotional scar on the family, and probably also on the child as it grows up.

3.7 Medical interventions

The Jehovah's Witnesses also base their objections to the current laws on principles of natural justice, asserting that 'the medical practitioner plays the combined role of the complainant, witness, prosecutor and ultimately the judge and jury of his own case' and that the laws 'require no accounting for his intrusion into the parent's role'.

They consider it anomalous that while strict laws govern the administration of blood transfusions there are no similar laws governing other interventions, such as the removal of an appendix, which may in certain cases be lifesaving.

Most of the State and Territory laws governing blood transfusions were enacted in the late 1950s and early 1960s. The Jehovah's Witnesses rely on this fact to some extent in their arguments. They claim that since that time there have been significant advances in medical technology which make non-blood treatment available for nearly every type of medical condition. They argue that medical practitioners often give insufficient consideration to the non-blood alternatives because they are not required by law to do so.

In formulating their recommendations for changes to existing legislation, the Jehovah's Witnesses state their fundamental concern as being to 'ensure that incursion into the sanctity of the family be permitted only in cases of genuine emergency and necessity'. They recommend that the law be changed so that medical treatment of a minor without parental consent, and without a court order, only be permitted when

- (1) any delay in administering the medical treatment will probably result in the patient's death or serious bodily harm; and
- (2) there is no available alternative medical management, supported by qualified medical opinion and acceptable to the parents or guardians, that would provide necessary medical treatment; and
- (3) there is no other available medical practitioner who is willing to provide alternative medical management that is acceptable to the infant's parents or legal guardian; and
- (4) the attending medical practitioner obtains an independent consultation and agreement from another qualified medical practitioner, who the parents or guardians may elect to choose, that there is an emergency need for the medical treatment.

They also recommend that medical practitioners involved in the administration of treatment according to these procedures be required to inform the parents in writing within 24 hours as to why the treatment was necessary and why no alternatives existed. This obligation would apply to both the medical practitioner who administered the treatment and the other practitioner from whom the independent opinion was sought.

Comment

Legitimate religious beliefs may, and often do, influence the nature of medical treatment given to children. However, the right of parents to determine the nature and extent of

medical intervention for their children is not an unqualified right. It is constrained by relevant principles of international human rights law and the responsibility of governments to uphold those principles and protect the rights and well-being of children.

CROC article 5 recognises the right of parents to make decisions about the upbringing of their children. However, the Convention also sets clear standards which must be observed in the exercise of that right, a number of which bear directly upon the question of medical intervention. Article 3 requires that, in all actions concerning children, the best interests of the child shall be a primary consideration. Every child has the inherent right to life (article 6) and a right to the highest standard of health and medical care attainable (article 24). The State is required to protect every child from all forms of maltreatment by his or her parents or others responsible for his or her care (article 19).

The legislative changes recommended by the Jehovah's Witnesses are not inconsistent with these requirements. They differ from existing State and Territory legislation in a number of respects. Generally they would impose more rigorous requirements of accountability on medical practitioners who administer blood transfusions to children without parental consent. For example, they impose an objective standard on the determination of the conditions necessitating a blood transfusion. They simply state that the transfusion must be necessary to avoid death or serious bodily harm and that no alternative courses of action are available. This contrasts with existing legislation in most jurisdictions which merely requires the medical practitioner to be 'of the opinion' that the transfusion is necessary and the other requirements are satisfied. In addition, the Jehovah's Witness recommendation includes the requirement of written notification to parents within 24 hours of the transfusion being administered.

The Commission is not in a position at this stage to make an authoritative assessment of the legislative provisions recommended by the Jehovah's Witnesses. This would require an examination of complex legal, medical and ethical issues and wide consultation with interested parties including medical practitioners and ethics committees of hospitals. However, the strength of the concerns expressed by the Jehovah's Witnesses leads the Commission to the view that such an examination is warranted.

Findings and recommendations on childhood medical interventions

- The Commission considers that the legislative changes proposed by the Jehovah's Witnesses for administering blood transfusions to children are not inconsistent with the requirements of the Convention on the Rights of the Child.
- The Commission finds that the Jehovah's Witness proposal should be subject to a more detailed examination involving consultation with relevant bodies in the legal and medical fields.

The Commission recommends

R3.11 The Standing Committee of Attorneys-General should establish a Working Group to give further consideration to changes proposed by the Jehovah's Witnesses to the laws governing parental consent to medical treatment of children. The Working Groups should include legal, medical and ethical experts and a representative of the Commission. It should develop and encourage the adoption in State and Territory legislation of best practice standards on the medical treatment of children.

3.8 Female genital mutilation

Female genital mutilation or female circumcision is the collective term for a number of different practices.⁷⁴ Genital mutilation of young females is a traditional practice in some African and other countries. It most commonly takes place when a girl is between four and twelve years of age.

There are different forms of female circumcision with varying degrees of seriousness in terms of the injury and long term damage they inflict. They range from ritualised circumcision, in which the clitoris is scraped or nicked, to infibulation, the most extreme form of circumcision involving the removal of nearly all of the external female genitals. In its 1994 report on female genital mutilation, the Family Law Council concluded that there was no evidence to support the view that infibulations were being undertaken in Australia.⁷⁵

The health issues associated with female genital mutilation are very serious. The physical effects include haemorrhaging, urine retention, septicaemia, tetanus, damage to nearby organs and in some cases death. However, the consequences of this practice go beyond physical injury and include severe shock, emotional stress and various psychological and sexual problems.

The Family Law Council acknowledged the lack of reliable data on the incidence of this practice in Australia but it concluded that it was an issue of concern.

It is not possible to get reliable statistics on the practice of female genital mutilation in Australia. As the population who have come from countries which practise female genital mutilation is small it is likely that the incidence of the practice in this country is also small. Although evidence of the practice in this country is largely anecdotal, it is not unreasonable to conclude from that evidence that female genital mutilation is now being practised in Australia. Even a low incidence of the practice cannot be disregarded. Council further suggests that as the volume of migrants from the relevant countries increases cumulatively it might be expected that the incidence of the practice in Australia will increase.⁷⁶

At the time that report was published, there were no laws in Australia specifically prohibiting female genital mutilation. However, the Australian Law Reform Commission considered that female genital mutilation would constitute an 'assault' under ordinary

criminal legislation.⁷⁷ Also relevant in this context is State and Territory child protection legislation allowing for intervention where a child is at risk of abuse or ill-treatment.

The Family Law Council expressed doubt about the adequacy of existing laws to deal with this practice. The Council concluded that there was a need for legislation dealing specifically with female genital mutilation.

Council considers that because of (a) doubts about the adequacy of the existing laws, (b) the desirability of having a clear legislative statement of the issue, (c) existing doubt within the general community about the status of the practice in this country, and (d) the need to give the protection and support of the law to women and children who wish to resist the practice within their communities, there should be special legislation which makes it clear that female genital mutilation is an offence in Australia ...⁷⁸

However, the Family Law Council emphasised that legislation by itself is not sufficient to combat the practice. Accordingly, the Council also recommended a national education program directed at families from countries where this practice is traditional as well as professionals and others within the general community.

In September 1994 the Queensland Law Reform Commission released its report on female genital mutilation expressing similar views to those of the Family Law Council.⁷⁹

Since the release of the Family Law Council's report considerable progress has been made in implementing its recommendations. The Commonwealth has developed a number of educational initiatives in co-operation with State and Territory governments. In addition, legislation specifically prohibiting female genital mutilation has been passed in most States and Territories.⁸⁰ Only the ACT provision explicitly refers to the possible religious connections of this practice. The *Crimes Act 1995* (ACT) provides that it is not an offence to perform a procedure with a 'genuine therapeutic purpose' but that

A medical procedure that is performed as, or as part of a cultural, religious or other social custom is not of itself to be regarded as being performed for a genuine therapeutic purpose.⁸¹

The Commission welcomes these reforms and encourages the full implementation of the Family Law Council's recommendations in all States and Territories. It received no submissions supporting tolerance of the practice of female genital mutilation. A submission from the Salvation Army condemned the practice even where it is undertaken in the context of religious rituals.

[W]e consider that the expression [of] "conscience and belief" has the potential to impinge upon the rights of others including the expressions of the religious beliefs of others. Therefore, legislation should not allow the **public expression** of these beliefs where such expression is contrary to the laws of Australia or the well-being of society at large ... a further example is the practice of female circumcision which is abhorrent to society at large but is a religious practice of minority groups in Australia.⁸²

Comment

Whether female circumcision is to be regarded as a religious practice has been widely discussed.⁸³ The Family Law Council concluded

Female genital mutilation is not a religious practice. It is generally accepted as having pre-dated Islam, Christianity and other major religions. It is sometimes incorrectly thought that female genital mutilation has its origin in Islam. Some groups which practise female genital mutilation consider incorrectly that the practice is endorsed by Islam. However, there is no Islamic religious basis for the practice. Both Muslim and non-Muslim religious leaders overseas and in Australia have emphasised the absence of a religious foundation for the custom.⁸⁴

In a submission to the Queensland Law Reform Commission the Islamic Council of Queensland advised that female genital mutilation 'is not a part of Islamic law, and is not a recommended practice'.⁸⁵

The Commission agrees that female genital mutilation is not a religious practice and is not encouraged or required by any religion. However, some acknowledgment of this practice is warranted in this report. There is no doubt that in some cultures the practice is linked with religious beliefs, however mistakenly. Furthermore, it has been raised as an issue in several submissions to the Commission.⁸⁶

The practice of female genital mutilation has been the subject of concern and comment by the Committee on the Elimination of Discrimination Against Women.

Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as ... female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms...[T]hese forms of gender-based violence help to maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities.⁸⁷

The Commission considers that female genital mutilation is a violation of internationally recognised human rights standards under a number of instruments including those relating specifically to women and children.⁸⁸ Even if linked to religion or belief the prohibition of this practice is justified by ICCPR article 18.3 and Religion Declaration article 1.3 as an allowable limitation on the right to manifest religion or belief because the limitation is necessary for the protection of health.

Findings and recommendation on female genital mutilation

- The practice of female genital mutilation breaches international human rights law.

- The Commission endorses the recommendations of the Family Law Council in its 1994 report *Female Genital Mutilation*.
- A great deal of progress has been made in implementing the Family Law Council's recommendations. However, gaps still remain, most notably the absence of legislation in Queensland⁸⁹ and Western Australia⁹⁰ specifically addressing female genital mutilation.

The Commission recommends

- R3.12** The federal Attorney-General through the Standing Committee of Attorneys-General should encourage the development of legislation in Queensland and Western Australia specifically prohibiting female genital mutilation.

3.9 Male circumcision

Unlike female genital circumcision, male circumcision has significant religious connections, particularly in the Jewish faith and Indigenous culture. Medical opinion has differed over time on whether male circumcision has positive or negative consequences for health and hygiene. There can be no questioning of the appropriateness of this practice when it is undertaken for necessary medical or therapeutic purposes.

Male circumcision for religious purposes is protected by the right to freedom of religious practice where it is carried out in a manner that does not constitute cruel, inhuman or degrading treatment or child abuse.

On the other hand, male circumcision undertaken in a cruel or degrading manner is unacceptable regardless of the religious implications. It violates articles in CROC relating to the best interests of the child, protection from abuse and neglect and the right to the highest attainable standard of health.⁹¹ It also violates Article 7 of the ICCPR which prohibits cruel, inhuman or degrading treatment. These extreme practices rightly attract criminal sanctions relating to assault and the infliction of serious or grievous bodily harm. The Commission considers that existing criminal laws adequately address dangerous and harmful male circumcision. Submissions did not include any compelling evidence to indicate that this type of activity needs to be dealt with as a separate offence. In this respect, it can be distinguished from female genital mutilation which requires separate laws because the health and other consequences associated with it tend to be more serious.

The precise degree of pain or discomfort which could be considered acceptable in circumcision and other procedures is a difficult question. It arises particularly in the context of religious circumcisions undertaken for non-therapeutic purposes which involve some pain but do not expose the child to serious health or other risks. However, this was not a major concern in submissions to the inquiry. The Commission does not

propose to make recommendations on this issue at this stage due to the lack of relevant evidence.

3.10 Paganism

Pagans see divinity expressed in every part of the universe. The Earth, the planets, the stars, the void - all are parts of one great, divine source to the Pagan. Pagans do not "worship" trees or rocks, however they do revere the divine life force which is contained within trees and rocks, and within every part of the universe.⁹²

Paganism is a general term which covers a variety of spiritual beliefs centred upon harmony with the Earth. The umbrella term embraces beliefs such as Celtic Paganism, Druidry, Shamanism, Wicca and Witchcraft. Wicca is described by the Pagan Alliance as

... a modern revival of the ancient folkloric and magical practices of Europe. Wiccans generally perceive divinity in the form of a Goddess and a God, who have many different aspects. Most Wiccans celebrate eight Festivals each year, and hold meetings in accordance with the phases of the Moon.⁹³

Practitioners of witchcraft are also described by the Pagan Alliance as 'often skilled herbalists and healers; their practices and techniques are similar in many ways to those of the tribal shaman, the village Wisewoman and Cunningman'.⁹⁴

The Commission received a large number of submissions from Pagans and Wiccans. They complained, in particular, that the free expression of their practices and beliefs are unnecessarily limited by the criminal law of Queensland which deems the practice of witchcraft, fortune-telling, sorcery or enchantment an offence.

Section 432 of Queensland's *Criminal Code 1899* provides

Pretending to Exercise Witchcraft or Tell Fortunes. Any person who pretends to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult science to discover where or in what manner anything supposed to have been stolen or lost may be found, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for one year.

Similar limitations on the practice of witchcraft also exist in Victoria.⁹⁵

A number of submissions from individuals in the Wiccan community who practise magic and witchcraft in the expression of their beliefs stated that the criminalisation of their practices is an unnecessary limitation on their beliefs and violates the right to freedom of religion and belief.

As a person with beliefs in traditional witchcraft I feel as though my religion is still not being accepted by the laws of this country ... the anti-witchcraft laws in the Queensland Criminal Code (section 432) ... can lead to fines and imprisonment for anyone "caught" practising witchcraft.⁹⁶

Witchcraft/Wicca is a valid religion ... My issue is the Witchcraft laws still active in Queensland. It should be removed because Witchcraft/Wicca is NOT devil worship.⁹⁷

A submission from R L Akers to the 1996 Queensland Criminal Code Review suggested that the illegal status of witchcraft and fortune-telling is evidence of State endorsed discrimination against Wiccans. He stated that the laws may be used to perpetuate the unfair stereotyping and stigmatisation which already exist against people who engage in these practices.⁹⁸

In one court case in 1990, the knowledge [that] a Wiccan's religion was illegal was offered as proof of his willingness to break the Law. This was despite the fact that the charges had nothing to do with the Wiccan's faith ...⁹⁹

In addition to the laws which criminalise witchcraft and fortune-telling, a number of States and Territories continue to have laws prohibiting fortune telling for 'payment or gain of any kind'. For example, section 4(1)(o) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) states that anyone who pretends or professes to tell fortunes for gain or payment of any kind shall be deemed to be a vagrant and shall be liable to a penalty of \$100 or to imprisonment for six months. Similar prohibitions exist in the Northern Territory,¹⁰⁰ Western Australia,¹⁰¹ South Australia¹⁰² and Tasmania.¹⁰³

The practice of fortune-telling, including tarot card reading and astrology, may be the expression of the spiritual beliefs of certain Pagans and Wiccans. The criminalisation and prohibition of these practices limits their rights to express their beliefs freely.

Mr Akers alleged that these laws have been used to arrest tourists engaged in fortune-telling in Queensland, especially backpackers who are unaware of the State's laws in this respect.

Over the decades there have been numerous reports of tourists being harassed, even arrested for Vagrancy, after reading cards in coffee shops in an attempt to raise living expenses.¹⁰⁴

NSW, Tasmania and the ACT have not found it necessary to enact or retain similar legislation.

Within the last five years the Queensland Criminal Code has been the subject of two reviews by successive Queensland governments. In 1992 R S O'Regan QC reviewed most of the sections of the Criminal Code and recommended the repeal of section 432.

This provision appears to be the relic of a more superstitious age and if to be retained at all, it should be set out in legislation other than the Criminal Code. There are summary offences relating to fortune telling for gain in the *Vagrants, Gaming and Other Offences Act 1931*. If the relevant conduct involves fraud, it would be sufficiently covered by the new fraud offence ...¹⁰⁵

Following a change of government the recommendations of the O'Regan Report were not adopted. A subsequent review of the Criminal Code by Peter Connolly QC,

completed in July 1996, had very specific and limited terms of reference and did not include section 432.¹⁰⁶

The rationale for retaining the offences prohibiting witchcraft or fortune-telling for gain or payment appears to derive from the view that the practices are fraudulent, dangerous and undesirable. In 1996, in response to questions in Parliament concerning the continued relevance of the provisions, the Attorney-General, the Hon. Denver Beanland, stated that he was aware of representations to have section 432 of the Criminal Code and section 4(1)(o) of the *Vagrants Gaming and Other Offences Act 1931* (Qld) repealed. He stated, however,

These provisions ... are there to protect the gullible and to discourage the practice of not only fortune-telling but, as, section 432 also provides, witchcraft, sorcery and practices in the occult ... these practices therefore are not archaic.¹⁰⁷

Mr Beanland referred to two instances since 1984 - the murder of a man and the alleged commission of deviant sexual acts on 12 to 15 year old boys - which were allegedly linked to the practice of the occult. He also referred to a 1976 South Australian Supreme Court decision as support for his view that the provisions concerning fortune-telling had continued relevance. He said that in that case it was accepted that the South Australian Parliament had outlawed fortune-telling 'because it was in itself a fraudulent practice and necessarily deceptive whether or not the defendant genuinely believed in his ability to foretell the future'.¹⁰⁸

Submissions on Paganism

A submission by Ms Louise Bowes on behalf of the Servants of the Elder Gods, however, alleged that the laws prohibiting witchcraft and fortune-telling are retained because of ignorance about the practices.

The law was retained largely on the basis of ignorance, marrying violent activities and deliberate deception with the practice of witchcraft and the adoption of the religion known as "Wicca" ... What this means for the many Wiccan followers in Queensland is obvious - they experience an immediate inability to follow their faith for fear of arrest and incarceration.¹⁰⁹

To comply with human rights requirements the right to manifest Wiccan or Pagan beliefs in witchcraft and fortune-telling can be limited by law but only if the limitation is necessary to protect public safety, order, health, morals or the fundamental rights or freedoms of others.

No submissions provided any evidence that witchcraft or fortune-telling practices of themselves present a threat to the safety or well-being of members of the community. Practitioners refuted such allegations.

Pagans do not perform sacrifices (other than of their own time and energy) and are not opposed to any other religious beliefs. Pagans do not sexually abuse children;

quite the contrary. Despite many hysterical claims of sexual abuse by witches and other occultists, none has ever been proven to be true.¹¹⁰

Wicca followers do not worship Satan; we don't even believe in his existence. We do not sacrifice animals or virgins, and we don't engage in debauched sex orgies ... we ask the Queensland government exactly what it sees as so dangerous in our religious practices. Could it be the use of alternative medicines, herbalism, the horoscope? Could it be self-awareness they are objecting to? Or perhaps the respect and reverence we give our Earth?¹¹¹

As Ms Bowes pointed out, if Wiccans engaged in practices which were harmful to others, they would be subject to the same general laws as the rest of the community.

Like so many alternate religions, none of our Wiccan practices contravene any state or federal law as far as violence, stealing, cruelty to animals, abuse of children etc. are concerned. Should a religious group partake of activities which do break laws of this nature, then obviously the participants in that religion would and should be open to prosecution.¹¹²

Many members of the Queensland Parliament agree. For example, the Hon T B Sullivan stated

If there are abuses, let us deal with that abuse. If people practising witchcraft abuse a young child, let us oppose them for the abuse of the young child, not for their faith, be that different from our own. If those who are of a non-Christian background believe in the spirit or spirits and abuse a person in some way they should be attacked for the abuse and not for their beliefs.¹¹³

The Hon M Foley also refuted arguments for the retention of the laws and in relation to the murder case relied on by the Attorney-General stated

The Attorney argues that the ... case justifies the retention of this provision. If the argument in favour of retaining this provision is that it continues to be relevant to modern times, I ask the Attorney ... on how many occasions in the last decade a prosecution has been brought under this provision? The person to whom the Attorney referred was charged and convicted of murder.¹¹⁴

Comment

If any person murders or sexually assaults a child or adult or commits fraud, he or she should be and can be adequately punished by the application of the ordinary criminal law. The jurisdictions of NSW, Tasmania and ACT do not have provisions which specifically criminalise practices of witchcraft or fortune-telling but do not find that Pagans endanger public order or that the law is inadequate to protect individuals from harm. This indicates that the retention of these laws in Queensland, Victoria, Western Australia and South Australia is not necessary to secure public order and the protection of individuals.

While these laws are unnecessary for any practical purpose they remain as a potent threat to the legitimate practices of Pagans and Wiccans. An example from England

shows how such legislation may be used in unforeseen ways. In 1944 a woman, Ms Helen Duncan, who practised as a medium was convicted under the long-forgotten *Witchcraft Act 1735* for ‘pretending to exercise conjuration’ and sentenced to nine months imprisonment. Ms Duncan had conducted a seance and allegedly contacted a sailor on the ship HMS Barham who told the participants in the seance ‘My ship has sunk’. The authorities decided to prosecute for fear that Ms Duncan constituted a wartime security risk able to ‘see’ and reveal the sites for planned D-Day landings in France.¹¹⁵ While this situation was provoked by wartime fears in 1940s England it is possible that unenvisioned circumstances in 1990s Australia may lead to the existing legislation being used in such an inappropriate way.

Findings and recommendations on Paganism

- Wiccans and Pagans have the right to manifest their beliefs ‘either individually or in community with others’ in the practice of witchcraft and fortune-telling 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’ (ICCPR article 18.3).
- There is no evidence to suggest that individuals or the community require specific protection from witchcraft or fortune-telling practices. There is no evidence that the practices of witchcraft and fortune-telling in Australia require limitations as permitted by the ICCPR.
- Any practice associated with witchcraft which might result in physical or mental injury to other individuals or loss of or damage to property can be dealt with under general criminal and civil laws dealing with conduct of that kind.
- Similarly, any fortune-telling practices found to constitute fraud or deceptive conduct can be dealt with adequately under the general criminal law.
- Section 432 of Queensland’s *Criminal Code 1899* and section 4(1)(o) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) and the equivalent legislation in Victoria, Western Australia, South Australia, the Northern Territory and Tasmania are not necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
- Laws prohibiting witchcraft and fortune-telling unnecessarily discriminate against members of the Wiccan and Pagan communities and contravene the right of practising Wiccans and Pagans to express their religions or beliefs in accordance with ICCPR article 18.

The Commission recommends

- R3.13** The federal Attorney-General through the Standing Committee of Attorneys-General should encourage Queensland and Victoria to repeal legislation criminalising the practice of witchcraft, fortune-telling, sorcery and enchantment.
- R3.14** The federal Attorney-General through the Standing Committee of Attorneys-General should encourage Queensland, Western Australia, South Australia, the Northern Territory and Tasmania to repeal legislation criminalising the practice of fortune-telling.

3.11 New religious movements

Examples of sects and cults ... run to the several hundreds in Australia. Most of them have overseas origins and they range in size from groups with substantial followings, running into thousands with several 'categories' of membership, to those with a small and exclusive stable of members. Many of the people who have dedicated their lives to these groups are wedded to the ideals and the way of life they propound, believing that the personal and financial costs are worth it. But for the followers who remain unconvinced or become disillusioned, the costs can be very high.¹¹⁶

The Commission received a very large number of submissions dealing with the issue of 'cults' or new religious movements. This is a complicated area which raises a number of issues, only a few of which can be discussed in the context of this report.

The first part of this section deals with the definition of a 'cult' and whether a 'cult' is either a religion or belief. The second part explores allegations that coercive tactics are used both to recruit members into 'cults' and to induce members out of 'cults' and that these tactics impair the right to hold a religion or belief of one's choice. The third part examines whether the practices of these groups should be limited by law or if there are other solutions to the problem of alleged coercion.

Is a 'cult' a religion or belief?

The essential problem is to identify the criteria by which 'cults' or potentially dangerous religious groups are to be identified. Kohn describes several groups in language which seems to focus on their dangers to people. However, most of the charges laid against these groups which Kohn considers dangerous would apply equally well to mainstream religious groups. For example, like the groups she describes, mainstream groups use other services like day-care, schools or counselling to attract and maintain members. Most religious groups are very concerned to grow and many offer graded access to the secrets, or message of the group as well as having authoritarian leadership and making high demands of their members.¹¹⁷

Many submissions to this Inquiry outlined fears and concerns relating to 'cults', sects or new religious movements. On one view many of these groups are suspect simply because they are new, unknown or marginalised. An alternative view is that they are identifiable by shared characteristics of secrecy, 'unnatural' belief systems and somehow dubious practices.

'Cult' is defined in the Concise Oxford Dictionary as

[a] system of religious worship esp. as expressed in ceremonies; devotion or homage to person or thing (esp. derog. of transient fad)...

The word has become a 'negatively value-laden term to refer to a transient fad of a perverse nature' and is applied today to groups which are 'believed to be somehow deviant according to popular opinion'.¹¹⁸ Many scholars have struggled with appropriate terminology for the phenomenon and most appear to prefer the value-free term 'new religious movements'.¹¹⁹

New religious movements are perceived to be distinct from mainstream religions and many submissions stated that they exhibit qualities which separate them from traditional religions. Several submissions suggested that some of these groups should not be considered as religions as they shield behind the facade of religion while practising something quite different. CultAware, the major organisation in Australia disseminating information about and lobbying against 'cults', claimed that new religious movements can be identified by some but not necessarily all of the following criteria.

- A leader who claims divinity or a special mission delegated to him/her
- The leader demands absolute and unquestioning obedience and is the sole judge of the member's faith and commitment
- Cults systematically employ sophisticated techniques designed to effect ego-destruction, thought reform and dependence on the cult
- Meaningful communication with family and pre-cult friends is sharply curtailed and the cult becomes the convert's new 'family'
- Members put cult goals ahead of individual and society concerns. Education plans, career, health and well being are ignored in pursuit of the cult's mission
- Members are preoccupied with fundraising, recruiting and worship/courses
- Established members are guarded, vague, deceptive or secretive about beliefs, goals, demands and activities until the recruit is converted
- The cult may maintain members in a state of heightened suggestibility through lack of sleep, intense spiritual exercise, constant indoctrination, controlled group experiences, and manipulated spiritual encounters
- Cults encourage exclusivity and sometimes isolation of the group, using the excuse that all outside the group are evil or of no value to the group's mission
- Cults often exploit members' finances

- Members are exploited with poor working conditions and low pay
- Deceptive techniques are used to recruit and solicit donations. The identity of the cult is often hidden to new recruits. 'Front' names are used until the member is conditioned to accept the group's identity.¹²⁰

On the other hand, it can be said that many of these criteria could identify, now or in the past, mainstream and established religions. As stated in the Anti-Discrimination Board's 1984 report *Discrimination and Religious Conviction*, the nature of religion has often been inexplicable to and feared by those who do not share the same faith or belief.

Conversion to a different and perhaps unusual faith and a way of life that expresses a total religious commitment has always been a matter of contention between some converts and their families. Had their parents had their way, St Francis and St Clare would not have been able to pursue their religious vocations and become the founders of two religious orders, the Franciscans and the St Clares.¹²¹

Nevertheless, most of the groups considered to be 'cults' or new religious movements tend to be marginalised from mainstream religions and their validity as genuine religions is often cast into doubt. For example, groups such as the Church of Scientology and The Family were not represented at the national conference on Religion and Cultural Diversity held in Melbourne in 1997 although all major religious organisations in Australia were represented. Nor are 'fringe religions' welcome to join the major inter-faith association, the World Conference on Religion and Peace (WCRP). The background information pamphlet on WCRP states

A conscious effort has been made to restrict membership to the adherents of the major religious traditions. Invitations to attend events are usually restricted and are not normally open to the public. WCRP's experience is that when open events are held, the members of the various fringe groups are likely to attend.¹²²

New religious movements then are perceived to be different and somehow troublesome in comparison to the established religions. This perception is not isolated to Australia in the 1990s. In Victoria in 1965 a major investigation into the Church of Scientology was undertaken¹²³ and in Germany the Church remains subject to much controversy.¹²⁴

Many submissions were received from members of new religious movements who claim that they practise a religion. The Church of Scientology was recognised as a religion by the High Court of Australia and the UN Special Rapporteur on Religion included a section on new religious movements in the report of his visit to Australia in 1997.¹²⁵

In the end, however, it matters little whether or not these groups are religions. Human rights protection clearly extends to religion *and belief*. The Human Rights Committee has stated

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly

construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.¹²⁶

Many 'cults' or new religious movements will fall within this definition. In fact they perform activities that are objectively similar in many ways to those of established religious groups.

The prohibition of coercion

... everyone should have the right to believe in whatever they like no matter how bizarre, as long as they have come to the decision to believe in that, freely and without undue influence or coercion, and with knowing exactly what they are getting themselves into when they make a decision to join a religious group.¹²⁷

ICCPR article 18.2 provides that '[n]o-one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice'. To coerce is defined in the Macquarie Dictionary as 'to restrain or constrain by force, law or authority; force or compel, as to do something, to compel by forcible action'. In the context of article 18, 'freedom to have or adopt a religion or belief of choice' has been interpreted by the Human Rights Committee as including 'the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief'.¹²⁸

Further the Committee stated

Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use or threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert ... The same protection is enjoyed by holders of all beliefs of a non-religious nature.¹²⁹

The prohibition of coercion which would impair the freedom to have or adopt a religion or belief clearly forbids the use or threat of physical force to compel believers (or non-believers) to recant or convert. It has also been argued that if the aim of protecting the right to have a religion or belief is to be achieved, then the prohibition on coercion should be expanded to include mental or psychological compulsion as well as physical means.¹³⁰

Many concerns were raised in submissions regarding the coercive techniques allegedly used by certain 'cults' to recruit members. Some submissions allege that some new religious groups use secretive and deceptive techniques to attract and retain members. It is alleged that these techniques may amount to coercion.

On the other hand, submissions from certain new religious movements and their members alleged that the activity of anti-cult groups in organising ‘deprogrammers’ or ‘exit counsellors’ to influence or talk people out of their beliefs is itself coercion.

Coercion into ‘cults’

Many submissions expressed concern with the recruitment practices of certain ‘cults’. Submissions received from anti-cult groups and individuals concentrated on the coercive ‘brainwashing’ techniques some new religious groups are said to employ to recruit and retain members. They alleged that psychological and financial damage is caused to members of such groups. They also alleged that many of these ‘cults’ shelter under the cover of religion while exercising destructive practices which effectively limit members’ ability to think for themselves.

Having read this discussion paper very thoroughly I have found that it does not address the issue of cults, which shelter under the umbrella of religious rights and privileges, while at the same time removing, by their practices, their members’ rights and privileges. Cults employ such techniques as hypnosis, coercion, behaviour control, information control, manipulation by fear and/or guilt, public confession, sleep deprivation, manipulation of diet, control of sexuality, alienation from families, and other practices which destroy their members’ sense of self.¹³¹

The apparent harm of these practices was recognised by the Model Criminal Code Officers Committee in their Discussion Paper *Non Fatal Offences Against the Person*. In this Paper the Committee sought submissions on whether the practices of ‘cults’ should be included within the criminal law.

The emergence of so-called “cults” and obsessive small religious groups has shown that it is possible to employ high pressure “persuasive” techniques which amount to mental or emotional coercion. In such cases, influence is brought to bear by one person over another so that the latter’s will is overborne and he or she is induced to act or not act in a particular way. The California Supreme Court has found that coercive persuasion may cause the subject to develop serious physical and psychiatric disorders [*Molko v Holy Spirit Association* (1988) 46 Cal 3d 1092]. The techniques involved may include isolation, manipulation of time and attention, positive and negative reinforcement, peer group pressure, prohibition of dissent, deprivation of sleep and protein and the inducement of fear, guilt and emotional dependence.¹³²

Many submissions agreed that the techniques and practices of these groups cause harm. Typically, these submissions came from a range of people including ex-cult members and concerned families and friends of cult members - people who have been alarmed by the sudden change in attitude and mentality of their previously ‘conventional’ friends or loved ones.¹³³ Additionally, many submissions were received from groups organised to provide information about cults to concerned family members.

Cult Information and Family Support (CIFS) was formed by a small group of parents who had been quite devastated by the actions of their children who had joined

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destructive cults. Subsequently, a number of ex members of cults have joined the association bringing with them details of their personal experience.

The aim of the organisation is to help persons when they find themselves in a similar position and to provide them with emotional support and information on specific cults.

... Certain groups, in particular those offering Personal Development programmes, claim that they are a religious organisation and therefore, immune from scrutiny by virtue of Section 116 of the Constitution. They ignore the fact that this immunity is inviolable only as to belief and does not extend to any actions by them that restricts the fundamental rights and freedom of others - such actions as coercive recruitment contravening Article 18.2 of ICCPR.¹³⁴

CultAware is a Sydney based organisation which disseminates information about and lobbies against various cult groups. CultAware organisers Joan and Tony McClelland submitted material outlining the dangers and coercive practices of various groups.

CultAware's focus is on the implications of destructive groups (cults) within Australian society. Of prime concern are the social and mental health implications of manipulative practices and control techniques used in varying degrees by cults. Many of these processes are used in everyday community living. Within a cult they are planned, formalised, prepackaged and delivered in a premeditated, very effective parcel to gain control of the unsuspecting recruit. Once recruited, other group controls, both formal and informal, continue to bind the member to the group.

CultAware totally respects the individual's freedom in religious choice, but firmly believes there can be no freedom of religion unless there is freedom of mind. Genuine choice requires

- Access to all information
- Opportunities for reflection
- Dialogue
- Exploration of the consequences of different options

Cults deny the individual this freedom through their use of psychological manipulation and mind control techniques.¹³⁵

Other submissions reiterated these concerns. A confidential submission from a person whose relative was recruited into a family church 'cult' in the USA argued that recruits cannot be 'free' to believe when they are psychologically manipulated into that belief.

... [T]here is a vast difference between choosing freely to believe in, and practise a set of religious beliefs versus being coerced, deceptively recruited, subjected to psychological manipulation and mind control techniques done in the name of religion and a belief system.

[Chapter 2 of the *Discussion Paper: Free to Believe*] for instance does not take into account any of the above techniques used by many groups in Australia known as

destructive cults and operating under the name of a church and using all manner of psychological and spiritual abuse on their members.¹³⁶

Another confidential submission came from a person who stated he had an 11 year involvement with a 'truly abusive religious sect'.

Groups such as ['The Family' and 'The Children of God'] thrive because they have secret beliefs that are not known to the new convert. These beliefs are introduced gradually in metered doses until the disciple undergoes a complete identity change. The final result is that a person engages in behaviour that they normally would have been repulsed by. This form of mind control is becoming very well documented and is the reason why things such as 'Jonestown', 'Waco' and the 'Heavens Gate' suicide happened.¹³⁷

Robyn Arielli, a former cult member who underwent 'exit counselling' (discussed below), now believes that all cults are a 'destructive influence not only on individual members but on society as a whole'.

From 1981 to 1993 I was a member of ... two separate [cults]. In early 1993, as a result of a voluntary exit-counselling I came to realise that I had been deceived and had been the victim of unethical mind control techniques that were used by these cults to recruit me, to take away my ability to think for myself and to control my life.

These cults cleverly led me to believe that I was making my own choices in regard to joining them and therefore taking on all their beliefs etc ... In light of the information provided to me during the exit counselling, I then freely made the decision to leave the cult. I have since this time made a point of learning as much as I can about cults, the use of unethical mind control techniques (brainwashing) used by cults, including psychological coercion, hypnosis, undue influence.¹³⁸

CultAware is critical of the 'control techniques' allegedly used by the Church of Scientology to recruit new members.

After people are hooked by the friendly, benign come-on, Scientology uses exercises that covertly put the receiver in hypnotic trance. The purpose of covert trance induction is to increase the subject's suggestibility and control the subject's resources. These techniques are derived from traditional hypnosis and from rituals used to produce fanatical loyalty in the initiatory rites of past secret societies.¹³⁹

Another confidential submission from a former member of a 'cult' group described why such practices are successful.

Everyone, like it or not, is vulnerable to mind control. Everyone wants happiness, affection and attention. Everyone is looking for something better in life: more wisdom, more knowledge, more money, more status, more meaning, better relationships, or better health. These basic human qualities and needs are exactly what cults prey upon. It is important to remember that for the most part, people don't join cults. Cults recruit people.¹⁴⁰

Such groups may offer a seductive alternative to idealistic people struggling in an uncertain world.

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Some submissions referred to abuse, including physical abuse, of members by cult groups. Submissions outlined sleep deprivation, obsessive dieting, fasting and unpaid labour.

I speak from personal experience having had a family member recruited into a church originating in Boston, USA, and known around the world as a cult, but operating in Australia under the protection of freedom of religion.

Having spent six years studying this and other such groups and speaking with family members and former members I can categorically confirm the immense control and neglect of basic human rights within these pseudo religious groups.

I give you an example of just a few of the injustices and abuse to the freedom of an individual carried out in such groups. I am more than willing to back up these claims with evidence if you so require it.

- Members told to fast by a leader even if it required them hospitalisation
- Members not given permission to attend a parent's funeral
- Members told to cut off from families
- Arranged marriages
- Sexual exploitation of children and adult members
- Enforced diets
- Sleep deprivation
- Young children from age five years being sent out of Australia to attend the cult school
- Financial exploitation, unpaid labour and all assets required to be given to the group
- Control of behaviour, information, thoughts and emotions.¹⁴¹

Some submissions also alleged that certain cults forcibly imprison members as a means of punishment or behaviour modification. Mr McClelland of CultAware provided numerous accounts, articles and affidavits from ex-members of the Church of Scientology who allege mistreatment, malnutrition and forced imprisonment at the hands of that organisation. In particular they describe a regime known as the 'Introspection Rundown' that requires members considered to have had a 'psychotic break' to be incarcerated in isolation. A statement provided by a former Scientology member alleged he was incarcerated in isolation on a farm.

Late one night, while I was being held captive in the dormitory in Cook St I was silently taken out of my bedroom and led into a large white car. We travelled toward an unknown destination and these same eerie characters that I used to know as friends gave me the impression that they were taking me to some isolated stretch of highway where they would stick a knife into my back ... It turned out that I arrived at a farm belonging to, [name deleted], a Scientologist.

I occupied this old, dingy caravan for many weeks. I was fed on boiled potatoes and porridge. I was given vitamins which ended up coming out of my pocket anyway ...

All this while I was offered no explanation as to why I was being held captive on that property. Also I was offered no explanation as to why these people whom I knew refused to talk to me ... I used to ask them questions very often. I got no answer, only deep silence and an unspoken hatred for me which I still have not been offered any explanation for.¹⁴²

However, many submissions from individuals who have been or are members of new religious movements argued that they made an informed choice and that the group has had a positive effect on their lives in many ways.

For example, Ian Cairns has been a member of the Church of Scientology for approximately seven years. Prior to visiting the Church he stated that he read books about the theories and philosophy of the religion and made an informed choice regarding his participation without any coercion or brainwashing whatsoever. The first Scientology course that he embarked upon was a detoxification program and he has been a committed member since.

I want to make it clear that my involvement with Scientology came about through a logical succession of events. I studied the subject first in the comfort of my own home without the influence of anyone else, Scientologist or not, and only after concluding the possibility that the theories might be true did I decide to observe their practice first-hand. It was at this point that I became convinced of their workability.¹⁴³

Similarly, Lucia D'Andrea wrote that she accepted Scientology freely and willingly although her parents found it difficult to understand her religion.

I am 34 years old, born in Australia to Italian parents and have been a practising Scientologist for the past eight years at least. At the time I joined the Church I was delighted that I had discovered Scientology and decided of my own free will and by my own thinking that Scientology had everything I wanted in a religion. Scientology was not, however, a traditional form of religion as understood by my parents and they had difficulty understanding my decision to join this Church. They had not been well educated in their home country and basically found it difficult to grasp anything different from the Catholic ideas of their religious indoctrination.¹⁴⁴

Sara Verrier also attested to the benefit she has gained from being a Scientologist.

I am a Scientologist and have been so now for 5 years. I joined the Church at 19 years of age and have benefitted greatly from my involvement. I have become aware of myself as a spiritual being, and have been able to improve my life and help others improve theirs. As a new Scientologist in 1992, I communicated to my family about my religion as I learnt new things. My father was very happy for me and the fact I was happy and doing well. However, my mother had been in contact with a group called 'CultAware'... who claimed to be an 'information service'. She

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was told lies and alarming claims regarding my religion. After this, she became concerned, and unnecessarily so.¹⁴⁵

There are elements of truth in both sides of the polarised arguments in this debate.

While it is overstated to argue that everyone in a cult is an unwitting victim of mind control techniques it is equally overstated that they are never a victim of strategies designed to influence them ...

The reasons why people join cults are very diverse. They can be actively seeking a spiritual experience; they may be seeking something lacking in their family experience; they may be facing a personal crisis such as the death of a loved one or a divorce; they may be following a family member or friend into the organisation; they may be impressed by the 'sponsorship' or 'testimony' of a prominent person; they may be recruited off the streets and sheer chance is a factor ...¹⁴⁶

Each case is different and should be considered on its merits. As Gary Bouma pointed out

That some people have been hurt by religious groups is not in question. What is in question is whether it is possible to label this group as dangerous and another safe. Enough people continue to be hurt (as well as helped) by aspects of mainstream religious groups to make such a categorisation impossible.¹⁴⁷

Coercion out of 'cults'

Many submissions from members of new religious movements, particularly the Church of Scientology, detailed incidents of 'deprogrammers' or 'exit counsellors' attempting to talk members out of their beliefs in circumstances often involving physical force, isolation from other group members or involuntary incarceration.¹⁴⁸ 'Deprogramming' is the term used for forcible counselling and 'exit counselling' is the voluntary method.¹⁴⁹

Over the past two decades New Religious Movements in Australia and individuals who are members of these movements have been the target of hate campaigns, harassment, intimidation, kidnap and unlawful restraint organised by a small number of groups in Australia.

Religious organisations such as the Hare Krishna Movement, the Unification Church and the Church of Scientology have had members unlawfully restrained and at times kidnapped by 'deprogrammers' and forced to undergo a coercive psychological counselling known as 'deprogramming'. This practice is unlawful and clearly violates [the Religion Declaration].¹⁵⁰

A submission from Reverend Mark Hanna of the Church of Scientology also argued that the practice of 'deprogramming' or 'exit counselling' constitutes physical and mental coercion 'designed to alter one's personal or spiritual beliefs'.

Such methods of forcibly altering beliefs are inherently criminal in nature as they involve unlawful restraint, kidnap in some cases, and often destroy family relationships. Whether violent or not, the aim is always to alter the person's state of mind and their beliefs even if it is masked by the use of psychological or

psychiatric terms to justify and explain away the true motivation and activities under a cloud of so-called “professional care and concern”.¹⁵¹

A typical personal example of deprogramming is provided by Ms D’Andrea, a Scientologist, who described her experience with a particular deprogrammer.

... Mr [D] stirred up my parents and family to act against me and my religious beliefs and to even endanger my physical wellbeing. Through [D]’s instigation, my parents imprisoned me in my own home and forced me to be subjected to a lengthy period (11 hours in total) of spiteful denigration of my religion by him. My own parents and family held me against my will and put more faith in [D]’s view of my religion than my own heartfelt statements to them.

[Mr D] attacked the founder of the Scientology religious philosophy, Mr. L Ron Hubbard and the ethical policies of Mr. Hubbard.

His raving persisted for hours, with not a decent thing being said; he denigrated everything he could and gave me information I knew to be utterly false.

I became tired, weary and eventually exhausted by his persistent harassment ... At least five times I tried to leave and each time, [Mr D] would become very angry with me and had my father convinced I had to remain, whereupon my father held me there. He has never done this to me before or ever held me against my will. It was an outrageous and humiliating experience.¹⁵²

In response to the allegations that CultAware is frequently involved with these activities, Mr and Mrs McClelland stated that CultAware has never condoned or been involved in involuntary counselling or ‘deprogramming’.

Because of the practice of deceptive recruiting, hidden agenda and mind control techniques used by many destructive groups, some families choose to offer counselling to their loved one.

Many groups actively oppose counselling and spread false rumours about practices carried out during counselling. On rare occasions, some families have restrained a family member, this is rare and illegal.¹⁵³

CultAware also submitted an affidavit from a person who underwent exit counselling before deciding to leave a particular new religious group.

The main task of an Exit Counsellor is to get a ... cult member ... to evaluate information about the group they are involved in, in an objective manner. It is up to the individual to study the material and to reach his own conclusion ... I suppose that is why it is called exit counselling ... the exit counsellor really only has to deal with the thought stopping techniques that the cult member has adopted and then present a more balanced set of information about the cult ... In my case, once I was aware of the thought stopping technique I had adopted I chose to set [that belief] aside on the grounds that I concluded that it was an unobjective way to deal with information.¹⁵⁴

Permissible limitations on religions

I believe that people are at their best and at their worst in Religion. We need to recognise that Religious faith is one of the most potent agents for good and for evil in the lives of people. This is clear particularly in the world of cults and New Religious Movements. Not all of them by any means are evil, but the capacity they have for inflicting pain and havoc in people's lives is enormous.¹⁵⁵

International law recognises that religion or belief may only be subject 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' (ICCPR article 18.3 and Religion Declaration article 1.3).

The Special Rapporteur on Religion and Belief noted that cult groups in Australia have relative freedom to practise their religion, subject only to the general law protecting the rights and well-being of others.

[T]he Church of Scientology represented only a small number of individuals in Australia, where people were free to do what they wanted within the law of the country ... Undoubtedly any violations committed by a religious group should not be sanctioned, but they should not lead to banning the religion as such.¹⁵⁶

Many submissions to this Inquiry expressed concern at coercive, deceptive, dishonest and dangerous practices by new religious groups and reasoned that limitations should be placed on those groups. Other submissions, particularly from the groups in question, disputed the accuracy of those claims.

Australian law does not prohibit the practice of any new religious movement although some of these groups have been in the past, and continue to be, subject to discriminatory attitudes. For instance, it has been argued that much of the hysteria surrounding the disappearance of Azaria Chamberlain in 1983 was due to ignorant and stereotyped ideas about the family's religious beliefs and practices.¹⁵⁷ The difficulty of deciding whether the practices of any new religious movements should be censured stems from a combination of such stereotyped fear of the unknown with a genuine concern about dubious practices and a reputation for the bizarre that many new religious groups have achieved. Fanatical action by cult extremists, as in Waco and the Japanese railway incidents, arguably gives cause to concerned onlookers to fear the radical, obsessive actions to which such groups can compel their adherents.

The problem can be approached in several ways. The former Attorney-General of Canada favoured a minimalist approach which presumes that individuals are able to take care of themselves.

Within the reasonable constraints of criminal and civil law, each person must be allowed the maximum in personal freedom to decide whether and what he will believe, whether or how to worship, as well as how or with whom to associate. Within those same constraints, he must be free to pursue any matter that intrigues him and even to fall victim to his own folly.¹⁵⁸

However, many submissions argued that this minimalist approach is inadequate and that more direction is needed to determine what is acceptable religious practice in this context.

... the right to believe should give guidelines, not only for those things that a religion should be allowed to do without restraint, but also the things that it should not be permitted to do.¹⁵⁹

Some of the important issues raised in submissions centred on the perceived conflict between the individual rights of adherents of religions and the rights of religions to practise their beliefs in an organised way. Dr David Millikan said, for example, that protection is needed for individuals who wish to leave or disagree with the principles of certain groups.

I would ask the Commission to consider the perspective of a person who is in dispute with or who claims to have been damaged by religious organisations in Australia. In situations such as this a point arrives when the rights to the freedom of religion in Australia appear to be in conflict with the rights of individuals who are or were adherents and claim that they are being disadvantaged by the practices and even the beliefs of groups who claim the privileges associated with having the status of a religion in Australia.¹⁶⁰

CultAware agreed that the individual's right to choose a religion, and to be free from coercion, should be respected and protected. It recommended that potential recruits of cult groups, prior to becoming involved with the group, should have free and open access to information pertaining to the group including scriptures and disciplinary procedures. The CultAware submission also stated that potential recruits should also be informed of the consequences of leaving the group and making criticisms of the group, to allow a balanced and informed judgement to be made.

We must seek ways to encourage a social commitment to individual autonomy and to avoid coercion and manipulative practices in our society solely for the benefit of a fundamentalist group leader or organisation.¹⁶¹

The difficulty of legislating to distinguish dangerous practices from legitimate ones was acknowledged by the University of Queensland Chaplaincy Team.

A number of these groups use intimidation and harassment against any member who wishes to leave the group, and have been known to use a range of tactics in endeavours to cut followers off from normal aspects of social life. We do not see these as legitimate parts of the normal emotional activities associated with religious practices, and do not believe that these activities should receive any sort of legal protection, though we appreciate that framing laws to prevent them, while not restricting legitimate activities, would be a difficult task.¹⁶²

However, many submissions made pragmatic suggestions for dealing with inter-faith conflict on allegations such as brainwashing, deception, dishonesty and coercion. These suggestions, if taken up, provide a foundation to help develop criteria for determining whether any of the criticised practices of some religious groups should be limited or restricted.

One submission recommended that each religious group should create a statement of faith to clarify its relationship with each adherent.

My suggestion to combat these truly coercive tactics is that all religious groups should have a clear statement of faith. This should outline all their beliefs and it should be made law that a person changing his faith or joining any group should have access to this document. If a person is drawn into such a group and finds immoral or unethical conduct not outlined in the statement he could then legally have the right to compensation. This would be similar to consumer affairs as people have a right to know what they are joining.¹⁶³

In a similar vein, Mrs Arielli submitted that all religions should have to abide by an ethical code of conduct.

I believe that all religious organisations or groups should have to abide by certain ethical standards of practice, if they wish to be allowed to operate as a religion and/or gain tax exemption. This should not interfere with beliefs as such but simply means that they must respect the rights of individuals and society and thereby be accountable for their actions, that the *behaviour & practices* of religious groups should be open to public scrutiny.

Religions should be forbidden to use deceptive methods of recruitment and should be open about who they are, what their purpose is, what their beliefs are and what becoming a member of the organisation entails.

Religious organisations should be accountable to authorities and to society in general. If a religious organisation applies for charitable status and therefore tax exemption, they should be made open to have their finances audited by the taxation department.¹⁶⁴

Dr David Millikan recommended that religious organisations should meet and agree on what is considered acceptable practice.

... it is in the best interests of all religious organisations to agree on what is acceptable and what is not acceptable in religious practice.¹⁶⁵

Further, Dr Millikan suggested that it would be helpful to hold a series of meetings between interested parties to attempt to tease out the issues of what acceptable practice should be.

Perhaps the Commission is the appropriate body to sponsor a series of meetings of representatives of the Churches, the police, Community Services and any other interested parties to address this matter. I would suggest that the agenda of these meetings might be this: What are the rights of a person within religious organisations? I include the Police and Community Services because of the difficulty which prominent leaders in these organisations have expressed to me when they are involved in situations which have to do with small and eccentric religious organisations.¹⁶⁶

Dr Millikan particularised several issues of importance.

The principles which emerge from a discussion such as I suggest might be seen as guidelines or 'acceptable principles' on which freedom of religion might be preserved. The sort of things I am thinking about are:

- the right of a person to doubt or question the teachings of the group
- the right of a person to leave without the curses and threats of the group ringing in their ears
- the right to preserve some privacy to their own psychological processes ...¹⁶⁷

Whether the issues raised necessitate specific legal limitations beyond the general protection of criminal and civil law is an emotionally charged question which is difficult to resolve. Indeed, at this stage, without a full investigation into the accusations made in the submissions against various religious movements, it is not possible to recommend changes to the law on this point.

Findings and recommendation on new religious movements

- Coercion is contrary to international human rights law and cannot be condoned under the umbrella of religious freedom (ICCPR article 18.2, Religion Declaration article 1.2).
- Coercion includes detention or mistreatment for the purposes of involuntary counselling.
- Coercion includes the use of covert or brainwashing techniques to recruit new members, involuntary incarceration of members, deprivation of contact with family and friends and other forms of abuse and mistreatment.
- Many people are concerned about coercive practices of new religious movements and consider that protection under the general law is inadequate.
- Many submissions argue that the most appropriate way of dealing with that problem is to develop a set of guidelines or principles to determine what is acceptable religious practice.
- An inter-faith dialogue may be helpful in clarifying and identifying the issue of possible limitations to be imposed or a standard of acceptable religious practice.

The Commission recommends

- R3.15** The federal Attorney-General's department should convene an inter-faith dialogue

1. to examine the question of methods of coercion in religious belief and practice and how they should be dealt with
2. to consider whether legal limitations should be imposed on religious groups regarding coercive tactics
3. to formulate an agreed list of minimum standards for the practice of religious groups.

Notes

- 1 See also Religion Declaration article 1.3.
- 2 Human Rights Committee, General Comment 22, (1993).
- 3 Office of Multicultural Affairs, *National Agenda for a Multicultural Australia: The Year in Review*, Australian Government Publishing Service, Canberra, 1990.
- 4 Lorraine Inje, Chairperson, Aboriginal Language Centre, quoted in *Human Rights and Indigenous Australians, Proceedings of the Australian Reconciliation Convention, 26-28 May 1997*, Book 3, The Council for Aboriginal Reconciliation, Commonwealth of Australia, 1997.
- 5 *Human Rights of Indigenous Peoples, Indigenous People and their relationship to land, Preliminary working paper prepared by Mrs Erica-Irene Daes, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1997/17, page 13.
- 6 W E H Stanner, *White Man Got No Dreaming, Essays 1938-1973*, Australian National University Press, Canberra, 1979, page 230.
- 7 *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/23, Addendum, Visit to Australia (Amor Report), UN Doc. E/CN.4/1998/6/Add.1, page 9.
- 8 *Id*, page 17.
- 9 *Toomelah Report, Report on the problems and needs of Aborigines living on the NSW-Queensland border*, Human Rights and Equal Opportunity Commission, Sydney, 1988, pages 55-56.
- 10 *Ibid*.
- 11 Hal Wooten, *Application under s 10 by Toomelah Boggabilla Aboriginal Land Council re Boobera Lagoon, Report to Minister for Aboriginal Affairs*, 20 April 1996.
- 12 *Id*, page 9.
- 13 *Id*, page 147.
- 14 However, a temporary declaration was made on 31 March 1994 in respect of certain aspects of the site and a burial ground on the foreshore of the lagoon is now protected by fencing and appropriate signs: Evatt Report, page 283.
- 15 <http://www.cowleys.com.au/public/tgd4390.htm>
- 16 The University of Queensland Chaplaincy Centre *Submission R/212*.
- 17 Dr Juliet Sheen, *Submission R/245*, attachment A, extract from J Sheen and K Boyle (eds), *Freedom of Religion and Belief: A World Report*, Routledge, London and New York, 1997, page 168.
- 18 Amor Report, above note 7, paragraph 93.
- 19 The Hon Elizabeth Evatt was invited by the then Minister for Aboriginal and Torres Strait Islander Affairs, the Hon Robert Tickner, to undertake a comprehensive review of the Heritage Act. The Review received almost 70 submissions and conducted extensive consultations with various groups and individuals around Australia.

- 20 *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (the Evatt Report).
- 21 *Id.*, pages xiii, xiv.
- 22 Amor Report, above note 7, paragraph 96.
- 23 Parliament of the Commonwealth of Australia, *Eleventh Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund* (Eleventh Report), Canberra, April 1998.
- 24 *Id.*, page 5. For details of the Hindmarsh Island Bridge situation see the Evatt Report, pages 299-303. In summary Hindmarsh Island (Kumarangk) was the subject of extensive litigation from 1993. In 1993 the Ngarrindjeri women of the island applied for declarations under section 10 of the Heritage Act to protect the site from a threat posed by a proposed bridge between Goolwa and Hindmarsh Island. The reporter appointed to receive information for the long-term application concluded that it was open to the Minister to find that the area has particular significance for Aboriginal people. Her decision was based partly on culturally sensitive confidential information which was attached to her report in envelopes. The reporter indicated that this information should not be read by men. The Minister granted the section 10 application to prevent the construction of the bridge for 25 years. The developers challenged the Minister's decision in the Federal Court which overturned the decision and stated, among other things, that the Minister should personally have to consider all relevant information, including the confidential material in the envelopes. The case indicates the uncertainty about the processes of Commonwealth and State legislation including the protection of culturally sensitive information.
- 25 Eleventh Report, above note 23, pages ix-x. Also W Entsch MP, *Media Release*, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Canberra, 2 April 1998.
- 26 Margo Kingston, *Sydney Morning Herald*, 12 May 1998, page 6.
- 27 Debra Jopson, *Sydney Morning Herald*, 7 May 1998, page 9.
- 28 Parliament of the Commonwealth of Australia, *Twelfth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, May 1998. Internet site <http://www.aph.gov.au/senate/committee>
- 29 *Id.*, paragraph 4.4.
- 30 Parliament of the Commonwealth of Australia, *Fifth Minority Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, May 1998, paragraph 1.7.
- 31 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 June 1998, 4852, (Dr Wooldridge, Minister for Health and Family Services).
- 32 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report 1995*, Australian Government Publishing Service, Canberra, 1995, page 63.
- 33 General Comment No. 23 (1994) in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/ Rev.3, page 41.
- 34 *Id.*, paragraph 7.
- 35 *Draft UN Declaration on the Rights of Indigenous Peoples*, UN Doc. E/CN.4/SUB.2/1994/2/Add.1.
- 36 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report 1995*, Australian Government Publishing Service, Canberra, 1995, page 87.
- 37 *Marriage Act 1961* (Cth) section 11.
- 38 *Id.*, sections 23(1)(e), 23B(1)(e).
- 39 *Id.*, section 12(2).
- 40 Australian Law Reform Commission, *Multiculturalism and the Law*, Report No. 57, Commonwealth of Australia, 1992, page 92.
- 41 Dr Prince Roman, Universal Family, *Submission R/04*.
- 42 *Marriage Act 1961* (Cth) sections 23(1)(a), 23B(1)(a).
- 43 *Id.*, section 94(1).

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- 44 Id, section 94(4).
- 45 *Family Law Act 1975* (Cth) section 6.
- 46 Australian Law Reform Commission, *Multiculturalism and the Law*, Report No. 57, Commonwealth of Australia, 1992, page 94.
- 47 Dr Prince Roman, Universal Family, *Submission R/04*.
- 48 Patrick Parkinson, 'Taking Multiculturalism Seriously: Marriage Law and the Rights of Minorities', *Sydney Law Review*, 16(4)December 1994 473, page 504. An internet essay *Polygamy, the Quranic way* states that polygamy is only permitted in the Quran under strictly observed circumstances and that 'the Quran emphasises the limitations against polygamy in very strong words: "If you fear lest you may not be perfectly equitable in treating more than one wife, then you shall be content with one"(4:3) and "You cannot be equitable in a polygamous relationship, no matter how hard you try."(4:129)' <http://www.submission..org.polygamy.html>.
- 49 See for example, *Cemeteries Act 1995* (NT) section 23; *Cemeteries Act 1986* (WA) section 11; *Cemeteries Act 1933* (ACT) section 17.
- 50 Leeroy Betti, *The West Australian*, 27 September 1997, page 28.
- 51 Cyril Glasse, *The Concise Encyclopaedia of Islam*, Harper and Row, San Francisco, 1989, page 134.
- 52 Wazim Rasa, Secretary, Muslim Cemetery Trust in Rookwood, telephone conversation, 19 June 1998.
- 53 Sunil Prakash, Director of Engineering, Young City Council and Rahif Nadi, member of Young's Muslim community, telephone conversations, 19 June 1998.
- 54 *Buddhist Beliefs on Death and Dying and Practical Implications for Policy*, prepared by RIGPA Australia for the Human Rights and Equal Opportunity Commission Workshop on Religion and Human Rights, 28 April 1998. This document includes a statement on Buddhist beliefs on death and dying 'which has been cleared by representatives of all the major Buddhist traditions'.
- 55 Letter dated 20 March 1995 from Ann Pickering on behalf of the Canberra Buddhist Community. Permission of author obtained.
- 56 Attachment to letter dated 20 March 1995 from Ann Pickering on behalf of the Canberra Buddhist Community. Submission by the Combined Buddhist Communities of Canberra to the ACT Attorney-General's Department, Response to Issues Paper on the *Coroners Act 1956* (ACT). Permission of author obtained.
- 57 Ibid.
- 58 Joint Committee on Post Mortem Examinations Submission to the Attorney-General and the Minister for Health of New South Wales in Respect of the Question of Autopsies, September 1994. Permission of author obtained.
- 59 *Coroners Amendment Act 1997* (NSW) section 3. This Act also inserts section 48B into the *Coroners Act 1980* (NSW) which provides that nothing in section 48A prevents persons other than the senior next-of-kin from objecting to a post-mortem examination.
- 60 For example, see *Coroners Act 1985* (Vic) section 29; *Coroners Act 1998* (NT) section 23; *Coroners Act 1995* (Tas) section 38.
- 61 *Coroners Act 1997* (ACT) section 3(1).
- 62 Id, section 24.
- 63 Id, sections 64, 68, 90, 91.
- 64 Royal Commission into Aboriginal Deaths in Custody, *National Report - Overview and Recommendations*, Australian Government Publishing Service, Canberra, 1991, page 39.
- 65 *Coroners Act 1995* (Tas) section 23.
- 66 New South Wales Anti-Discrimination Board, *Discrimination and Religious Conviction*, Sydney, 1984, recommendation 32.
- 67 For example, Steven and Helen Doven *Submission R/182*.
- 68 *Sideway v Board of Governors of the Bethlehem Royal Hospital and the Maudsley Hospital* [1985] AC 871.

- 69 Ibid.
- 70 As reported in *The Age* (Melbourne), *The Herald-Sun* (Melbourne), *The West Australian* and *The Sydney Morning Herald* on Thursday 26 Feb 1998. Telephone advice from the Registrar, Guardianship and Administration Board, Victoria on 22 April 1998 confirmed that on 24 February 1998 the Board made a limited guardianship order with respect to the health care of the woman. The order was made for a period of 21 days. Under the terms of the order the Public Advocate was appointed as the guardian. The Public Advocate delegated its powers under the order to the woman's husband. On 17 March 1998 the order was reviewed. Following the review the order was revoked.
- 71 *Convention on the Rights of the Child* articles 6 and 24.
- 72 See *Transplantation and Anatomy Act 1978* (ACT) section 23; *Children (Care and Protection) Act 1987* (NSW) section 20A; *Emergency Medical Operations Act 1973* (NT) section 3; *Transplantation and Anatomy Act 1979* (Qld) section 20; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) section 13; *Human Tissue Act 1985* (Tas) section 21; *Human Tissue Act 1982* (Vic) section 24; *Human Tissue and Transplant Act 1982* (WA) section 21.
- 73 Watchtower Bible and Tract Society of Australia for and on behalf of Jehovah's Witnesses *Submission R/253*. Note that all following quotes are taken from this submission.
- 74 Nahid Touibia, *Female Genital Mutilation, A Call for Global Action*, Rainbo, New York, 2nd edition, 1995, page 9.
- 75 Family Law Council, *Female Genital Mutilation*, Commonwealth of Australia, 1994, pages 6-7.
- 76 Id, page 17.
- 77 Australian Law Reform Commission, *Multiculturalism: Criminal Law*, Discussion Paper 48, Australian Law Reform Commission, Sydney, 1991, page 22.
- 78 Family Law Council, *Female Genital Mutilation*, Commonwealth of Australia, 1994, page 47.
- 79 Queensland Law Reform Commission, *Female Genital Mutilation*, Report No. 47, Brisbane, September 1994.
- 80 *Crimes (Female Genital Mutilation) Amendment Act 1994* (NSW) section 45; *Crimes (Female Genital Mutilation) Act 1996* (Vic) sections 32-34; *Criminal Law Consolidation Act 1935* (SA) sections 33A, 33B; *Crimes (Amendment) Act (No. 3) 1995* (ACT) sections 92W-Y; *Criminal Code* (NT) sections 186B-D. In Tasmania, provisions dealing directly with female genital mutilation are contained in the *Criminal Code Amendment Act 1995* (Tas) which is yet to be proclaimed, pending implementation of relevant educational programs (advice from Tasmanian Attorney-General's Department, 27 May 1995).
- 81 *Crimes Act 1995* (ACT) section 92Y(3).
- 82 The Salvation Army, Australian Eastern Territory, *Submission R/206*.
- 83 For example, Fran P Hosken, *Genital and Sexual Mutilation of Females*, Women's International Network News, Lexington, MA, 1993, page 32; Nahid Touibia, *Female Genital Mutilation, A Call for Global Action*, Rainbo, New York, 2nd edition, 1995, page 31.
- 84 Family Law Council, *Female Genital Mutilation*, Commonwealth of Australia, 1994, page 8.
- 85 Queensland Law Reform Commission, *Female Genital Mutilation*, Report No. 47, Brisbane, September 1994, page 16.
- 86 Stanley W Johnston *Submission R/36*, for example, argued that the practice offends CROC article 34 and CEDAW articles 2(f) and 5.
- 87 Committee on the Elimination of Discrimination Against Women, General Recommendation 19, 'Violence against Women', in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI\GEN\1\Rev.1, 1994, page 84.
- 88 For example, CEDAW article 5(a); CROC article 24.3; ICCPR article 7.
- 89 Advice from Queensland Department of Justice, 25 May 1998.
- 90 Advice from WA Attorney-General's Department, 29 May 1998.

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- 91 Articles 3, 19 and 24 respectively.
- 92 Chel Bardell, Pagan Alliance Inc., *Submission R/220*.
- 93 Id, in attached booklet *Paganism: Beliefs and Practices, A Guide to modern Paganism in Australia*, Pagan Alliance 1993, revised 1994 and 1997, page 4.
- 94 Id, booklet, page 5.
- 95 *Vagrancy Act 1966* (Vic) section 13: 'Any person who pretends or professes to tell fortunes or uses any subtle craft means or device by palmistry or otherwise to defraud or impose on any other person or pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration or pretends from his skill or knowledge in any occult or crafty science to discover where or in what manner any goods or chattels stolen or lost may be found shall be guilty of an offence. Penalty: 5 penalty units.'
- 96 Meagan Phillipson *Submission R/25*.
- 97 V O'Brien *Submission R/24*.
- 98 R L Akers, *Queensland Criminal Code Review Submission*, September 1996, www.powerup.com.au
- 99 Id, page 1.
- 100 *Summary Offences Act* (NT) section 57(1)(d): 'Any person who pretends to tell fortunes, or uses any subtle craft, means, or device, by palmistry or otherwise, to deceive or impose upon any of her Majesty's subjects shall be guilty of an offence. Penalty: \$1,000 or imprisonment for 6 months, or both.'
- 101 *Police Act 1892* (WA) section 66(3): 'Every person pretending to tell fortunes, or using any subtle craft, means, or device, to deceive and impose upon any person ... shall on summary conviction be liable to a fine not exceeding \$1000 or to imprisonment for any term not exceeding 12 calendar months.'
- 102 *Police Offences Act 1953* (SA) section 40: 'Every person who for personal gain - (a) pretends to tell fortunes; or b) uses palmistry or other subtle craft, means or device to deceive any person, shall be guilty of an offence. Penalty: Forty dollars or imprisonment for one month.'
- 103 *Police Offences Act 1935* (Tas) section 8(1): ' A person shall not pretend or profess to tell fortunes or use any subtle craft, means or device, by palmistry or otherwise, to defraud or impose on any other person. Penalty: \$500 or imprisonment six months.'
- 104 R L Akers, *Queensland Criminal Code Review Submission*, September 1996 @ www.powerup.com.au at page 5.
- 105 *Final Report of the Criminal Code Review Committee to the Attorney General*, June 1992, Schedule 2: Sections Recommended for Repeal.
- 106 *Report of the Criminal Code Advisory Working Group*, July 1996 (unpublished internal report to the Attorney-General).
- 107 Queensland, 'Fortune-Telling Criminal Sanctions, Questions on Notice,' *Hansard Parliamentary Debates*, No. 1062, 14 November 1996, page 4237.
- 108 *Hartridge v Samuels* [1976] 14 SASR 209.
- 109 Louise Bowes, *Servants of the Elder Gods*, *Submission R/221*.
- 110 Chel Bardell, Pagan Alliance, *Submission R/220*, attached booklet *Paganism: Beliefs and Practices, A Guide to Modern Paganism in Australia*, Pagan Alliance, 1993, revised 1997, page 10.
- 111 Pagan Alliance NSW, *Submission R/222*, attached excerpt from *The Sunday Telegraph*, Letters to the Editor, April 6 1997, from 'Lily and Tara - Blacktown'.
- 112 Louise Bowes, *Servants of the Elder Gods*, *Submission R/221*.
- 113 Queensland, *Hansard Parliamentary Debates*, 25 March 1997, page 819.
- 114 Id, page 819-820.
- 115 Justice P W Young (ed), 'Current Issues: Witches', [1998] 72 *Australian Law Journal* 253, page 254.

- 116 Rachael Kohn, 'Cults and the New Age in Australia', in Gary Bouma (ed), *Many religions, all Australian: religious settlement, identity and diversity*, The Christian Research Association, Adelaide, 1996, page 156.
- 117 Gary Bouma (ed), *Many religions, all Australian: religious settlement, identity and cultural diversity*, The Christian Research Association, Adelaide, 1996, page 47.
- 118 Lynne Hume, 'A Reappraisal of the term 'Cult' and consideration of 'Danger Markers' in Charismatic Religious Groups', (1996) 28(1) *Colloquium* 35, page 36.
- 119 This report uses this description where possible. However, as many of the submissions were specifically opposed to the 'cult' aspects of 'new religious movements' both words are used at times to ensure clarity. Many of the groups identified as 'new religious movements' may be neither new nor, more contentiously, correctly described as religious. However, this term appears to be the most neutral descriptor for the purposes of this discussion.
- 120 Joan McClelland, CultAware, *Submission R/251*. This list of criteria was also provided in confidential *Submission R/192* and sourced to The American Citizens Freedom Foundation.
- 121 *Discrimination and Religious Conviction*, NSW Anti-Discrimination Board, Sydney, 1984, page 236.
- 122 *Background Information on the World Conference on Religion and Peace*, undated.
- 123 The controversial *Report of the Board of Inquiry into Scientology* by Kevin Anderson QC, Victoria, 1965 reported that 'Scientology is not, and does not claim to be a religion. The general attitude of its founder is hostile to and disparaging of religion ... The Board has been unable to find any worth-while redeeming feature in Scientology. It constitutes a serious medical, moral and social threat to individuals and to the community generally', page 2.
- 124 K Klæbe, *Submission R/122*, attached booklet *Escalation of Discrimination & Xenophobia Against Minority Religion in Today's Germany*, Tal Pechner, 1997.
- 125 Amor Report, above note 7, page 15.
- 126 General Comment No. 22 (1993) paragraph 2 in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.3, page 37.
- 127 Robyn Arielli *Submission R/117*.
- 128 General Comment No. 22 (1993) paragraph 5.
- 129 Ibid.
- 130 D Sullivan, 'Advancing the Freedom of Religion and Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination', (1988) 82 *American Journal of International Law* 487, page 494.
- 131 R G Hassell *Submission R/178*.
- 132 *Non Fatal Offences Against the Person*, Model Criminal Code Discussion Paper, Chapter 5, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, August 1996, page 21.
- 133 For example, Mr S Riley *Submission R/170* and *Confidential Submission R/42*.
- 134 C Webster, Cult Information and Family Support, *Submission R/213*.
- 135 Joan McClelland, CultAware, *Submission R/251*.
- 136 *Confidential Submission R/136*.
- 137 *Confidential Submission R/34*.
- 138 Robyn Arielli *Submission R/117*.
- 139 Joan and Tony McClelland, CultAware, *Submission R/250*, attachment 10, *Death, Psychosis and Scientology*, Information Sheet, Fight Against Coercive Tactics Network, page 5.
- 140 *Confidential Submission R/192*.
- 141 *Confidential Submission R/136*.
- 142 Joan and Tony McClelland, CultAware, *Submission R/250*, attachment 14.
- 143 Ian Cairns *Submission R/167*.

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- 144 Lucia D'Andrea *Submission R/172*.
- 145 Sara Verrier *Submission R/121*.
- 146 *Confidential Submission R/163*.
- 147 Gary Bouma (ed), *Many religions, all Australian: religious settlement, identity and cultural diversity*, The Christian Research Association, Adelaide, 1996, page 148.
- 148 Although most of the submissions on this point tended to characterise this practice as vilification or harassment, the issues are more appropriately dealt with as coercion.
- 149 Joan and Tony McClelland, CultAware, *Submission R/250*.
- 150 Brian Johnston, Researcher, Church of Scientology, *Submission R/247*.
- 151 Reverend Mark Hanna, Director, Official Affairs, Church of Scientology, *Submission R/6*.
- 152 Lucia D'Andrea *Submission No R/172*. See also Loueen Bayly *Submission R/176*; Ms S Verrier *Submission R/121*; Ms Adrienne Harris *Submission R/153*; Ms Rosalie Seren *Submission R/165*.
- 153 Joan and Tony McClelland, CultAware, *Submission R/250*.
- 154 Id, attachment 48, *To Whom it may Concern Regarding Exit Counselling*.
- 155 Rev. Dr David Millikan *Submission R/2*.
- 156 Amor Report, above note 7, page 9.
- 157 The Chamberlain family were Seventh Day Adventists: see James T Richardson 'Minority Religions ('Cults') and the Law: Comparisons of the United States, Europe and Australia' (1995) 18(2) *University of Queensland Law Journal* 183, at page 199.
- 158 D G Hill, *Study of Mind Development Groups, Sects and Cults in Ontario*, Report to the Ontario Government, June 1980, page 48. Quoted by Dr Juliet Sheen *Submission R/245*, in Attachment (C), 'Balancing the Act' at page 139. See also *Discrimination and Religious Conviction*, NSW Anti-Discrimination Board, 1984, Sydney, pages 236-263.
- 159 For example, Peter and Christine Kipps *Submission R/249*.
- 160 Rev. Dr David Millikan *Submission R/2*.
- 161 Joan and Tony McClelland, CultAware, *Submission R/250*.
- 162 The University of Queensland Chaplaincy Centre *Submission R/212*.
- 163 *Confidential Submission R/34*.
- 164 Robyn Arielli *Submission R/117*.
- 165 Rev. Dr David Millikan *Submission R/2*.
- 166 Ibid.
- 167 Ibid.

4 Discrimination on the ground of religion or belief

[T]he contemporary Australian workplace consists of persons from a diverse range of cultures with many different specific religious beliefs and needs. In this regard it is asserted that the freedom to hold or not to hold religious beliefs should be a fundamental right of Australian workers. However, it is clear that religious discrimination exists in many workplaces and that this is a significant industrial relations issue that should be addressed as a matter of urgency.¹

4.1 Introduction

Discrimination on the basis of religion or belief is prohibited under the International Covenant on Civil and Political Rights (ICCPR). Article 2.1 imposes on states an obligations to uphold all of the rights in the ICCPR

... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR provides that all persons are equal before the law. It requires that all persons be guaranteed equal and effective protection under the law against discrimination

... on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 3 of the Religion Declaration proclaims discrimination on the ground of religion or belief 'an affront to human dignity' which is to be condemned as a violation of fundamental rights and freedoms. Article 2.1 proclaims that 'no one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs'. For the purposes of the Declaration discrimination means

any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

There are a number of parallels between article 2 and the provisions relating to racial discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). Like CERD, the Declaration prohibits unintentional as well as intentional acts of discrimination and actions which have a discriminatory effect in fact although they are applied equally to all.

The basic right of all Australians to realise their full potential and participate fully in society can only be achieved when all Australians, whatever their backgrounds, receive equality of opportunity and treatment in all areas of life.

This chapter summarises the current legislative protection in Australia against discrimination on the ground of religion or belief. The experiences of many Australians who have faced prejudice and discrimination because of their religion or belief are then detailed. Finally recommendations to address and prevent discrimination on the grounds of religion and belief are made.

4.2 Discrimination under Australian law

Relevant federal laws

Human Rights and Equal Opportunity Commission Act

Under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the HREOC Act) the Commission has a variety of functions and powers relating to the protection and promotion of human rights for all people in Australia. The Commission has the power to investigate violations of human rights, including the right to freedom of religion and belief, where the alleged violator is the Commonwealth or an agent of the Commonwealth or the violation occurs under a Commonwealth enactment.²

The Commission can also investigate complaints of discrimination in employment or occupation based on religion at all levels of government and in the private sector. There is an exception for any distinction, exclusion or preference made 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, being a distinction, exclusion or preference made in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.³

However, the HREOC Act does not provide enforceable remedies against discrimination on the ground of religion or belief. Where the Commission finds discrimination within the terms of the Act and the parties are unable to achieve a conciliated settlement, the only course open to the Commission is to submit a report to the federal Attorney-General for tabling in Parliament.⁴

Racial Discrimination Act

The *Racial Discrimination Act 1975* (Cth) (RDA) provides some limited protection against discrimination on the basis of religion. The RDA makes direct and indirect discrimination on the ground of race unlawful.⁵ Public behaviour based on race which offends, insults, humiliates or intimidates a person or group is also made unlawful.⁶ 'Race' includes colour, descent, national origin and ethnic origin.⁷

If a religious group can also be classified as a 'racial' or 'ethnic' group, the RDA offers protection from discrimination and vilification. In fact, even if a religious group cannot be classified in that way, the RDA arguably covers discrimination on the basis of religion in certain circumstances as indirect racial discrimination.

Indirect discrimination occurs when a practice or policy purports to treat everyone in the same manner but in effect disadvantages a higher proportion of people from a particular racial or ethnic group and is not reasonable in the circumstances. The indirect race discrimination provision of the RDA makes discrimination on the basis of religion unlawful when the discriminatory act or practice disadvantages an ethno-religious group disproportionately.

The term 'ethnic origin' has been interpreted broadly by courts in a number of jurisdictions. In 1979 the New Zealand Court of Appeal held that Jews in New Zealand form a group with common ethnic origins within the meaning of the *Race Relations Act 1971*.⁸ In the UK in 1983 the House of Lords held that Sikhs have a common ethnic origin.⁹ According to Lord Fraser, for a group to constitute an 'ethnic group' for the purpose of the legislation in question, it had to regard itself and be regarded by others as a distinct community by virtue of certain characteristics, two of which were essential: 'a long shared history of which the group was conscious as distinguishing it from other groups and the memory of which it kept alive' and a 'cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance'.¹⁰ The English Court of Appeal relied on this decision when it held in 1989 that Roma (or 'gypsies') form a racial group within the definition of the *Race Relations Act 1971* (UK) with a common geographical origin, distinct customs and a common dialect.¹¹ By way of contrast, Muslims and Rastafarians have not received the protection of racial discrimination laws in England.¹²

The NSW Equal Opportunity Tribunal followed the New Zealand and English decisions in a 1993 case holding that a Jewish person was a member of a 'race' for the purposes of the *Anti-Discrimination Act 1977* (NSW).¹³

While Jews and Sikhs are likely to be classified as members of ethnic groups for the purposes of the RDA, it is a matter of conjecture whether Muslims comprise such a group. The English Employment Appeal Tribunal held in 1988 that Muslims are a group defined mainly by religion and thus do not fall within the *Race Relations Act 1976*.¹⁴ Although Muslims profess a common religion and a common cultural, historical and other background and have a common literature in the Holy Quran, the Tribunal held that other characteristics of an ethnic group are lacking and there are Muslims in many countries and of many colours and languages. The common denominator was said to be religion and a religious culture.

On the other hand, there are indications that a broader view may apply in Australia. The second reading speech¹⁵ and the explanatory memorandum associated with the passage of the *Racial Hatred Act 1995* (Cth)¹⁶ used a broad interpretation of 'ethnic' which could include Jews, Sikhs and Muslims. The Explanatory Memorandum to the Racial Hatred Bill 1994 stated

The terms 'ethnic origin' and 'race' are complementary and are intended to be given a broad meaning.

4.2 Discrimination under Australian law

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 as formulated by the Court in *King-Ansell* involves consideration of one or more 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.¹⁷

Under the *Acts Interpretation Act 1901* (Cth)¹⁸ an Australian court would be entitled to use this material as guidance.

Workplace Relations Act

The *Workplace Relations and Other Legislation Amendment Act 1996* includes a range of provisions intended to prevent and eliminate discrimination in employment. Religion is among the specified grounds of employment discrimination prohibited by this Act.

Relevant State and Territory laws

Victoria, Queensland, Western Australia, the Northern Territory and the ACT have passed legislation prohibiting direct and indirect discrimination on the ground of religion. Each of these Acts makes it unlawful to discriminate against another person on the basis of lawful religious beliefs and practices or the absence of lawful religious beliefs and practices.¹⁹ None of the Acts contains a definition of religion or religious belief. The Northern Territory Act provides specifically that religious belief and activity includes Aboriginal spiritual belief and activity.²⁰

The New South Wales *Anti-Discrimination Act 1977* prohibits discrimination on many grounds but not on the ground of religion. The definition of 'race' in the New South Wales Act now includes ethno-religious background.²¹ Consequently, in NSW there is a measure of protection against discrimination for a religion associated with a particular racial or ethnic group but not for others.

Anti-discrimination laws in South Australia and Tasmania do not deal with discrimination on the ground of religion.

In terms of coverage, the legislation in Victoria, Queensland, Western Australia, the Australian Capital Territory and the Northern Territory prohibits direct and indirect discrimination on the grounds of religious belief and religious activity in

- employment and work, including partnerships, professional, trade or business organisations, qualifying bodies and employment agencies

- education
- provision of goods and services
- accommodation and
- club membership.

The Queensland legislation, which probably has the widest coverage, also applies to superannuation, insurance and the administration of State laws and programs.

The Victorian legislation also prohibits members of local government councils from discriminating against other members on the basis of, among other things, their religious practices or beliefs.

Most of the State and Territory anti-discrimination Acts include requirements of reasonable accommodation. That is, they recognise that some accommodation of the special needs of individuals should be made in circumstances where it would not be an unreasonable requirement.²² The ACT legislation, for example, makes it unlawful to discriminate by refusing an employee permission to observe religious practices during working hours where

- it is of a kind recognised as necessary or desirable by persons of the same religious conviction as the employee
- it is reasonable having regard to the circumstances of employment
- it does not subject the employer to unreasonable detriment.²³

The Western Australian legislation has a similar provision²⁴ while the remainder deal with special needs in a negative way, by providing that it is not discriminatory to fail to provide for a special need if it would be an unreasonable imposition to do so.

There are a number of exemptions in each Act which permit discrimination on the grounds of religious beliefs and activities. Most of these are for the benefit of religious organisations. For example, it is not unlawful for a religious school to discriminate between applicants for employment on the basis of their religious convictions or absence of religious convictions to avoid injury to the religious susceptibilities of the adherents of that religion.²⁵

Religious organisations also have broader exemptions from other provisions of State and Territory anti-discrimination legislation if the discrimination is on the basis of religion and is to avoid injury to the susceptibilities of adherents of that religion. For example, the NSW Act includes a provision allowing for

any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.²⁶

4.3 Experiences of discrimination in public life

A particularly wide exemption is contained in the Victorian legislation. In addition to exemptions relating to religious bodies and religious schools there is a provision which allows discrimination where

the discrimination is necessary for the [discriminator] to comply with the person's genuine religious beliefs or principles.²⁷

A comparison between the NSW and Victorian provisions illustrates the lack of uniformity between different jurisdictions with regard to exemptions. Some of these exemptions are very broad and effectively amount to an absolute exemption for conscience.

4.3 Experiences of discrimination in public life

Despite the legal protections that apply in different jurisdictions, many Australians suffer discrimination on the basis of religious belief or non-belief, including members of both mainstream and non-mainstream religions and those of no religious persuasion. Submissions received by the Commission detailed many areas in which people experience discrimination based on religion or belief.

Civic activity

As a matter of law, there is no established or state sponsored religion or church in Australia. Religion is not imposed by civil authority. As a matter of history and convention, however, woven into the fabric of Australian life and culture is an underlying thread which creates an impression that, in substance, Australia's national religion is Christianity, albeit of a 'vaguely non-denominational nature'.²⁸ Many areas of civic life are affected. Exclusively evoking Christian symbolism on civic occasions potentially marginalises a significant number of Australians. The Executive Council of Australian Jewry expressed concern about the predominance of Christian symbolism in many areas of public life.

On a number of occasions, including public memorial services, the concept of multi-faith prayer or ceremonies has not replaced the practice of purely Christian liturgies. For example, given the involvement of Jews, Muslims, followers of Indigenous beliefs and other non-Christians in Australia's armed forces, there exists a possibility that the "Unknown Soldier" was not a Christian and that his burial should not have been based on the assumption that he was. Further, at Anzac Day services, particularly in communities and locations where non-Christians comprise a majority of identifiable proportion of those in attendance, it is inappropriate and insensitive to marginalise Australians through the choice of liturgy.

... In Australia, elections are held on Saturday, the Sabbath for Jews and Seventh-Day Adventists. Judaism proscribes certain behaviour on the Sabbath, which extends beyond employment to, for observant, traditional Jews, writing and travelling in vehicles.

The needs of voters who are unable to participate in casting ballots on the set day for election are accommodated to a degree by the provision of pre-poll and postal voting. These facilities permit individuals to fulfil their legal requirements to vote, but not at the same time as the majority of electors.

The problem is more acute for members of political parties and candidates. For most political party members, handing out literature at polling booths is a basic element of their party commitment, and it is arguable an Observant Jew could not participate in this activity in any way. Candidates could not canvass support, encourage their supporters or otherwise further their prospects for election.²⁹

Most Australian public holidays are based on Christian religious days. The Humanist Society of WA submitted that some members

find it irksome to be forced to observe Christian feast days and would prefer such public holidays to be converted to special leave which an individual can take when it suits her belief system or lifestyle.³⁰

Dr David Maddison agreed.

Many Christian religious holidays have official status. Examples are Christmas Day and Boxing Day, Good Friday, Easter Monday and Sundays. Some people don't consider this to be an official religious impost, as these religious holidays are now considered secularised by many. This may be true, so in that case, why not abolish them and replace them with general-purpose vacation days that can be used whenever one wants? If there is sufficient demand to have these vacation days at their traditional times, then employers will still make appropriate arrangements and individuals who wish to undertake their normal activities of visiting family and so on will be able to do as usual. Many people who aren't Christian find the official religious holidays meaningless and find the times inconvenient.³¹

Having made the same point, the Executive Council of Australian Jewry concluded

Australians who observe Western Christianity can be therefore understood to have their religious needs accommodated in a manner which is not common to members of other faiths.

This council is not recommending that Christmas or Easter holidays be abolished. It is our concern that equivalent holy days of other faiths be accommodated to meet the needs of their adherents.³²

Employment opportunities

The Commission received many letters and submissions outlining incidents of discrimination in employment based on religion or the absence of religious belief. There were many reports of people losing their jobs or being denied promotional opportunities. Also of significance were experiences related to the identification of and accommodation for the religious needs of employees in the workplace.

The Victorian Church and Trade Union Committee, an organisation jointly sponsored by the Victorian Council of Churches and the Victorian Trades Hall Council, submitted

4.3 Experiences of discrimination in public life

that 'religious discrimination exists in many workplaces and ... this is a significant industrial relations issue that should be addressed as a matter of urgency'.³³

Seventh-Day Adventist Pastor Don Fehlberg described a number of incidents leading to the loss of employment because of a failure to accommodate religious requirements concerning the Sabbath.

Chris worked shift work at a cement manufacturing place in NSW. He was scheduled to work one Friday night shift per fortnight. Chris came to the conviction that he should observe the Sabbath from Friday sunset to Saturday sunset. He approached his boss and the boss didn't mind if Chris could find a workmate who would be willing to swap shifts with him. That worked for a while but he ran into difficulty when he couldn't find anyone who was able to swap with him. I went with Chris to visit the boss and explain his convictions and to guarantee he was genuine. The boss said, "It is only once a fortnight, can't you talk to your superiors and arrange a dispensation for Chris to be able to work when he needs to do so." (The boss was expressing his religious belief concerning how to solve a conflict between what God asks us to do and what man may want us to do). We explained that according to our belief we had to obey what God commanded and a dispensation would make no difference to it. They were not prepared to accommodate Chris's religious convictions concerning the Sabbath and so he lost his job.

John worked as an officer in a maximum security prison. As a result of his study of the Bible he too came to the conviction he should observe the Sabbath. He also worked shift work. He resigned his position because he believed he could not perform unnecessary work on the Sabbath. (He would have been willing to do necessary work on the Sabbath - ie. essential work for their care but not taking them on sporting activities or doing work that could be done on the other six days). He didn't believe the authorities would grant him Sabbaths off, so rather than cause a conflict he resigned.

Bill worked at a mining operation that works 24 hours 7 days per week. He didn't want to work on the Sabbath (Saturday) but seeing he needed work he agreed to do so. After a period he couldn't live with his conscience and so he resigned. He also believed the administration would not have been willing to accommodate his convictions.

Amy had just left school and applied for work at a local supermarket. She had an interview and was asked when she would be able to work. She stated "anytime, except on Friday night and Saturday", (her Sabbath). She heard later that the only reason she hadn't been successful was because she was unwilling to work on Saturday (her Sabbath).

Wolfgang worked as the manager of an electrical store. It opened Saturday mornings. When he came to the conviction that he should keep the Sabbath and not work on Saturday, he told his boss and within a few days he had been sacked and a new manager appointed.³⁴

Seventh-Day Adventist Pastor Ray Coombe reported two experiences of alleged discrimination based on religious belief in the Australian Defence Forces.

I enlisted into the Australian Army on 11 August 1982. My religion at the time was Roman Catholic. At the completion of initial employment training I qualified as an Operator Signals within the Corps of Signals. Between the years 1982 to 1990 I was posted to various localities within Australia including Cabarlah QLD, Melbourne and Darwin. My duties were essentially communications orientated involving 24 hour rotational shiftwork.

As a practising Catholic during this time, I frequently requested permission to attend church services on Sundays. However, this was always refused even when volunteers offered to work for the hours I would be absent. As a young soldier, I was unaware of Australian Defence Force (ADF) policy on religious practices. I was never informed of my right to observe my faith in accordance with my beliefs.

Shortly after converting to the Seventh-Day Adventist faith, Pastor Coombe experienced further discrimination.

It was only a week or so after my baptism that [my superior] approached me and asked if I had any problems returning to shiftwork in the new year (1995). I explained my religious convictions and stressed my inability to work on the Sabbath and therefore, could not work shiftwork. He simply laughed at me and told me it was my problem and ordered me to commence shiftwork on 18 January 1995.

Daily, from this time on, other senior colleagues ... threatened and informed me that I would be arrested, imprisoned and charged if I refused to work on Sabbaths. I felt harassed, discriminated against as though my religious liberty rights were violated. (It must be understood that the stance I had taken was unnatural for me because at that time, I had been a dedicated soldier for 13 years and had always obeyed orders. To go against the regimental grain and inbuilt discipline was terrifying).

I suggested that I work any other day or night including Sundays to make up any lost hours. This was rejected. I then suggested that I swap with a volunteer from another Watch when I was rostered on Sabbaths. This was too rejected.

I felt very discriminated when colleagues were allowed to be absent from duty for four hours at a time to play sports when I was not allowed equivalent time on the same evening to keep holy my Sabbath day. Sport took precedence over religious observance.

The ongoing threats, harassment and religious intolerance which occurred all day every work day for months on end, caused extensive physical and mental trauma. In February 1996, I was diagnosed with Chronic Fatigue Syndrome and to date, am unable to work.³⁵

Denial of employment opportunities also featured in the submission by the Executive Council of Australian Jewry.

4.3 Experiences of discrimination in public life

Officers of this Council have received anecdotal reports of members of the Jewish community who believe they have been denied advancement in employment due to anti-Jewish sentiments in the workplace. There has been a significant increase in such reports over the past twelve to eighteen months.

Another type of incident is when an individual is exposed to anti-Jewish discussions amongst colleagues, which may not be directed at a personal target but nevertheless result in individual Jews feeling uncomfortable and alienated. Related to this are reports that Jewish individuals have been informed that they can not be advanced in their employment as other workers, particularly from Eastern Europe, would not accept a Jewish person as an overseer or supervisor.³⁶

Members of some religious movements, particularly non-mainstream movements, report they would often avoid professing their beliefs in a workplace setting for fear that it would lead to the denial or loss of employment.

Alison (not her real name), tells a story about discrimination whilst working for a Government Department. She had been “out” as a Pagan for a long time. Her department was given a new CEO who didn’t like her Pagan outlook. She had decorated her cubicle with obviously Pagan decoration, and she found her CEO a number of times standing in front of it with disapproving looks on his face. Alison felt that she was gradually forced out of a stable middle management position and pushed into the position of having to take a redundancy package. Alison worked with one other Pagan who was also made to feel pressure enough to resign. There was no opportunity for exit counselling to discuss the reasons for her position being made redundant, and there was no chance to identify religious discrimination as most of it was in a fairly subtle and non defining way. Alison would like to make a point about subtle forms of discrimination in employment. There was nothing definitively that she could use as being direct discrimination. She wanted to take up the issue with the Anti-Discrimination Board [in NSW], but found that they would not investigate the case unless religious discrimination could be linked with race. This whole incident left Alison feeling like there was no support for her during and after this discrimination, and has found that it has taken her a long time to let others in her new job know that she is Pagan.³⁷

The Commission also received a report of discrimination in employment based on the absence of religious belief.

One of our members failed to get a job in an old people’s home because she was judged not being ‘caring’ when she admitted she was not Christian.³⁸

Reasonable accommodation in employment

The needs of employees, both religious and non-religious, require some accommodation in the workplace. The failure to accommodate religious requirements concerning the Sabbath for members of the Seventh-Day Adventist Church as outlined above, for example, clearly demonstrates that this is an area of pressing concern.

The Victorian Church and Trade Union Committee listed the following general religious needs of employees as among those needing attention

- religious holidays, that is, non-Christian and/or Christian holidays observed on different days by different denominations
- bereavement leave which accords with requirements for mourning
- religious rituals such as prayer times
- prayer locations which provide the necessary quiet and privacy
- religious aids such as prayer mats
- religious dress such as head covering.³⁹

The Executive Council of Australian Jewry detailed some needs specific to the Jewish faith.

The key problem area in employment for members of the Jewish faith is the fact that a wide variety of activities are religiously proscribed on the Sabbath, the Pilgrim Festivals and the High Holy days.

The total number of week days on which observant Jews will be unable to work are four for Passover, two for Pentecost, two for the New Year, one for the Day of Atonement, two for the Tabernacles and two for the Rejoicing of the Torah. (For followers of Reform or Progressive Judaism, the number of days is lower).

During the period immediately after the death of an immediate family member, there is a mourning period of seven days which also disqualifies individuals from employment.⁴⁰

The Egyptian Coptic Orthodox Church reported that members of its community require reasonable accommodation in the workplace for the following times for daily worship.

- | | |
|---------------------------|----------------------|
| 1. Morning prayer | 6 am |
| 2. Third Hour prayer | 9 am |
| 3. Sixth Hour prayer | 12 noon |
| 4. Ninth Hour prayer | 3 pm |
| 5. Sunset prayer | 6 pm |
| 6. Prayer before sleeping | 9 pm |
| 7. Midnight prayer | 12 am. ⁴¹ |

4.3 Experiences of discrimination in public life

Community members also require time off from work to celebrate the following holy days

1. Christmas Day
2. The Holy Epiphany
3. Holy Thursday
4. Good Friday
5. Easter Sunday.⁴²

Education

Children have a right to an education which enables their personality, talents and abilities to develop to their fullest potential. According to the Convention on the Rights of the Child, article 29.1, a child's education should include the development of respect for his or her parents, cultural identity, language and values. The ICCPR, article 18.4, also provides that parents have a role in ensuring that their children are educated in accordance with their own moral and religious convictions.

Parents have a right to educate their children about their own religions. Specialist religious schools and institutions which guarantee the teaching of certain values can contribute to the enjoyment of that right. Warwick Poole stated

Parents send their children to religious schools for many reasons, one of which is the attitude of the teachers to their work, to their pupils ... It is something like voting Liberal or Labor, you know what the candidate stands for even though you have not spoken to them.⁴³

A submission from the Christian Community High School also highlighted the importance of these schools.

Christian Community High School ... a co educational school with over 500 students, was established ... to be a partner with Christian parents and the church in educating students in a distinctive Christian environment emphasising distinctive Christian values. The school emphasises Christian education through teaching a wide variety of academic and vocational courses leading to the award of the Higher School Certificate.⁴⁴

Religious schools seek to teach and to promote the beliefs and values of the particular religion through the whole ethos and life of the school - not merely in religious education curriculum but in all curricula and all other activities. Clearly religious education has a central place in specialist religious schools. However, the place of religious education in State schools is not clear cut.

Education and State schools

Many submissions raised issues about the proper role of State schools in providing religious education to children. In Australian society children come from diverse cultural

and religious backgrounds and this diversity should be respected in the education offered to children in State schools.

A number of submissions argued that, while schools should not promote any one religion, a general education in comparative religion and the history and role of religion is valuable.

Neville Wainwright submitted that no single religion or belief system should be taught in State schools but that education for children should include

... an overall basic understanding of past and present supernatural belief systems, their beginnings, their various rituals and other activities, including the good with the bad, plus giving the psychological and environmental reasons why people become religious and why others don't ...⁴⁵

Alex Mills also felt that a broad education about religious issues is important and wrote that comparative religious education should play a bigger role in State school education. He stated

... students have the right to be educated to understand that religion has been significant in Australia's history and is still a dynamic influence in the lives of many of its citizens ...

Mr Mills wrote that religion is important in the lives of nearly all the ethnic groups in multicultural Australia but

Most teachers do not acknowledge that religious influences were, or are, significant in Australian history ... It is evident that religious influences are not given their relevant place in the teaching of history. This can be verified by a reading of text books that are currently available to students and by conversations with teachers.⁴⁶

Some submissions argued that State education should be entirely secular. For example the Humanist Society of Victoria argued that if religion forms part of a school curriculum it should only be in the context of comparative religion.

The core of culture and ethnicity has been defined as language and religion. Whereas language is a skill that may be utilised in a variety of careers, religion is not. It is a set of beliefs often disputed by others and often a source of violent conflict. Thus, while there is justification for teaching foreign languages at public expense, there is none at all for teaching religious instructions of any denomination in such manner. Those who insist on religious instructions should form private groups for that purpose and bear the cost ... If religion is to be part of the school curriculum, it would only be appropriate in the context of comparative religion. Education should be entirely secular and segregation on religious grounds should not be assisted by the State.⁴⁷

Some submissions expressed concern that children in State schools, regardless of their religious background, are often expected to participate in Christian rituals or undertake some form of Christian education.

The Humanist Society of WA said that children automatically receive some form of religious instruction in State schools notwithstanding the contrary views of some parents.

We find that there are prayers in assembly or class. One of our members found his daughter was receiving religious teaching from her class teacher and when he wrote asking for her to be excused, he was met at first with incomprehension and refusal. Another member found her child had been assigned to the Anglican religious instruction class, as that was where 'others' were placed. Some humanist parents are reluctant to write letters asking for their children to be excused from religious instruction for fear the children are made to feel outsiders. We feel it would be less discriminatory if parents who want religious instructions for their children should have to opt in, rather than non-believers having to opt out.⁴⁸

A parent submitted

Despite the fact that my son was registered as a Pagan at Kindy, despite the fact that I requested that he not participate in Christian religious rites, guess who the Christian staff chose to sing the finale duet praising Our King Jesus at the Kindy Christmas Party - my Pagan son. All the children were participating in the Christmas party - including his Pagan cousin, Muslims and Buddhists. It was not worth the drama to do a scene and ruin the children's Christmas party. Christians believe it is their God given right and duty to convert the world; so what can you do.⁴⁹

Evan Gellert felt it was discriminatory that the government provides funding for private religious schools.

All citizens expect equitable access to tax-funded education for their children. This appears to have occurred historically through Government funding of both public and private sectors, but is not guaranteed. We need an entrenched right to a minimum of free, secular primary and secondary education. I am alarmed that current Federal policy will in effect deny the expected basic standard of education to State (secular) schools through a funding scheme which will divert resources from secular to denominational (religious) schools. This policy has been promoted through hyperbole as offering greater choice. However when the State sector is brought to its knees by the withdrawal of resources, then the secular education option is compromised as a realistic choice. This offends the right of many parents to quality education, free from religion.⁵⁰

There are also problems for Jewish children with the scheduling of classes and examinations on the Sabbath or holy days.

In the government school sector, there is often pressure on students and teachers to participate in extra-curricular activities, including inter-school sport, on the Sabbath. This creates the situation where a student can be excluded from activities which can provide important social benefits, while teachers can lose their opportunity to work with students in a coach/team relationship.

The issue of prayer at school has received some public airing, due to the legal affirmation in NSW that Christian prayer is acceptable, if it is "non-denominational". An example of the difficulties this presents to non-Christians is

that of parents of a Jewish child who found that the local government junior school had a policy of a (Christian) grace offered before meals. The appropriate place of Xmas carols is also one which can legitimately be raised by parents and children who may find the carols either meaningless or, depending on the words used, offensive and hurtful.⁵¹

Home schooling for religious reasons

Many parents now choose to educate their children at home because of their religious convictions. Significant numbers of students undertaking distance education courses do so for this reason. Michael O'Callaghan submitted that those parents are discriminated against in the provision of government benefits.

There is a strong trend today for parents to educate their children at home. Apart from the concerns of parents who are dissatisfied with the poor standard of education their children receive in the mainstream schools, most of these parents have decided to educate their children at home because of their religious beliefs.

Having made this decision, many mothers are denied Family Payments and Austudy by the Social Security Department. This is a clear case of discrimination because of one's belief. I might add, that it is not illegal in most states to educate your children at home. These parents are taxpayers and are not costing the government anything in education funding and yet are denied equal rights when it comes to Family payment or Austudy.⁵²

Goods and services

Members of a variety of groups are discriminated against in the provision of goods and services on the basis of their beliefs. Louise Bowes representing the Pagan/Wiccan community reported how easily goods and services can be withheld on the ground of conviction.

A fellow Wiccan recently tried to gain information via the Government Printing Office in Canberra in relation to the debates in Queensland as to whether or not wicca/witchcraft should remain an illegal activity. Not only was the information on how to obtain a copy of the law in question withheld, but the caller was treated to a lengthy and passionate lecture on the dangers of the craft and he shouldn't even be asking about it!⁵³

Adrienne Harris of Pagan Alliance NSW submitted

It is difficult for Pagan groups to gain access to community centres or local halls for meetings or other activities. When the word "Pagan" is mentioned, people are less willing to allow their premises to be used. Part of this is due to public misunderstanding of what Paganism is about and as a consequence premises are difficult to find, with most meetings ending up in people's homes.⁵⁴

Pastor Don Fehlberg, from the Seventh-Day Adventist Church, reported a similar experience.

4.4 Federal anti-discrimination legislation

I went to enquire about booking the assembly hall of a public Primary School to hold public religious lectures. The headmaster was favourable and showed me the facilities, but had to check with somebody before he could say “Yes”. When I called back to see him he asked would I be lecturing on Creationism. I said, “Yes, it will be one of my topics”. Well he said, “I am unable to allow you to hire the facilities if you will give a lecture on that topic”. I was amazed, because the public schoolhouse for years has been the place where various ideas have been discussed by the public. I felt this was real religious discrimination and was completely unnecessary. A public facility that is available for hire should be available to all regardless of their religious convictions or teachings.⁵⁵

Accommodation and land use

Colston Vowles, a former Scientologist, reported that some members would not disclose their affiliation when applying for accommodation fearing doing so would jeopardise their chances.⁵⁶

Smaller religious communities have had difficulty on occasions in obtaining approval to build places of worship or religious schools. Mark Simpson and Cedric Mansley of the Brethren Community described their problems in obtaining council permission to build a new church in Katoomba. They advised that the Brethren had to go to court twice before they finally received approval from the local authorities to build the church. Although the building was completed in April 1994, Saturday morning service hours are still restricted.⁵⁷

Christian Community Schools Ltd (CCSL) stated that schools in its association have had problems with planning requirements.

As most schools affiliated with CCSL have commenced in the last 20 years there has occasionally been difficulties associated with planning requirements in established communities. In most cases these problems have been resolved through negotiation however in rare cases they have necessitated resort to the Courts.

While these difficulties have certainly arisen during the development of our schools CCSL recognises that difficulty in balance with the requirements of the local community with the proponents of the school. In our view these issues are best dealt with within the normal planning processes.⁵⁸

Muslim, Buddhist and Sikh communities have also encountered difficulties with planning approvals for places of worship and schools. For example, an article in the Queensland Sunday Mail reported that many objections had been lodged to a proposal by a local Muslim community to turn a house in a Brisbane residential area into a mosque. The Redland Shire Council reported that they had received 140 objections to the proposed mosque including one from the Catholic Church.⁵⁹ Many communities have been forced to resort to expensive litigation to obtain necessary approvals.⁶⁰

4.4 Federal anti-discrimination legislation

Arguments in favour of federal legislation

The freedom to hold and to manifest religious and other beliefs is guaranteed by ICCPR article 18. States parties to the ICCPR have undertaken to ensure that all of the rights and freedoms stipulated therein are respected. These rights are to be enjoyed without any distinction on the basis of religion or other grounds (article 2.1). If legislation is required to give full effect to these rights and freedoms, it must be implemented (article 2.2). Moreover, the state must ensure that a person whose right is breached has an effective remedy, even in the case where the state itself, or someone acting in an official capacity, has caused the breach (article 2.3).

The Religion Declaration repeats these obligations in the context of religious freedom. Article 4 provides that all States should take effective measures to

- prevent and eliminate discrimination on the ground of religion or belief in all fields of public life
- make all efforts to enact or rescind legislation where necessary to prohibit such discrimination and
- take all appropriate measures to combat intolerance on the grounds of religion or belief.

In the Commission's Discussion Paper, *Free to Believe?: the right to freedom of religion or belief in Australia*, the views of the community were sought as to whether or not federal legislation prohibiting discrimination on the ground of religion or belief in the areas of employment, goods and services, accommodation, clubs, education and land use is warranted in Australia. The Commission received submissions both in favour and opposed to such national legislation.

Dr Reid Mortensen agreed that the national coverage of religious discrimination laws is incomplete and in some States itself discriminatory.

There are no religious discrimination laws in NSW, SA and Tasmania ... Federal legislation has the *partial* effect of making it unlawful to discriminate on the ground of religion anywhere in the country, and so, to a minor extent, corrects the position in NSW, South Australia and Tasmania ... [H]owever, under the *Racial Discrimination Act 1975* (Cth), it is unlawful to discriminate against ethno-religious groups, but not against those - including the largest Christian and Islamic sects - which are ethnically heterogeneous. The discriminatory operation of laws which are themselves intended to prohibit discrimination only brings them discredit and dilutes their moral force.⁶¹

The Buddhist Council of Victoria stated that legislation is necessary to counteract the imperfect coverage of current federal laws which protect some religious groups from vilification but not others.

4.4 Federal anti-discrimination legislation

[T]he Racial Discrimination Act 1975 and Racial Hatred Act 1995 provide protection for peoples as defined within the Act; however, it misses the point on religious discrimination by the fact that a case of religious discrimination must needs depend on the ethnic factor under either Act. This clearly ignores the right to freedom of discrimination by thousands of Buddhist converts who are not from traditional Buddhist countries or ethnic groups and are therefore not protected under either Act ...

At present, people who make Australia their home are protected from discrimination in gender, race etc. However, on grounds of religion and belief, the BCV strongly feels that this issue needs greater in-depth attention at the earliest possible time.⁶²

Participants in the Religion Workshop held at the Commission on 28 April 1998 discussed whether there was a need for federal legislation prohibiting discrimination on the basis of religion and belief. It was noted that, with privatisation and the withdrawal of services by the state, churches and religious organisations are playing an increasingly prominent role in the provision of welfare services, which may increase the potential for religious discrimination in these areas.

Arguments opposing federal legislation

The Commission received significantly more responses opposed to legislation prohibiting discrimination on the ground of religion and belief than in favour, many of them in the form of very similar letters. About 50 of the 255 submissions, for example, came from a particular area in Queensland and were very similar in content and form.⁶³

Most argued that the current legislation is adequate and there is no need for change. Typically these submissions expressed suspicion of the very idea of legislating in relation to religion at all.

Religious liberty is best protected when the State and religion are separate. I submit that any combination of law and religion will annihilate the freedom to believe.⁶⁴

Australian law enshrines freedom of religion or belief much more than the laws of the majority of countries around the world. In addition, the more legislation there is which specifically defines rights and freedom, the less freedom there will be because the law will be interpreted and re-interpreted as common law is and it will become more and more stringent in terms of the limitations it places.⁶⁵

At the Commission's Religion Workshop a number of participants strongly opposed legislation. They and others emphasised that legislation is not by itself sufficient and that other strategies such as public education and community dialogue are also very important in addressing religious discrimination.

Comment

Freedom of religion and belief is a fundamental human right which every person is entitled to enjoy. Discrimination against a person on the basis of religion or belief infringes the full enjoyment of that right.

Most Australians may not experience discrimination on the basis of religion and belief but many do. Some Australians are protected from discrimination on the basis of religion and belief by State and Territory laws but many others are not. Laws providing protection from discrimination on the basis of religion and belief are patchwork across Australia. The human rights of all Australians, including the right to freedom from discrimination on the basis of religion and belief, should be protected regardless of where they live or what religion or belief they hold.

Australia's human rights commitments require that all persons receive equal protection before the law and are not discriminated against on the basis of religion. Australia has already enacted federal legislation proscribing discrimination on the basis of race, sex and disability. The Commission has concluded that to comply with international human rights commitments Australia should enact federal legislation to make unlawful in Australia discrimination on the basis of religion and belief.

4.5 Exemptions for religious discrimination

Arguments in support of exemptions

The Commission received a number of submissions from individuals and organisations stating that if legislation is enacted then certain exemptions should be included to allow for discrimination on the basis of conscience or in employment by religious bodies. Conscience is defined in the Concise Oxford Dictionary as 'a moral sense of right or wrong'. An exemption on the basis of conscience would permit an otherwise unlawful act that is done in pursuit of religion or belief.

A number of submissions received from fundamentalist Christians were concerned with the need for discrimination on the basis of conscience in activities associated with running small family businesses. Ron Parson said that the right to discriminate is a divine principle and part of the freedom of religion and argued the need for a conscience exemption.

As a business owner (and employer) I hold my business as an area of moral responsibility - something akin to a family in principle; in fact I employ my own family members. Non family members who may from time to time be employed are regarded as a sort of extension of the family, and as one holding Christian beliefs, I have the right to be judicious and to refrain from employing persons who are known to practice evil. Such would be morally incompatible.⁶⁶

N J Kennard expressed similar concerns.

4.5 Exemptions for religious discrimination

It must be pointed out that a 'family business' has a fundamentally different meaning to us, than it does to most. Our business is not only a source of income for family needs. Nor does it only provide employment for our families. It is an area of our lives entirely compatible with family and Christian standards. This is of paramount importance in the maintenance of family principles.⁶⁷

John Allpress, a Christian in the Brethren Community who also manages a small family construction business, submitted

In order to protect our children in the workplace, we have sought to exercise care in the selection of employees who can work alongside members of our family without having any wrong influence on them. For example, we would not want to employ a person who practices sodomy, or a person living in a defacto relationship. In addition it is at times necessary, on account of our obligation to keep the Christian fellowship pure for the Lord Jesus, to exclude (usually temporarily) a person from the fellowship. Depending upon the seriousness of the matter, we could not employ or continue to employ such a person until it was resolved.

We feel that these discriminatory policies are necessary and justified in a small family business such as ours ... Since January of this year, our employment practices are subject to Federal law, which we understand over-rides the Victorian legislation referred to above. It is clear that, because of our conscientious beliefs and our obligation to keep our workplace clear of wrong influences, we could find ourselves in conflict with the law.⁶⁸

E and N Teiffel expressed similar views with respect to choice of customers and suppliers.

We believe that the law should recognise that the providers of goods and services may in some circumstances need to be discriminative in respect of those with whom they do business. As Christians maintaining and operating a business according to Christian standards we again have an obligation to be discriminative. Where the lifestyle and known practices of persons are totally opposed to the principles we uphold, the law should respect our right to decline to enter into business relationships with such. Persons whose lifestyles are corrupt by the practice of immoral conduct eg: drug addiction, sexual immorality, public crime etc. should not assume to have an unfettered right to compel others who find such conduct offensive, to deal with them.⁶⁹

Graeme Turton, Principal of the Annandale Christian School, is concerned that a legislated right to religious freedom will infringe on his right to discriminate on the basis of his religious beliefs.

... I would be loath to have my own property rented to someone who would then, in a spiritual sense, defile it with Satanic rituals and worship. I believe there should be at least limited scope for people to take religion and belief into account.⁷⁰

Dr Reid Mortensen also felt that the principle of a conscience exemption is important.

... it is important to recognise that the very existence of many religious groups depends on their ability to discriminate. Federal religious discrimination laws

should it is submitted, recognise this and allow religious groups to discriminate on the ground of religion of belief in some case ... There would be almost no right to religious liberty if a religious group had no right to exclude others who held to different religious conceptions or practices and, therefore, a right to exercise some discrimination on the ground of religion.⁷¹

Several submissions argued that an exemption for employment within religious bodies is important. The Chaplaincy Team at the University of Queensland submitted

There are... special circumstances associated with schools run by religious bodies, clergy and other people involved in pastoral work, and key administration staff in religious groups. In many of these, the people involved are (or can be) trying to cultivate a particular view of morality, along the lines of religious views of the group involved. For example, some religious groups believe that it is inappropriate for divorced people, or practising homosexuals to be admitted to the ranks of the clergy, or to be involved as teachers in religious schools. We feel that there should be exemptions for these groups (staff of schools, clergy and other pastoral workers, staff in key administration positions) from any legal requirements about discrimination in employment, provided that the religious body has adopted some ethical code, and included this in any contract of employment. We further feel that religious bodies should be free to dismiss an employee in any of these categories who has breached the particular code of conduct of the religious group concerned.⁷²

Graeme Turton also argued that all religious bodies should retain the right to employ only fellow believers.

As one involved in employing on behalf of a Christian school, I can say that we need to retain our freedom to look at the whole picture when we employ people. Our expectations of staff are that they will be routinely responsive to the God of the Christian bible and be ready, through frequent impromptu words, prayer and actions, to encourage students and fellow staff to be worshipping and obeying Jesus Christ/God. Current legislation permits this and should be retained.⁷³

Arguments against exemptions

On the other hand, the Rationalist Society of Australia argued that toleration and freedom of religion should not be used as a justification for breaching accepted values in our society.

Any right to freedom of or from religion or belief, or any complementary prohibition against discrimination on the same grounds, must be applied in the context of the accepted values and laws of our society. So, for example, religious toleration should not be used as justification for breaching standards accepted in our society concerning equity between genders or classes of persons, nor should prohibitions on discrimination become effective censorship of expressions or opinions.

4.5 Exemptions for religious discrimination

In other areas of discrimination, including employment and services, some people would argue that current exemptions (under some state anti-discrimination laws) for religious organisations are reasonable. However, the RSA considers that religious or other organisations - particularly those in receipt of taxpayer-funded benefits or concessions - should be obliged to comply with normal laws and practices of the community. This view has clear implications for religious schools in receipt of government funding and church organisations receiving tax or other concessions. Just as we prohibit cultural practices such as female genital mutilation because they do not accord with our mores, so we should insist on compliance with our existing and generally agreed anti-discrimination laws.⁷⁴

The Religious Society of Friends, also known as Quakers, also opposed automatic exemptions from discrimination laws for religious organisations.

... we believe that religious organisations should be required to be consistent in their approach to anti-discrimination ... If organisations or individuals wish to be protected against discrimination on the ground of their beliefs, they should not expect to be exempt from complying with other aspects of anti-discrimination legislation ... Religious organisations cannot expect to be protected against discrimination on the grounds of belief if they in turn claim a "right" to discriminate against other groups in the community.⁷⁵

The scope of exemptions

Religion and spirituality are highly personal issues. For many people, they go to the very core of their existence, underpinning all of their actions and their decisions. It is therefore natural for people to have very strongly held views on matters of religion or belief, views they are reluctant to compromise. The Commission understands and respects this.

However, within this context a distinction needs to be made between private and public spheres of human activity. In the conduct of their private life, people as a general rule should be able to shape their actions and decisions on the basis of their religious and other beliefs, free from interference by the state. This may include whom they choose to invite into their homes, arrangements with respect to their personal relationships, upbringing of their children and so on. This is reflected in many international human rights instruments including the Religion Declaration which upholds, among other things, the right of parents to organise family life in accordance with their religion or belief.

However, this approach is not appropriate in public life where the state has a much clearer role in ensuring that people do not exercise their rights in a manner that infringes unduly upon the rights and freedoms of others and that all people have basic guarantees of physical integrity, equality of opportunity and freedom from discrimination and injustice.

The importance of this distinction is recognised in the *Racial Discrimination Act 1975* (Cth) which places the prohibition of racial discrimination within the framework of ‘public life’.

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.⁷⁶

Freedom from discrimination in employment is an issue which clearly falls within the ambit of ‘public life’ justifying legislative guarantees by the state. The same is true for other areas of public life. Employers and businesses that operate in the general community cannot expect to be exempted from laws that protect human rights.

However, special provision for religious institutions is appropriate. It is reasonable for employees of these institutions to be expected to have a degree of commitment to and identification with the beliefs, values and teachings of the particular religion. This is also an established principle of anti-discrimination law which, as has been noted earlier, finds expression in numerous statutes containing exemptions for religious organisations. They include the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) which provides that discrimination does not include any distinction, exclusion or preference

- (c) in respect of a particular job based on the inherent requirements of the job; or
- (d) 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, being 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; ...⁷⁷

Accommodating the distinct identity of religious organisations is an important element in any society which respects and values diversity in all its forms. This was emphasised in a submission by the Uniting Church in Australia Board for Social Responsibility.

[R]eligious organisations make their unique commitment to the provision of these services by virtue of their religious commitment. To remove the right of such bodies to decide their staff on religious grounds, if that seems appropriate to them, appears to run the risk of reducing all services whoever provides them, to one amorphous mass, a situation which diminishes the choices of all Australians.⁷⁸

For these reasons, and taking into account the views expressed in submissions, the Commission considers that federal legislation prohibiting discrimination on the basis of religion or belief should include an exemption for religious organisations. However, the nature and scope of the exemption need careful definition. This issue was critical in a recent inquiry by the Commission, which was the subject of a report to the federal Attorney-General.⁷⁹

4.5 Exemptions for religious discrimination

This inquiry arose out of a complaint against the Catholic Education Office of the Archdiocese of Sydney for its refusal of an application for classification as a teacher in Catholic schools in the Archdiocese. The complainant was a lesbian who had been involved in campaigning against homophobia and violence against gay and lesbian students and teachers. Among its reasons for refusing classification to the complainant, the Catholic Education Office cited her high public profile as a convenor of the Gay and Lesbian Teachers and Students Association and her public statements on these issues. The Commission found the refusal of her application was not protected by the exception for religious institutions in the HREOC Act.

The Commission found that Catholic teaching condemned homosexual activity, not homosexuals. Catholic teaching also condemned 'unjust discrimination' and violence against homosexuals. There was no evidence that the complainant had or advocated a lifestyle and values contrary to the teachings of the Catholic Church. In fact all her public comments were fully consistent with Catholic teaching. They related to the need to eliminate violence and discrimination against gay and lesbian teachers and students and to provide them with personal support. The fact that she was openly lesbian and that her openness might attract speculation regarding her private activities could not be held to be injurious to the religious susceptibilities of adherents of Catholic Christianity.

Indeed it would not be an injury to their religious susceptibilities but an injury to their prejudices. These injuries do not come within the terms of [the] exception and are not a permissible reason for discriminating on the ground of sexual preference. In applying for classification with the [Catholic Education Office] [the complainant] asserts that she will act in accordance with its Principles for Employment. If she fails to adhere to those Principles then the [Office] can take action in relation to her classification.⁸⁰

This inquiry illustrates the importance of limiting the scope of exemptions for religious organisations under anti-discrimination law and in particular of not allowing absolute exemptions which have the potential to encourage prejudice and unfair treatment not related to any relevant belief. This is a central and long established tenet of anti-discrimination law. To allow religious organisations an absolute exemption could encourage prejudice and unfair treatment of certain individuals. Indeed, during the inquiry the respondent itself acknowledged that the test for determining whether the employment of a person in a religious organisation would cause 'injury to the religious susceptibilities of adherents to that religion or creed' was not a completely subjective one and that the exception could not be applied 'capriciously or randomly'.⁸¹

The importance of limiting the scope of exemptions for religious organisations was also recently recognised by the Senate Legal and Constitutional References Committee in the report of its Inquiry into Sexuality Discrimination.⁸² The Committee expressed concern about religious organisations using exemptions to exclude non-heterosexual people from access to various community services and recommended

That a body established for religious purposes may not exclude a person from the receipt of services which are funded, directly or indirectly, in whole or in part, from Commonwealth funding, on the grounds of the person's sexuality or gender status.⁸³

The Commission supports that recommendation.

The Commission does not support a general exemption for conscience. International human rights law provides no basis for that. Such an exemption would, in the Commission's opinion, be dangerously open to misuse and would seriously undermine the effectiveness of anti-discrimination provisions.

The Commission does support an exemption for religious organisations but it should not be absolute. It should be a limited exemption. It should apply only to employment of people by religious institutions and should be limited to discrimination that is required by the tenets and doctrines of the religion, is not arbitrary and is consistently applied.

This exemption should complement a more general rule that the prohibition of discrimination based on religion or belief does not include distinctions based on the inherent requirements of the job. This is a widely accepted principle in anti-discrimination law and would apply to both religious and other organisations.

Findings and recommendation

- Discrimination on the ground of religion or belief occurs in Australia in many areas of public life.
- Current legal protections against discrimination on the ground of religion or belief, at federal, State and Territory level, are generally inadequate and lack consistency and uniformity.
- Australia therefore falls short of internationally recognised standards in the ICCPR and the Religion Declaration.

The Commission recommends

R4.1 The proposed *Religious Freedom Act* should make unlawful direct and indirect discrimination on the ground of religion and belief in all areas of public life, in accordance with ICCPR articles 2 and 18 and Religion Declaration article 4, subject to two exemptions.

1. A distinction, exclusion or preference in respect of a particular job based on the inherent requirements of the job should not be unlawful. Preference in employment for a person holding a particular religious or other belief will not amount to discrimination if established to be a genuine occupational qualification.
2. A distinction, exclusion or preference 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, being a distinction, exclusion or preference required by those doctrines, tenets, beliefs or teachings made in good faith and necessary to avoid injury to the religious susceptibilities of adherents of that particular religion or that creed should not be unlawful provided that it is not arbitrary and is consistently applied.

Notes

- 1 Church and Trade Union Committee, Victorian Council of Churches and the Victorian Trades Hall Council, *Submission R/243*.
- 2 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) section 11(1)(e).
- 3 Section 3(1). See also Human Rights and Equal Opportunity Commission *Report of Inquiry into Complaints of Discrimination in Employment and Occupation, Discrimination on the ground of sexual preference*, HRC Report No. 6, 1998.
- 4 Section 31(b).
- 5 Section 9.
- 6 Section 18C.
- 7 Section 9.
- 8 *King-Ansell v Police* [1979] 2 NZLR 531. Justice Richardson said '... a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.'
- 9 *Mandla v Dowell Lee* [1983] 1 All ER 1062.
- 10 *Id*, page 1069.
- 11 *Commission for Racial Equality v Dutton* [1989] ILR 8.
- 12 In *Crouss Suppliers (PSA) v Dawkins* [1991] IRLR 327, the Employment Appeal Tribunal found that Rastafarians were a religious cult and failed to meet the two essential characteristics for ethnic groups stipulated in *Mandla*.
- 13 *Phillips v Aboriginal Legal Service* [1993] EOC 92-502. This was prior to the amendment of the Act to include ethno-religious origin.
- 14 *Nyazi v Rymans Ltd* [1988] EAT 86.
- 15 Commonwealth, Parliamentary Debates, House of Representatives, 15 November 1994, page 3336.
- 16 The *Racial Hatred Act 1995* forms a new Part IIA of the *Racial Discrimination Act 1975*.
- 17 The Parliament of the Commonwealth of Australia, House of Representatives, Racial Hatred Bill 1994, Explanatory Memorandum.
- 18 Section 15AB.
- 19 *Equal Opportunity Act 1991* (Vic) section 6; *Anti-Discrimination Act 1991* (Qld) section 7(1); *Equal Opportunity Act 1984* (WA) sections 53-66; *Anti-Discrimination Act 1992* (NT) section 19(1); *Discrimination Act 1991* (ACT) sections 7(1), 10-23.
- 20 *Anti-Discrimination Act 1992* (NT) section 4(4).

- 21 *Anti-Discrimination Act 1977* (NSW) section 4(1).
- 22 *Anti-Discrimination Act 1991* (Qld) section 5; *Equal Opportunity Act 1984* (WA) section 54(3); *Discrimination Act 1991* (ACT) section 11; *Anti-Discrimination Act 1992* (NT) section 24.
- 23 *Discrimination Act 1991* (ACT) section 11.
- 24 *Equal Opportunity Act 1994* (WA) section 54(3).
- 25 *Equal Opportunity Act 1995* (Vic) section 38; *Anti-Discrimination Act 1991* (Qld) section 109; *Equal Opportunity Act 1984* (WA) section 66(1).
- 26 *Anti-Discrimination Act 1977* (NSW) section 56.
- 27 *Equal Opportunity Act 1995* (Vic) section 77.
- 28 Jeremy Jones, Executive Vice-President, Executive Council of Australian Jewry, *Submission R/236*.
- 29 *Ibid.*
- 30 The Humanist Society of WA *Submission R/162*.
- 31 Dr David Maddison *Submission R/202*.
- 32 Jeremy Jones, Executive Vice-President, Executive Council of Australian Jewry, *Submission R/236*.
- 33 Church and Trade Union Committee, Victorian Council of Churches and the Victorian Trades Hall Council, *Submission R/243*.
- 34 Pastor Don Fehlberg, Seventh-Day Adventist Church, *Submission R/241*. See also Ms Sylvia Oostewegel *Submission R/164*.
- 35 Pastor Ray Coombe, Seventh-Day Adventist Church, *Submission R/49*.
- 36 Jeremy Jones, Executive Vice-President, Executive Council of Australian Jewry, *Submission R/236*.
- 37 Adrienne Harris, Pagan Alliance *Submission R/222*. See also David Wyggs *Submission R/40*; Colston Vowles *Submission R/208*.
- 38 Humanist Society of WA *Submission R/162*.
- 39 Church and Trade Union Committee, Victorian Council of Churches and the Victorian Trades Hall Council, *Submission R/243*.
- 40 Jeremy Jones, Executive Vice-President, Executive Council of Australian Jewry, *Submission R/236*.
- 41 The Australian Coptic Association *Submission R/209*; The Coptic Centre of Culture and the Arts *Submission R/210*.
- 42 *Ibid.*
- 43 Warwick Poole *Submission R/13*.
- 44 Neville Pollard, Christian Community High School, *Submission R/48*.
- 45 Neville Wainwright *Submission R/201*.
- 46 Alex Mills *Submission R/199*.
- 47 Humanist Society of Victoria Inc. *Submission R/224*. See also Rationalist Society of Australia *Submission R/235*.
- 48 Humanist Society of WA *Submission R/162*.
- 49 Morgan *Submission R/51*.
- 50 E Gellert *Submission R/112*.
- 51 Jeremy Jones, Executive Vice-President, Executive Council of Australian Jewry, *Submission R/236*.
- 52 Michael O'Callaghan *Submission R/186*. See also Morgan *Submission R/51*; Adrienne Harris, Pagan Alliance NSW, *Submission R/222*.
- 53 Louise Bowes, Servants of the Elder Gods, *Submission R/221*.

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- 54 Adrienne Harris, Pagan Alliance, *Submission R/222*. See also *Submission R/144*, a confidential submission concerning one group's difficulty in maintaining the annual use of a camping ground due to objections from other religious groups.
- 55 Pastor Don Fehlberg, Seventh-Day Adventist Church, *Submission R/241*.
- 56 Colston Vowles *Submission R/208*.
- 57 Mark Simpson and Cedric Mansley, Katoomba Gospel Trust, *Submission R/156*.
- 58 Christian Community Schools Ltd *Submission R/226*.
- 59 Dianne Butler, 'Doubt over Mosque Bid', *Sunday Mail* (Qld Metro Edition), Sunday 28 March 1998, page 30.
- 60 See for example *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1987), 162 CLR 145; *Tsang Hui v Council of Municipality of Strathfield*, (1988) No 10548, Cripps J, Land and Environment Court, 1 June 1989; *M Wijenake v City of Hume*, (1996) No 1645, Member I R Marsden, AAT (Vic), 8 August 1996.
- 61 Dr Reid Mortensen *Submission R/244*.
- 62 Buddhist Council of Victoria *Submission R/239*. For further submissions supporting the implementation of legislation see, for example, Victorian Secular Society *Submission R/12*; The Public Policy Assessment Society *Submission R/41*; Anglican Diocese of Melbourne, Social Responsibilities Committee, *Submission R/50*; The Humanist Society of WA *Submission R/162*; The Religious Society of Friends *Submission R/204*; Presbyterian Church of Australia *Submission R/205*; Pagan Alliance *Submission R/222*, Rationalist Society of Australia *Submission R/235*, Executive Council of Australian Jewry *Submission R/236*; NSW Council for Civil Liberties *Submission R/252*.
- 63 Submissions R/56 to R/104. See also, for example, N Saad *Submission R/55*.
- 64 G Cunningham *Submission R/109*. See also, for example, B J Lambert *Submission R/113* and E Garth *Submission R/114*.
- 65 D Gawler *Submission R/149*.
- 66 Ron B Parson *Submission R/174*.
- 67 N J Kennard *Submission R/197*.
- 68 John Allpress *Submission R/22*.
- 69 E S and N G Teiffel *Submission R/152*.
- 70 Graeme Turton, Principal, Annandale Christian School, *Submission R/230*.
- 71 Dr Reid Mortensen *Submission R/244* and attachment titled *Rendering to God and Caesar: Religion in Australian Discrimination Law*, page 229.
- 72 The University of Queensland Chaplaincy Centre, *Submission R/212*.
- 73 Graeme Turton, Principal, Annandale Christian School, *Submission R/230*.
- 74 Rationalist Society of Australia *Submission R/235*.
- 75 Religious Society of Friends *Submission R/204*.
- 76 *Racial Discrimination Act 1975* (Cth) section 9(1).
- 77 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) section 3(1).
- 78 Uniting Church in Australia Board for Social Responsibility *Submission R/228*.
- 79 Human Rights and Equal Opportunity Commission, *Report of Inquiry into Complaints of Discrimination in Employment and Occupation, Discrimination on the ground of sexual preference*, HRC Report No. 6, 1998.
- 80 Id, page 22.
- 81 Ibid.
- 82 Parliament of the Commonwealth of Australia, Senate Legal and Constitutional References Committee, *Inquiry into Sexuality Discrimination*, December 1997.
- 83 Id, recommendation 8.

5 Incitement to religious hatred

5.1 Introduction

‘Sticks and stones may break my bones but words will never hurt me’ - English saying

‘Words hurt more than fists’ - Samoan saying

‘The shaft of the spear may be parried but the shaft of the word cannot’ - Maori saying

Vilification, insults, threats and abuse against a person on the basis of religion or belief impede the freedom of religion and belief, cause hurt and even deny its targets their right to full participation in the political, social and cultural life of the community. To ‘vilify’ is ‘to speak evil of’ or ‘defame’.¹ In certain circumstances vilification can amount to incitement of others to hate the vilified person or group. This chapter is concerned with public vilification of people on the grounds of religion or belief.

In the course of the Race Discrimination Commissioner’s National Inquiry into Racist Violence, racially based behaviour of concern included

- specific acts of violence, intimidation or harassment carried out against an individual, group or organisation on the basis of race or ethnic origin
- behaviour intended to intimidate or threaten the victim, including physical and verbal abuse and damage to property
- the supply of racist propaganda including written or verbal material based on a belief in racial superiority or hatred and which is generally directed towards a group of people identified by race (colour, national or ethnic origin, descent)
- incitement to racial hatred which includes the use of words, writing, images or behaviour to stir up hatred in others against a group or groups of people identified by race.²

Where this kind of conduct is based on religion or belief it is religious vilification and, in some cases, incitement to religious hatred for the purposes of the ICCPR, the Religion Declaration and this report.

Legislation in Australia currently defines incitement to hatred, in most cases on racial rather than religious grounds, in different ways. The Commonwealth’s *Racial Discrimination Act 1975* makes unlawful a public act which is reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people because of the racial characteristics of that person or group.³ In New South Wales a public act which incites hatred towards, serious contempt for or severe ridicule of a person or group of persons on the ground of race is unlawful.⁴ In Queensland the advocacy of racial or religious hatred or hostility which incites unlawful discrimination is itself unlawful.⁵ In Western Australia publication, distribution, display or possession

of any material which is threatening or abusive and which intends hatred of any racial group to be created, promoted or increased is a criminal offence.⁶

5.2 Experiences of vilification and incitement to hatred

Extreme incidents of incitement to religious hatred have occurred on a number of occasions over the last decade. Fortunately they are exceptional occurrences in contemporary Australia. However, the public denigration of religious beliefs and of the people holding those beliefs always causes concern. Jeremy Jones, Executive Vice-President of the Executive Council of Australian Jewry, noted in a speech at the 1997 Religion and Cultural Diversity Conference that it is not difficult to find examples of religious vilification in our culturally and religiously diverse society.

If one doubts the contention that religious vilification exists in Australia today, I recommend a reading of a front page story of the Australian Muslim News of June 1997, which recounts the comments by a ... District Court judge that Islam is 'savage' and perhaps should not be classified as a religion ...⁷

Although the judge's defence of his comments was accepted by the Australian Federation of Islamic Councils, the incident raises serious concerns.⁸

Or turn to the internet sites of Australia's homegrown extremists, who will variously tell you the Talmud is the source of all human corruption, the 'fact' that Jews deserve contempt is demonstrated in the Gospels and/or that Judaism is the product of Satan.⁹

Many submissions described experiences of vilification, hatred, harassment or violence on the basis of religion or belief.

Mainstream religions

Several submissions raised concerns about anti-Christian vilification and typically felt that Christianity was not protected from ridicule by Australian law. Dr Michael Hains expressed concern about the perceived desecration and ridiculing of Christian symbols at events such as the Gay and Lesbian Mardi Gras.

The Gay Mardi Gras is a yearly exhibition of intolerance and hatred towards Christianity. It systematically and repeatedly vilifies, mocks and persecutes Christians and their beliefs, for example:

- homosexuals dressed as the Pope hand out condoms and behave in a lewd and lascivious manner;
- effigies of Rev. Fred Nile's head on a silver platter are paraded. The message is clear Rev. Fred Nile MLC should be beheaded like St. John the Baptist;
- blessed Mother Mary McKillop is mocked; and
- Sisters of Perpetual Indulgence always make an appearance.¹⁰

Dr Hains also cited various art festivals and exhibitions which have displayed images of sacred religious figures in compromised positions.

The Museum of Contemporary Art in Sydney owned and displayed (until its theft) an item known as the Virgin in a Condom. This item consisted of a condom placed over a figurine of the Blessed Virgin Mary. The Catholic Church teaches that the Mother of the Son of God was immaculately conceived ... and was a perpetual virgin. The 'Artist' responsible for the item [name deleted] admitted that it was a statement against the Catholic Church's teaching concerning contraception. Perhaps not surprisingly the Museum defended this outrage as 'art'.¹¹

W Morrison also alleged that Christians suffer vilification.

As a Christian, I am concerned at the systematic degradation of, and insulting references in the media, to Christ and the Christian religion. This is exemplified by the insults offered to the Catholic Pope, John Paul II in 1995's Gay Mardi Gras.¹²

Members of the Jewish and Muslim communities also complained of vilification on the basis of their religious beliefs. The Executive Council of Australian Jewry, the elected representative organisation of the Australian Jewish community, stated

Judaism has historically been vilified, its followers intimidated and others incited to act violently against Jews. In Australia today, the Jewish community experiences vilification, a proportion of which is directed at the Jewish religion and the remainder at Jews as members of an ethno-religious group.

Judaism is depicted by some ... Christians as archaic and irrelevant, with its followers deluded. Religious teachings are misrepresented and Jews portrayed as practitioners of a vile, harmful and destructive belief system.

Vicious anti-Jewish invective has also been recorded from Islamic sources, based on the early rejection by Jews of The Prophet. While Islam does not include the most heinous of vilifications, that of deicide, there are numerous negative depictions of theology, belief and practice ...

Jewish Australians regularly testify to the currency of negative and vilificatory depictions of Judaism. When directly challenged, informed Jews can deal with criticisms of theology, belief and practice, but it is not always the case that response can be effected prior to vilification establishing a foothold.¹³

In its submission the Council reported having received 300 reports of anti-Jewish vilification, intimidation and vandalism in 1996.

It is not possible to authoritatively identify which of the attacks were motivated by the perceived "ethnic" and which by the perceived "religious" identification of the target, but that number includes unprovoked harassment of individuals wearing the head covering of Jews; intimidation of Jewish Australians arriving at or leaving synagogue services; abusive and threatening mail, telephone calls and electronic mail making references to Judaism; and property damage of places of worship and cemeteries.¹⁴

5.2 Experiences of vilification and incitement to hatred

The Council subsequently reported that it had received another 324 complaints in the time between 1 January 1997 and 10 April 1998. In total, since 1990, it has received 1772 complaints, 155 of which were regarded as serious threats of violence.¹⁵

Eddie Girgia complained of incitement of hatred against Jews on a radio network.

They focus every and each day on broadcasting material which create hatred against certain community ie. Jewish people, through fanatic correspondents overseas ie Syria, Palestine, Lebanon.

The material they put on the radio incites hatred among communities, like Jewish people ...¹⁶

Salaheddin Bendak, on behalf of the Islamic Council of Victoria, said that Islam is constantly the subject of stereotypical media representations.

In newspapers and on radio and TV channels in Australia, we are bombarded daily with tens of lies about Islam and Muslims, while there appears to be no legal way to stop this. To clarify this point, I will give two examples. A person who tried to kill his daughter in Melbourne two years ago was marked by newspapers to have done this because of his Islamic beliefs (although in this specific case, the same man allegedly converted to Catholicism years before he tried to kill his daughter, the fact that was never mentioned in these newspapers). Although the Islamic faith prohibits its followers from harming any creature (not even a harmless insect!), these newspapers could get away with this lie. Later, newspapers were bombarded with hundreds of protesting letters, but failed to publish any.¹⁷

Mr Bendak provided a second example of stereotypical media representation.

Another example is [Mr H]'s case. He came illegally to Australia from Denmark carrying a fake passport. He was marked by newspapers as a Muslim terrorist chased by the Interpol and the Danish police. The Federal police published a fake photograph of an Australian person living in Preston-Victoria and claimed that it was Mr H's photo. Mr H was accused by newspapers to be an example of the real Muslim, a killer, a terrorist and an indecent person who was protected by the Muslim community in Victoria. This way, they accused all Victorian Muslims to be terrorists and dangerous. A few days after Mr H was arrested and extradited to Denmark by the Federal Police, he was freed in Denmark. The Interpol announced that they were not chasing him while the Danish authorities prosecuted him for carrying a fake passport only. In Australia, the person whose photo appeared in newspapers sued both the Federal Police and the media but the whole case was covered up. Although the whole Muslim community in Victoria was framed and offended, they could not defend themselves under any existing law in Australia. Similarly, no media organ was willing to publish any defence argument. Muslims felt framed, prosecuted and found guilty without even having the right to be heard.

This whole issue is leading to stereotyping against Muslims in Australia. In most people's eyes, Islam became equal to terrorism after years of brain-washing by the media. This obviously restricted Muslims from practising the promised freedom to believe.¹⁸

Complaints of vilification against Jews and Muslims were also canvassed by the National Inquiry into Racist Violence in Australia. *Racist Violence*, the 1991 report of that Inquiry, commented on violence against all racial groups within Australia but observed that among the major ethnic communities suffering from racial or ethnic violence and hatred were the Jewish and Arab Muslim communities.²⁰ As the ethnicity and religion of each of these groups is often perceived to be linked,²¹ much of the reported violence against people belonging to either group is likely to be motivated by religion. This is particularly pertinent when many reported attacks focus on the symbols representing, or perceived to represent, the religious beliefs of those groups.

For example, the Racist Violence Inquiry reported receiving a great deal of information about anti-Semitism in general as well as evidence of racist violence against Jewish people.²² The report cited evidence of several attacks on Jewish synagogues and two attacks on Jewish kindergartens. As an indicator of the religious nature of the violence reported, the report stated

As far as racist organisations are concerned, anti-Semitism is essentially directed at all Jews on the basis of their ethnicity, although some organisations would consider a Jew who converted to Christianity as undeserving of hostility.²³

In relation to violence and intimidation against Arab Muslims the Inquiry reported that the 1990 Gulf Crisis served to create a general social, political and economic context which was conducive to 'scapegoating' Arab and Muslim communities. It found that during the Gulf War many Arab and Muslim people, particularly women, were afraid to leave their homes or allow their children to do so.

There have been widespread reports of Muslim women having their *hijabs* pulled off in the street; such attacks are more significant for their symbolic impact on the victim than for any physical harm they may do.²⁴

The Racist Violence Inquiry also reported that in 1990 several mosques and Islamic schools were vandalised and, following the outbreak of the Gulf War, the Rooty Hill Islamic Cultural Centre at Mount Druitt was seriously damaged by an attack with a Molotov cocktail.²⁵

Verbal and physical violence also occurred independently of the Gulf Crisis.

Many Arab and Muslim groups have expressed fear of a hostile and threatening environment in which violence seems a real possibility. It has been reported that Arab and Muslim school children have been subjected to harassment or rejection at school, and threats of physical attack from other students. There have also been cases of teachers being accused of hostile or potentially intimidating remarks.²⁶

Non-mainstream religions and other beliefs

R Edwards, Secretary of the Humanist Society of WA, submitted to the Commission that many members have been subjected to harassment on the basis of their non-religious viewpoint.

5.2 Experiences of vilification and incitement to hatred

Members admit to feeling constrained from articulating their non-religious viewpoint for fear that others will take offence, or that they will find themselves tagged as immoral or even potential criminals ... In one memorable letter to the editor of the West Australian, we were even accused of child sacrifice.²⁷

Chel Bardell, Administrator of Pagan Alliance, complained of vilification of members of the Pagan community by other religious groups. She stated that the practising Pagan community is estimated by researchers at Queensland University to number approximately 5,000 and Pagan Alliance currently has 400 active members nationwide.

Christian fundamentalists on occasion cause us undue harassment, for example, picketing our outdoor rituals (I have witnessed this personally), and the unfortunate line in the Bible that reads "Thou shall not suffer a Witch to live" is often translated in today's society as "thou shall not suffer a Witch to live in peace". Therefore, the mere exposure of our religious beliefs to others can sometimes lead to personal vilification.²⁸

A large group of submissions was received from members of the Church of Scientology who complained of vilification and harassment on the basis of their membership of that group or their beliefs.²⁹ Virginia Stewart of the Church of Scientology alleged that the Church had been publicly vilified in a State Parliament by derogatory claims about Scientology such as

The Church of Scientology is on a recruiting drive targetting our children ... Has the Athena school, established in Tempe but now housed at Balmain, been turned into a Church of Scientology school? ... Is this school receiving money from the taxpayer to brainwash children in this so-called religion? ... This sect seems to be ... disturbing in its theoretical underpinnings stemming as it does essentially from the science-fiction writing of Mr. Hubbard ...³⁰

Ms Stewart argued that these claims were misinformed and that the claims of 'brainwashing' were 'completely inappropriate, unnecessarily emotive and slanderous' amounting to vilification on the basis of religion.

Judy Tampion, a Scientologist since 1963, told the history of what she perceives to be vilification and bad press that Victorian Scientologists have endured and the effect that such constant vilification can have.

I look back over my life and I am acutely aware of the constant vigilance that has been required to protect my own and other's right to practice our religion of Scientology ... [In 1963] the Victorian government Inquiry into Scientology was in full swing with the newspapers printing lurid reports, completely unchecked ... One lost many friends in those days, just by being a Scientologist ...³¹

Colston Vowles, a Scientologist from 1963 until 1983, surveyed 60 Scientologists and found that, despite the gradual acceptance and recognition of Scientology in Australian society over the last 30 years, many still experience intolerance and discrimination and believe that 'misconceptions and falsehoods' regarding Scientology continue to be propagated.

THE STATISTICAL PICTURE OF INTOLERANCE

Verbal Abuse and Harassment

60% of the Scientologists surveyed have been verbally abused or harassed because they are Scientologists

Physical Abuse or Intimidation

13.3% of the Scientologists surveyed have been physically abused or intimidated because they are Scientologists.

Property Defaced or Damaged

6.6% of the Scientologists surveyed have had property defaced or damaged because they are Scientologists.

False Media Reports

96.6% of the Scientologists surveyed say that the media denigrate, misrepresent and inaccurately report the activities, beliefs, practices and values of Scientology. 80% of these said it happens often/usually.³²

The Community Relations Officer of the Church of Scientology, Henry Bartnik, was also concerned about media representation of Scientology. Mr Bartnik complained of a television current affairs story on a Scientologist which he claimed was defamatory and biased.

The program was deliberately and intentionally crafted to give an evil and vicious impression about the Church of Scientology, such as would tend to justify the lengths that [the young man's father] went to in order to deprogram his son.

The producers of the program, in the quest for good, scandalous program material ... helped perpetuate the myth of dangerous minority religious groups and helped in turn to promote the activities of freelance deprogrammers or exit counsellors by positioning them as caring individuals who were possibly the only hope that the victims of the religious groups had.

This top-rating program beamed an entirely critical and negative portrayal of our Church into a million or more Australian homes and the effect of this on our parishioners and their sincere efforts to achieve broad laudable goals is something that must be weighed in this discussion.³³

Sara Verrier, a Scientologist for five years, submitted that the information that an anti-cult group provided to her mother constituted religious vilification.

I joined the Church at 19 years of age and have benefited greatly from my involvement. I have become aware of myself as a spiritual being, and have been able to improve my life and help others improve theirs. As a new Scientologist in 1992 I communicated to my family about my religion as I learnt new things. My father was very happy for me and the fact I was happy and doing well. However, my mother had been in contact with a group ... who claimed to be an 'information service'. She was told lies and alarming claims regarding my religion. After this,

5.2 Experiences of vilification and incitement to hatred

she became very concerned, and unnecessarily so ... The statements and claims by this group ... amount to religious vilification ...³⁴

Similarly, Mr Bartnik alleged, in a submission typical of concerns raised by Scientologists, that the activities and dissemination of information by certain anti-cult groups constitute vilification on the basis of religion.

In the course of my work in community relations the following instances of vilification of my church by ... [these groups] have occurred:

- Protests with placards and defamatory fliers in the city near our Castlereagh Street Church building
- Harassment of Church members and their friends at Church events
- Deleterious and critical postings on the internet newsgroup devoted to criticising the Church of Scientology
- Complaints about Church-related advertisements in magazines ...
- Press releases and packs of critical material and misinformation forwarded to radio and TV program producers and press journalists in the Australian Broadcasting Commission, Sydney Morning Herald, the Australian, country newspapers, regional radio stations, radio programs in Melbourne etc and critical press articles or radio programs organised.³⁵

Joan McClelland of CultAware denied that her group is interested in vilifying the Church of Scientology. She submitted that CultAware's goals are

- to raise community and professional awareness of destructive groups
- to provide appropriate information and support on request to people affected by cult activities
- to provide resource lists of books, videos, and counsellors as requested ...³⁶

Tony McClelland of CultAware submitted that he himself has been subject to 'considerable harassment' because of his anti-cult crusading.

Since the McClelland family has been involved in community awareness about Scientology we have experienced the following:

- A letter drop in our street advising neighbours that we are religious bigots
- Presentation of an 80 page book to Federal Members of Parliament with inaccurate information about us.
- A private detective and a member of the C of S spent 3 weeks investigating the past of Tony McClelland in an effort to discover information to silence criticism of the C of S for its 3 1/2 month incarceration of a member at Gosford ...
- Threats to tap our phone ...
- Threats of interference with one of our children ...
- Publication of inaccurate and offensive information about Tony McClelland on the Internet.

- Distribution of leaflets to neighbours with inaccurate information.
- Articles in Scientology with inaccurate and offensive accusations.
- Advertising in 3 newspapers to find information to suppress Tony McClelland...
- Death threats to Tony McClelland (2 on one day) at a street protest ...³⁷

Many submissions from members of the Church of Scientology alleged that the activities of deprogrammers or exit counsellors constituted vilification or harassment on the basis of religion. 'Deprogramming' is discussed in Chapter 3 as a possible example of religious coercion. Where it does not involve public acts and speech, deprogramming is not an instance of vilification as defined in this chapter.

5.3 Current legal protection in Australia

Australian law offers limited protection against religious vilification. The common law offence of blasphemy survives in some States. Federal and New South Wales anti-discrimination legislation makes incitement to religious hatred unlawful in some form but in both cases only ethnically based religions are covered.

Blasphemy

Blasphemy is an ancient English common law offence defined as a publication containing contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, the Bible or the formularies of the Church of England which are calculated to provoke outrage in the feelings of any sympathiser or believer in Christianity. A person who publishes any blasphemous document is guilty of publishing a blasphemous libel.³⁸

Blasphemy is an offence in all jurisdictions. In the Commonwealth, the ACT, the Northern Territory, New South Wales, South Australia and Victoria, blasphemy remains a common law offence. In Queensland, Tasmania and Western Australia blasphemy is a statutory offence.³⁹ There have been no successful prosecutions for blasphemy in over a century.⁴⁰

The current status of the offence of blasphemous libel in Australia was brought to prominence in the recent decision relating to the Andre Serrano art exhibition in the National Gallery of Victoria in Melbourne.⁴¹ That case concerned an application by the Catholic Archbishop of Melbourne, Dr George Pell for an injunction to prohibit the exhibition in the Gallery of a photograph entitled 'Piss Christ' depicting a crucifix immersed in urine.⁴²

One of the grounds for seeking the injunction was that the exhibit constituted blasphemous libel as it was 'so offensive, scurrilous and insulting to the Christian religion that it is beyond the decent limits of legitimate difference of opinion and is calculated to outrage the feelings of sympathisers with or believers in the Christian religion'.⁴³

Although the injunction was ultimately refused,⁴⁴ Justice Harper discussed the offence of blasphemy and its continued relevance. He stated that, although Mr Serrano's work

5.3 Current legal protection in Australia

is likely to be deeply offensive to many Christians as well as to many non-Christians, it was open to question whether the offence of blasphemy still exists in contemporary Australia. Justice Harper entertained the defendant's argument that blasphemous libel was no longer, if it ever was, an offence known to Victorian law.

It may be as the defendant submits, that the offence of publication of blasphemous libel has lapsed through desuetude. It does appear that only one prosecution has been instituted in Victoria this century, and that was withdrawn before trial.⁴⁵

He noted that the offence is clearly recognised in England but observed that Australia did not import the historical unity between the Anglican Church and the State which exists as a background to the offence in England.⁴⁶

Not only has Victoria never recognised an established church, but now s.116 of the Australian Constitution forbids the Commonwealth making any law for establishing any religion.⁴⁷

While Justice Harper was prepared to acknowledge tentatively that 'the ancient misdemeanour of [blasphemous libel] may have survived transportation to the colonies', he noted the incongruity of a law which implicitly protects only the Anglican Church in a multi-cultural and multi-religious society.

... there may be a place in a pluralist society for retaining the offence - although ... its rebirth as a law protecting much more than the Christian faith would be a necessary part of the new order.⁴⁸

As evidenced by many submissions the offence of blasphemy has continued relevance and importance for some. However, it is increasingly seen as outmoded in a multi-religious society.

Blasphemy as currently formulated in Australia protects Christianity, generally as practised by the Church of England. It offers no protection of the religious sensibilities of people of other faiths. As the Australian Law Reform Commission Paper concluded: "This is not appropriate in a society where there are many faiths." There would appear to be no grounds for retaining laws against blasphemy in Australia.⁴⁹

The Atheist Foundation of Australia Inc. stated

Blasphemy is a crime for which atheists have no equivalent. Heresy cannot exist when thought is not constrained.⁵⁰

In 1992, the Australian Law Reform Commission (ALRC) wrote in its report *Multiculturalism and The Law*

Religious affiliations in Australia are many and diverse. Although most Australians describe themselves as Christian, the largest single group of whom are Catholics, a growing minority ... are members of non-Christian religious faiths, particularly Islam, Buddhism and Judaism. Nearly 2 000 000 Australians do not subscribe to any religion. The offence of blasphemy, however, protects only the Christian religion, with specific reference to the rituals and doctrines of the Anglican Church.⁵¹

The ALRC concluded that blasphemy laws should be repealed and that offences to protect personal and religious sensibilities should be recast in terms of offensive behaviour or other laws which proscribe incitement to hatred on the basis of religious belief.⁵²

Incitement to religious hatred

Australian law offers little protection from religious vilification. New South Wales explicitly makes religious vilification unlawful but only if linked to ethnicity. The *Anti-Discrimination Act 1975* (NSW) makes it unlawful for a person to incite hatred towards, serious contempt for or severe ridicule of a person or group on the grounds of race. Race is defined to include ethno-religious background.⁵³ This protection fails to cover people whose religion is not linked to their ethnicity.

Queensland's anti-discrimination legislation makes advocacy of religious hatred or hostility unlawful but only where it is the means for inciting unlawful discrimination contrary to the Act.⁵⁴ A breach of this provision is subject to a penalty.⁵⁵ No definitions are provided and no cases have been reported on this section.

Victoria, South Australia, Western Australia, Tasmania, the ACT and the Northern Territory do not proscribe acts which vilify or incite hatred on the basis of religion.

The *Racial Hatred Act 1994* (Cth) extended the *Racial Discrimination Act 1975* (Cth) to make offensive or abusive public behaviour based on the race, colour, national or ethnic origin of a person unlawful.⁵⁶ Arguably these provisions extend to acts done on the basis of ethno-religious background. The Explanatory Memorandum to the Racial Hatred Bill stated that ethnic origin may be extended to include 'Jews, Sikhs and possibly Muslims'.⁵⁷

The terms 'ethnic origin' and 'race' are complementary and are intended to be given a broad meaning.

The term ethnic origin has been broadly interpreted in comparable overseas common law jurisdictions ... It is intended that Australian courts would follow the prevailing definition of 'ethnic origin' as set out in *King-Ansell*⁵⁸ ... [which includes] ... 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.⁵⁹

A submission by the Executive Council of Australian Jewry in response to the Race Discrimination Commissioner's recent *RDA Review Community Consultation Guide* expressed concern about the lingering uncertainty about the definition of ethnicity in Australia.

While it is true that in England and New Zealand it has been held that Sikhs and Jews are protected as ethnic groups, we submit that it is important that the issue be placed beyond doubt.⁶⁰

The Muslim community has also expressed concern that the definition does not clearly extend to include Muslims because their religion is not necessarily ethnically based.

There are gaps within the existing laws that do not protect Muslims from religious hatred and vilification. As an example, openly cursing someone's Islamic beliefs is not considered a crime under federal and most states' laws. What is applicable for race is not applicable to some unracially based religions like Islam. What we need in Australia is a Religious Hatred Act similar to the Racial Hatred Act 1995.⁶¹

The English Employment Appeal Tribunal has held that Muslims are a group defined mainly by religion rather than race or ethnicity and hence do not fall within the *Race Relations Act 1976*. Although Muslims share a common religious, cultural and historical background, the Tribunal stated that other characteristics of an ethnic group were lacking and that there are many Muslims of many different countries and of many colours and languages.⁶²

A complaint under the extended definition which includes religion has never been successfully pursued under the RDA. The Commission currently has a complaint from a Muslim under this provision alleging religious vilification but it has yet to be resolved.

Vilification on the ground of religious beliefs which cannot be linked to ethnicity, such as Buddhism, Christianity, Hinduism, new religious movements and possibly Islam, is not currently unlawful in Australia. In Queensland vilification is only unlawful when it amounts to incitement to religious discrimination.

A person of any race or ethnicity may convert to a religion such as Judaism, Islam, Christianity or Buddhism. This means that the law currently protects some members of some religious groups and not others. The inconsistency and unfairness of this situation were raised in a submission by the Buddhist Council of Victoria.

... the *Racial Discrimination Act 1975* and the *Racial Hatred Act 1995* provide protection for people as defined within the Act; however, it misses the point on religious discrimination by the fact that a case of religious discrimination must needs depend on the ethnic factor under either Act. This clearly ignores the right to freedom from discrimination by thousands of Buddhist converts who are not from traditional Buddhist countries or ethnic groups and are therefore not protected under either Act. The same could be said of converts to Hinduism, Islam, Judaism and so forth.⁶³

Similarly, former Scientologist Colston Vowles wrote

Unlike some religions, Scientologists do not have any characteristic racial or cultural indicators that identify them. Scientologists come from all racial and cultural backgrounds. This ... means that they are not protected by any discrimination legislation in Australia.⁶⁴

Criminal law

Australian criminal law prohibits a range of conduct which can be motivated by religious hatred, including threats to harm another or destroy property, incitement to violence, conspiracy and sedition. Although the religious or anti-religious motivation is not an element of these offences, they can operate to protect targets from some harmful conduct.

The criminal laws of the States and Territories prohibit threats to harm a person or to destroy or damage property belonging to another person with the intention of causing fear to the person that the threat will be carried out.⁶⁵

At common law it is a criminal conspiracy to agree with one or more persons to do an unlawful act. Acts which merely offend public morality or are viewed as immoral are not necessarily unlawful and are therefore outside the scope of criminal conspiracy.⁶⁶ The mental element required is intention to be a party to an agreement to achieve the unlawful object. Legislation in some jurisdictions also limits the scope of criminal conspiracy. For example, the *Crimes Act 1914* (Cth) provides that conspiracy is only committed when a person conspires with another to commit an offence against a law of the Commonwealth punishable by imprisonment for more than 12 months or by a fine of 200 penalty units or more.⁶⁷ The Criminal Codes of the Northern Territory and Queensland create general offences of conspiracy to contravene the criminal law⁶⁸ and Victoria has abolished the common law offence and replaced it with a comparable statutory offence.⁶⁹

Inciting another person to commit an offence, even though the offence is not actually committed, is an offence in all jurisdictions except the Northern Territory and Queensland. The common law offence is retained in New South Wales and South Australia but the offence is regulated by statute in the remaining jurisdictions.⁷⁰ For example, section 7A of the Commonwealth Crimes Act provides that it is an offence for any person to 'incite to, urge, aid or encourage or print or publish any writing which incites to, urges, aids or encourages' the commission of an offence against any law of the Commonwealth or a Territory.⁷¹

Additionally, the common law offence of sedition is preserved or has been legislatively modified in all jurisdictions. The Commonwealth Crimes Act provides that it is an offence to write, publish, utter or print seditious words with the intention of causing violence or creating public disorder or a public disturbance.⁷² A seditious intention includes an intention to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth. Exemptions exist for certain acts done in good faith.⁷³ Sedition is also punishable in some form in the States and Territories and has been expressly preserved in New South Wales.⁷⁴

5.4 Proposed federal anti-vilification law

Many Australians experience vilification or incitement to hatred on the basis of their religion or belief. However, current legislative protection against that behaviour is incomplete. Acts of violence are dealt with by the criminal law. A remedy for vilification on the basis of religion may be available in situations where religion is linked to ethnicity or race. However, there is no comprehensive protection against vilification on the basis of religion or belief.

The Commission's discussion paper, *Free to Believe? The right to Freedom of Religion and Belief in Australia*, asked whether federal legislation proscribing vilification on the basis of religion should be implemented in Australia.

Arguments in favour of federal legislation

Dr Juliet Sheen, in a comprehensive submission, supported the enactment of religious vilification laws. She argued that religious vilification, like any vilification, discourages participation in a free and democratic society on an equal basis.

It is appropriate to protect people through discrimination law if by a public act they have hatred incited towards them, have serious contempt expressed towards them or experience severe ridicule because of their religion or belief. The ground should cover people of all beliefs, whether religious or secular.

The existence of tension between secularists and religious believers is a reason for legislating in this area. Interfaith initiatives by their very nature cannot tackle the question of promoting understanding, acceptance and tolerance between secularists and religious believers. Both parties are highly critical of those on the other side. It is, however, appropriate for the law to indicate where the boundaries of criticism should be drawn.⁷⁵

Similarly the Uniting Church in Australia Board for Social Responsibility wrote

We have not accepted the argument based on freedom of speech, since vilification intimidates its targets and thereby undermines their freedom of speech. To consider only the right to freedom of speech of the vilifier, but not the vilified, is not appropriate. Vilification also undermines the right of the individual to security of person; it is a form of emotional violence, and can lead to physical violence. It is inappropriate to absolutise the right to freedom of speech to the extent that it undermines other human rights in this way.⁷⁶

Reverend E Smith, Hobart City Centre Parish of the Uniting Church in Australia, also agreed with the implementation of laws proscribing the vilification on the basis of religion.

[T]here should be anti-vilification legislation. Freedom of speech only exists in so far as it does not impinge upon the other rights of individuals and communities.

- i. minorities need protection: it is an unfortunate pattern of human society that some people choose to pick on weaker or smaller groups and want them to

become the same as the majority. There are so many examples of this that it does not need to be argued.

- ii. the majority needs protection: it is ... unfortunate ... that some people choose to attack the perceived establishment or core groups of society. There are many recent examples in Australia of Christians or Christianity being subjected to attacks that would not be tolerated if they were made on any other religious group. All religious groups are entitled to expect equal protection.⁷⁷

Many submissions received from members of the Church of Scientology also supported anti-vilification legislation on the basis that they should be free to exercise their religion of choice without vilification or harassment.⁷⁸

Arguments opposing federal legislation

Of the submissions opposed to the introduction of religious vilification legislation, some stated that Australians are already free to believe in the religion of their choice and therefore legislation is unnecessary.⁷⁹

One submission, while agreeing with the principle of anti-vilification laws, was concerned that the courts may be inundated with petty grievances arising from comments which turn into lengthy legal battles.⁸⁰

Colonel Joe Noland, Chief Secretary of the Salvation Army, Australia Eastern Territory, expressed a concern that such legislation would hinder the rights of individuals to speak out on moral issues without fear of reprisal.⁸¹

Overwhelmingly, the submissions opposed to religious vilification legislation feared that such legislation would constitute an unnecessary incursion into freedom of expression.

I admit to some sympathy with the claim that the passing of a law such as the Racial Hatred Bill (Racial Vilification Bill 1995) would send a clear message of community expectations, as would a similar law re religious hatred. However because I see free speech as an absolute fundamental to a free society, I see dangers to gradual quarantining of areas of speech from the public arena, however offensive the message, however attractive the cause. I want us to forge a culture which confronts words with words.⁸²

It is apparent from the issues raised in submissions that many people are concerned that religious vilification would infringe the right to freedom of expression. This concern and the tension between freedom of expression and the proscription of religious vilification are important and require further discussion.

5.5 International human rights law

Freedom of expression

Freedom of expression is a fundamental right which lies at the core of civil and political rights. The right is often viewed as a touchstone for all other rights protected by the ICCPR.⁸³ It has been said that it unites civil and political rights into a harmonious whole and symbolises the historical unity and interdependence of those two categories of rights.

... as a (liberal) human right, it lies at the heart of the individual's emancipation during the age of Rationalism from the throes of the religiously legitimated social order of the Middle Ages, whereas as a (democratic) right of the citizen, it symbolizes political emancipation from vassal to responsible citizen.⁸⁴

The right to free expression is important but it is not absolute. As Dr Michael Hains submitted, the right to freedom of expression carries with it duties and responsibilities.

While it is true that ... the *International Covenant on Civil and Political Rights 1966* guarantee[s] a person's freedom of expression including expression in art form, the right is not absolute. Article 19(3) of the ICCPR cautions that the right carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, including the respect of the religious rights or reputations of others and for the protection of public order, or of public health or morals ...⁸⁵

The term 'freedom of expression' is broadly interpreted in international law. ICCPR article 19.2 states that it includes the 'freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media'.

While international law requires that freedom of opinion be guaranteed without qualification (ICCPR article 19.1), freedom of expression is not an absolute and unqualified right. ICCPR article 5 limits the exercise of all Covenant rights and freedoms by reference to the rights and freedoms of others. The Covenant is not to be interpreted as giving anyone a right 'to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised [in the Covenant]'. ICCPR article 19.3 further stipulates that the exercise of freedom of expression carries with it 'special duties and responsibilities'. The state may limit the freedom where necessary to respect the rights and reputations of others and to protect national security, public order, public health and/or public morals.

It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's right.⁸⁶

The Human Rights Committee has emphasised that, when a state 'imposes certain restrictions on the exercise of freedom of expression, *these may not put in jeopardy the right itself*'.⁸⁷

Article 19 provides in full

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally in writing or in print, in the forms of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are necessary:
 - a) For respect of the rights or reputations of others;
 - b) For the protection of national security or of public order ... or of public health or morals.

Proscription of religious vilification

While article 19.3 *permits* a state to restrict freedom of expression where necessary in certain circumstances, ICCPR article 20 *requires* the prohibition by law of certain particularly harmful expression. The inclusion of article 20 makes clear the drafters' intentions that on no account should this kind of expression be permitted within states and that the question whether to restrict this expression should not be left to the discretion of individual states. Article 20 provides

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

The Human Rights Committee has commented upon the relationship between articles 19 and 20 by emphasising that the limitations required by article 20 'are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities'.⁸⁸

Australia has expressed its agreement with the interpretation of the Human Rights Committee but declined to introduce further legislation to implement article 20. Australia's 'reservation' or statement of interpretation and intention with respect to article 20 states

Australia interprets the rights provided for by Articles 19, 21 and 22 as consistent with Article 20; accordingly the Commonwealth and the constituent States, having legislated with respect to the subject matter of the Article in matters of practical concern in the interests of public order (ordre public), the right is reserved not to introduce any further legislative provisions on these matters.⁸⁹

This statement is of no legal effect but provides an excuse for inaction in relation to Australia's obligation under article 20. As one commentator has stated

5.6 Finding the balance in Australian law

A bar upon expressions of hatred and incitement to hatred, acts of violence or discrimination may constitute an effective preventive means of promoting the goals of the [Religion] Declaration, but may require restrictions that conflict with the freedoms of expression and association. The arguments for and against such a provision should therefore be considered carefully ...⁹⁰

The Religion Declaration does not guarantee specifically a right to be free from religious vilification. However, article 4 requires all States to 'take all appropriate measures to combat intolerance on the grounds of religion or other beliefs'. This is a similar requirement to that in ICCPR article 20 to prohibit advocacy of religious hatred that constitutes incitement to hostility.

5.6 Finding the balance in Australian law

International human rights law requires states to balance the competing requirements of protecting freedom of expression and protecting freedom from vilification and incitement to discrimination, hostility and violence.

Australian law recognises the importance of freedom of expression but also recognises the need to impose limits on that right. Current laws within Australia place limitations on speech and behaviour when those acts are seen to infringe upon the rights of others.

Recognition of freedom of expression

Freedom of speech has been recognised by the High Court of Australia as a 'principle of cardinal importance'.⁹¹ It has been defined as the principle that 'speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed'.⁹² The freedom of communication on political matters has been identified as a constitutional right flowing necessarily from Australia's system of representative democracy.⁹³ However, restrictions, even on political communication, will be necessary and permitted in 'an ordered society'.⁹⁴

Limitations on freedom of expression

Laws relating to defamation, offensive language, contempt of court and film censorship are among those which traditionally and currently limit freedom of expression in Australia. As Mark Leibler of the Ethnic Coalition argued in 1994 prior to the implementation of the federal Racial Hatred Bill

Freedom of speech ... is not, and has never been, an absolute right or an unequivocal right. Australian law contains many exceptions to the rule. It already prohibits criminal defamation, sedition and malicious communication, and, to date, I am unaware of any outcry, let alone any national campaign, which calls for the repeal of these laws. In various degrees, similar limitations apply to restrict access to pornography or to the use of offensive language in public. One's right to

say or to do what one likes is appropriately constrained by one's obligation not to cause harm to another human being; someone who has an equal right not to be harassed.⁹⁵

Additionally, some current anti-discrimination laws in Australia already limit freedom of expression by proscribing vilification on the basis of nationality, ethnic origin, race and, in some jurisdictions, religion.

ICCPR article 20.2 has been implemented in part by some federal, State and Territory anti-discrimination laws which make incitement to discrimination unlawful⁹⁶ and incitement to racial hatred unlawful when done in public.⁹⁷ The advocacy of religious hatred that constitutes incitement to violence or threats to people or property may also be covered by State, Territory and federal criminal law as discussed above.

All of these laws potentially inhibit the right to freedom of expression in Australia. However, despite the existence of these laws, freedom of expression has not suffered unduly. Politicians, the media and other groups continue to speak openly on race issues.

A survey of reported cases of racial vilification reveals that 'trivial' complaints of vilification are not covered by the legislation.⁹⁸ This dilutes the force of the argument against religious vilification legislation based on the threat to freedom of expression.

The appropriate balance

Freedom of religion and belief is fundamental. The right to believe is a fundamental right which should not be infringed unnecessarily. An element of that right is the right to be free from vilification and the incitement to discrimination, hostility or violence. States Parties are required to prohibit such actions by law.

The right to freedom of expression is a core right of international human rights law which is recognised and established in Australian law. That right is not absolute but it should not be unnecessarily limited. It can and should be limited by the state to maintain order and a civil society.

In a speech to the World Conference on Religion and Peace, Sir Ronald Wilson stated

Free expression, without a doubt, is fundamental among human rights. Many other rights, not least freedom of religion, suffer by its suppression. But it is equally fundamental that no right encompasses the right to destroy the rights of others.

Incitement of the violation of human rights on the basis of race or religion is not in my view within the protection of the right to free expression. Free expression did not include, or should not have included the right to promote Nazi terror. It does not include the right to promote violence and discrimination against Muslim or Arab Australians now.⁹⁹

A few submissions, while acknowledging the importance of freedom of religion and belief and of promoting tolerance, were not convinced that legislation was the most appropriate vehicle for this recognition. The Very Reverend Boak Jobbins, Chairman of the Social Issues Committee of the Anglican Church Diocese of Sydney, stated

Although vilification and expressions of hatred are abhorrent to the ethics of Christianity, and to most other religious systems, legislation may well benefit the legal profession more than the vilified. The law may not always be the best instrument for dealing with hatred or vilification.¹⁰⁰

Edward Glennie-Infield stated that, although he agreed that we should work towards the creation of a society which embraces tolerance between different religions, he was uncertain that legislation would assist in that process.

It is difficult not to be subjective when it comes to discussion of religion. For me tolerance, harmony and mutual understanding and respect constitute core values. Nevertheless I do not think that those values will necessarily be promoted by legislation imposing penalties and sanctions. I am concerned that if, for example, anti-vilification or hatred laws were passed then there might be a rash of litigation that would lead to fear, distrust, suspicion and vindictiveness.¹⁰¹

Dr Reid Mortensen expressed similar concerns.

[I] am concerned that the effect of such measures would be to exacerbate the feelings which motivate the more serious insults of people of different religions. It is also likely that, since expression in this *genre* is frequently motivated by the speaker's own religious beliefs, governmental moves to regulate or proscribe it are possibly an actual violation of the speaker's religious freedom and, if made through the medium of federal legislation, the free exercise clause ... But more pertinently, it will almost certainly be *felt* by the speaker as such a violation, and therefore is prone to heighten resentment and make the intolerant attitudes fester.¹⁰²

Mr Glennie-Infield offered an alternative to legislation. He recommended the establishment of a Council, Office or Committee of Religious Affairs 'charged with the responsibility of promoting dialogue, toleration, mutual respect and understanding between the various different religious organisations and their adherents'.

Also as part of its charter such a composite body of representatives of various faiths could design programmes of an educational nature whereby interested persons could be afforded an opportunity to study other religions under expert guidance and instruction. Much fear, distrust and suspicion stem from ignorance. Educational programmes would promote understanding, tolerance and respect.

In order for there to be a change in attitudes there must be educational programmes designed to promote mutual respect, tolerance and understanding between persons following different religious traditions and practices. As well there must be a continuing dialogue between those various religious communities.¹⁰³

The Commission is supportive of this proposal. Educational programs with a commitment to dialogue and respect between various groups would advance the goal of tolerance, acceptance and mutual respect among various religious and belief groups.

However, the Commission also considers that federal legislation proscribing religious vilification should be enacted. As well as imposing limits and regulations, laws are expressions of the values which the community considers important. Australian society abhors violence or intolerance for any reason. Equally as abhorrent is the incitement to violence on the basis of race, religion or belief. The implementation of legislation proscribing such behaviour would be a positive expression of community distaste for and disapproval of this type of behaviour. It is also required by international law.

Federal legislation in the form of the *Racial Discrimination Act 1975* implements Australia's obligations under ICCPR article 20.2 to prohibit vilification on the basis of nationality and race. The implementation of similar federal legislation on the basis of religion would ensure that the same standard of protection is offered to all Australians on the basis of religion.

5.7 Federal anti-vilification legislation

Introduction

Concern in some submissions about the introduction of religious vilification legislation related mainly to uncertainty about its scope. Legislation which would make unlawful the criticism of religions, beliefs or certain religious ideas or values was opposed. As Dr Reid Mortensen submitted

... many citizens strongly believe that religious matters are questions of ultimate concern - even more basic and important than political issues. It would therefore be most regrettable if, by the "chilling" effect of anti-vilification laws, they felt reluctant to ventilate religious ideas or were unwilling publicly to criticise religious conceptions they believed to be bogus or bizarre.¹⁰⁴

Many people shared the concern that vilification laws would prevent opinions critical of religious beliefs being aired in public or prevent debates about particular religions or belief systems being conducted. As Dr Mortensen further stated, it is feared that religious vilification legislation would effectively extend and re-emphasise blasphemy laws.

... laws which make it unlawful to offend, insult or humiliate persons of certain religious susceptibilities bear a close relationship to the common law offence of blasphemous libel, and effectively extend its protection to non-Christian groups. There is a long history of attempts to reform or abolish blasphemy laws which is counter to the trend of extending anti-vilification laws. But, in light of law reform agencies' specific attitudes to blasphemy laws, religious vilification laws which simply reinstate and strengthen them would be seen as regressive.¹⁰⁵

However, the difference between vilification legislation and blasphemy laws is that the former proscribes the incitement of hatred *towards a person* on the basis of his or her beliefs while blasphemy laws are concerned to prevent the desecration of religious symbols or religious or belief systems themselves.

Sir Ronald Wilson, former President of the Commission, pointed out in a speech to the World Conference on Religion and Peace in 1991, that there is a difference between vilification of adherents of a religion and criticism of the religion itself. Vilification of adherents is an attack on individuals and violates their freedom of religion and belief. Criticism of the religion itself is borne by the institution which, as a public institution, should be open to questioning of its methods, beliefs and motives.

Criticism or even ridicule of a religion is itself I think a conceptually different case from vilification of its adherents or promotion of intolerance against them, although the two may coincide. However genuine the offence which may be caused, I find it difficult to see a violation of human rights in the criticism of religion itself.¹⁰⁶

This dichotomy was recognised in a submission from Daryl Haslam.

[S]o long as a person's beliefs remain personal beliefs, no-one can gainsay them - they cannot be attacked - they are 'free' ... But once those beliefs are projected into the market place of ideas and beliefs, they become open to challenge ... [When] beliefs cease to be just personal and become a religion, then they can - and should - be open to criticism and challenge.¹⁰⁷

Vilification, when discrimination, hostility or violence is incited *against a person* because of his or her beliefs, is the proper focus of the proposed legislation rather than critiques of the religion or belief itself.

The scope of the legislation

An obvious model for federal legislation proscribing vilification on the basis of religion is the racial hatred provisions of the *Racial Discrimination Act 1975* (Cth) (the RDA). Those provisions make unlawful public acts which are reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people because of race, colour or national or ethnic origin.¹⁰⁸

A 'public' act is defined as an act which causes words, images, sounds or writing to be communicated to the public, is done in a public place or is done within sight and hearing of people who are in a public place.¹⁰⁹

At the Commission's Religion Workshop in April 1998 one working group discussed the question of the proper scope of religious vilification legislation. It was felt that the terms of section 18C of the RDA are too broad for the purposes of religious vilification. In particular, it was felt that making unlawful every public act which offends, insults or humiliates a person on the basis of his or her religion or beliefs would almost replicate the offence of blasphemy.

The working group suggested instead that the language of ICCPR article 20.2 should be preferred and that the proposed legislation should proscribe ‘advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence’. This language has the advantages of clearly reflecting Australia’s obligations under the ICCPR and excluding acts and language which are trivial.

This formulation was also advocated by Dr Reid Mortensen who stated in respect of the Queensland Act

This may be a suitable model if the Commissioner is still inclined to recommend the introduction of religious vilification laws. But there would be less reason to regulate expression which, in the weaker form of the anti-vilification provisions of s18C [of the RDA] is reasonably likely ‘to offend, insult, humiliate or intimidate’ ... it is submitted that any reform should be more favourable to the right of expression than to regulating it.¹¹⁰

Exemptions

The key to appropriate vilification legislation is the inclusion of appropriate exemptions. Exemptions permit acts which would otherwise be proscribed. The proposed religious vilification legislation must make allowances for fair speech and fair reporting to ensure a balance between the competing rights of freedom of expression and the right to be free from vilification on the basis of religion or belief.

The Victorian Secular Society supported the implementation of legislation proscribing vilification on the basis of religion or belief and noted the importance of exemptions which would ensure that the proposed legislation will not unduly inhibit the right to free speech.¹¹¹

Again the starting point is the federal RDA which exempts public acts done reasonably and in good faith

- (a) in the performance, exhibition or distribution of an artistic work;
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest;
- (c) in making or publishing;
 - (i) a fair and accurate report of any event or matter of public interest
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.¹¹²

The working group considered paragraph (c)(ii) too generous since any comment no matter how hostile or hateful could be described as an ‘expression of a genuine belief’. It was recommended that this provision be omitted from the religious vilification exemptions.

The Commission is satisfied that the approach proposed by the working group is the proper one, achieving an appropriate balance between the freedom of expression and the right of the individual to be protected against vilification which incites discrimination, hostility or violence.

Process and remedies

Another issue is whether racial vilification should attract criminal penalties in addition to the standard investigation and conciliation process leading to a civil remedy.

The original Commonwealth Racial Hatred Bill created both civil remedies and criminal sanctions, the latter applicable to more serious incidents of racial vilification.¹¹³ However, the Senate amended the Bill to remove the criminal sanctions and these amendments were agreed to by the government. The amended *Racial Discrimination Act 1975* now only proscribes offensive behaviour based on racial hatred, making it unlawful and subject to civil remedies rather than criminal.

The scheme of the NSW *Anti-Discrimination Act 1977* mirrors that of the original Commonwealth Bill. Racial vilification is unlawful and can be the subject of a complaint and civil remedies.¹¹⁴ Serious racial vilification involving a threat of physical harm to persons or property is an offence punishable by a penalty.¹¹⁵ In introducing this provision the NSW Attorney-General stated

This offence is aimed at very serious and blatant forms of racial vilification such as the threatening or inciting others to threaten physical harm to people or property.¹¹⁶

While criminal penalties may provide a strong deterrent to severe religious vilification, the Commission considers that they are not appropriate in this context.

In the report of the Senate Committee concerning the Racial Hatred Bill both the majority and minority noted that there were good reasons for civil rather than criminal penalties. It was argued for instance that it is inappropriate to criminalise racial vilification, when other forms of equally serious discrimination are dealt with civilly under the Act. It was seen to be unbalanced to create tougher penalties for incitement to racial hatred than for other forms of discrimination on the basis of race. Another view argued that the civil process is preferable to the criminal process as it provides far greater personal remedies.¹¹⁷

These arguments are applicable to the present discussion. In addition more serious acts including threats to injure persons or property can and should be dealt with under the general criminal law in each State and Territory. Civil remedies are preferable to criminal provisions in the context of the proposed religious vilification legislation.

Findings and recommendations

- Vilification, harassment and incitement to religious hatred on the basis of religion or belief occur in Australia.
- Blasphemy laws still exist in Australia but probably do not protect religions other than Christianity.
- Current laws in Australia proscribing vilification on the basis of religion lack uniformity and are inadequate.
- Uniform federal legislation proscribing incitement to religious hatred is necessary to ensure that Australia complies with its obligations to ensure that ‘the advocacy of ... religious hatred that constitutes incitement to discrimination, hostility or violence’ is proscribed by law (ICCPR article 20.2).

The Commission recommends

- R5.1** The federal Attorney-General through the Standing Committee of Attorneys-General should encourage the States and Territories to repeal laws creating the offence of blasphemy or to abolish the common law offence of blasphemy, as appropriate.
- R5.2** The Commonwealth should withdraw Australia’s statement of interpretation relating to ICCPR article 20.
- R5.3** The proposed *Religious Freedom Act* should proscribe the advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence as required by ICCPR article 20. The Act should exempt from the proscription of religious vilification acts done reasonably and in good faith
- in the performance, exhibition or distribution of an artistic work
 - in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest or
 - in making or publishing a fair and accurate report of any event or matter of public interest.
- R5.4** The process and remedies available for contravention of the religious vilification provision should be civil remedies similar to those provided for in the racial hatred provisions of the *Racial Discrimination Act 1975* (Cth).

Notes

- 1 The Macquarie Dictionary.
- 2 Human Rights and Equal Opportunity Commission, *Racist Violence, Report of National Inquiry into Racist Violence in Australia*, Australian Government Publishing Service, Canberra, 1991, page 14. The *Racial Discrimination Act 1975* (Cth) was amended as a result of the recommendations made by the National Inquiry into Racist Violence.
- 3 *Racial Discrimination Act 1975* (Cth) section 18C.
- 4 *Anti-Discrimination Act 1977* (NSW) section 20C.
- 5 *Anti-Discrimination Act 1991* (Qld) section 126.
- 6 *WA Criminal Code* (1913) Chapter XI - Racist Harassment and Incitement to Racial Hatred, inserted by the *Criminal Code Amendment (Racist harassment and incitement to racial hatred) Act 1990* (WA).
- 7 Jeremy Jones, 'Building cohesion in religiously diverse societies: religious vilification, discrimination and liberty', (1997) 19(3) *Migration Action* 31, page 31.
- 8 The Australian Federation of Islamic Councils also pursued a complaint to the Human Rights and Equal Opportunity Commission. The complaint was unsuccessful as it did not fall within the jurisdiction of the *Racial Discrimination Act 1975* (Cth).
- 9 Jeremy Jones, above note 7, *Ibid*.
- 10 Dr Michael Hains *Submission R/254*, pages 1 and 2.
- 11 *Id*, page 2.
- 12 W Morrison *Submission R/8*.
- 13 Jeremy Jones, Executive Vice-President, Executive Council of Australian Jewry, *Submission R/236*.
- 14 *Ibid*.
- 15 Statistics provided by the Executive Council of Australian Jewry as at 16 June 1998.
- 16 Eddie Girgia *Submission R/150*.
- 17 Salaheddin Bendak, Islamic Council of Victoria, *Submission R/218*.
- 18 *Ibid*.
- 19 Human Rights and Equal Opportunity Commission, *Racist Violence, Report of the National Inquiry into Racist Violence in Australia*, Australian Government Publishing Service, Canberra, 1991.
- 20 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, Australian Government Publishing Service, Canberra, 1991, page 139.
- 21 Australia's Muslim population is ethnically diverse, with overseas born Muslims coming from the Middle East, Africa, South and Southeast Asia and Eastern Europe: W Omar and K Allen, *Religious Community Profiles - The Muslims in Australia*, Australian Government Publishing Service, Canberra, 1996. However, as Islam originated in Arabia, the ethnic identity and religion of people from that background are often associated.
- 22 *Id*, page 142.
- 23 *Id*, page 143.
- 24 *Id*, pages 145-146.
- 25 *Id*, page 146.
- 26 *Id*, page 145.
- 27 Robyn Edwards, Secretary, Humanist Society of WA, *Submission R/162*.
- 28 Chel Bardell, Administrator, Pagan Alliance, *Submission R/220*.

- 29 See for example *Confidential Submission R/108*, page 1.
- 30 Virginia Stewart, Church of Scientology, *Submission R/33*.
- 31 Judy Tampion *Submission R/168*.
- 32 Colston Vowles *Submission R/208*.
- 33 Henry Bartnik, Community Relations Officer, Church of Scientology, *Submission R/232*.
- 34 Sara Verrier *Submission R/121*.
- 35 Henry Bartnik, Community Relations Officer, Church of Scientology, *Submission R/232*.
- 36 Joan McClelland, CultAware, *Submission R/251*.
- 37 Tony and Joan McClelland, CultAware, *Submission R/250*.
- 38 This definition was approved in an obiter statement in *Ogle v Strickland* (1987) 71 ALR 4, per Justice Lockhart at page 52, who quoted the definition from Stephen's *Digest of the Criminal Law* 9th edition, 1950, page 163.
- 39 Butterworths, *Halsbury's Laws of Australia*, Vol. 23 (as at 6 March 1998) 365 Religion, '8 Offences', paragraph [365-695].
- 40 *Ibid.* The last known successful prosecution was *R v Jones* in 1871 (unreported, Quarter Sessions (NSW), Simpson J, 1871).
- 41 *The Most Reverend Dr George Pell Archbishop of Melbourne v The Council of Trustees of the National Gallery of Victoria*, unreported, No 7358 of 1997, Supreme Court of Victoria, Harper J.
- 42 *Id.*, page 1.
- 43 *Id.*, page 2. The other ground on which the injunction was sought was that the public display of the work would constitute the exhibiting of an indecent or obscene figure contrary to the provisions of section 17(1)(b) of the *Summary Offences Act 1966* (Vic.).
- 44 *Id.*, pages 8-10. The injunction was refused as the judge was not convinced that either of the alleged offences would be made out if the photo were displayed. He also stated that to constitute blasphemy the publication probably needs to have a 'tendency to threaten the breach of the peace'. He did not think that the exhibit had that quality.
- 45 *Id.*, page 6.
- 46 *Id.*, pages 5-6.
- 47 *Id.*, page 6.
- 48 *Ibid.* Justice Harper quoted the reasoning on this point of Lord Scarman in the English case of *Whitehouse v Lemon* [1979] AC 617.
- 49 Jeremy Jones, Executive Vice-President, Executive Council of Australian Jewry, *Submission R/236*.
- 50 Atheist Foundation of Australia Inc. *Submission R/255*.
- 51 The Law Reform Commission, *Multiculturalism and the Law*, Report No. 57, Commonwealth of Australia, 1992, paragraph 7.55, pages 164-165.
- 52 *Id.*, page 166.
- 53 *Anti-Discrimination Act 1977* (NSW) section 20C.
- 54 *Anti-Discrimination Act 1991* (Qld) section 126.
- 55 *Anti-Discrimination Act* (Qld). The maximum penalty for an individual is 35 penalty units and for a corporation 170 penalty units.
- 56 *Racial Discrimination Act 1975* (Cth) sections 18C-18D.
- 57 The Parliament of the Commonwealth of Australia, House of Representatives, *Racial Hatred Bill 1994, Explanatory Memorandum*, circulated by authority of the Attorney-General, the Honourable Michael Lavarch MP, 1994.

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- 58 *King Ansell v Police* [1979] 2 NZLR 531.
- 59 *Explanatory Memorandum*, above note 57, pages 2-3.
- 60 Jeremy Jones, Executive Council of Australian Jewry, Submission No 23 to the *RDA Review Community Consultation Guide*
- 61 Salaheddin Bendak, Islamic Council of Victoria, *Submission R/218*. The uncertainty of the extension of the definition to include certain ethnic groups was also referred to by the Senate Standing Committee before the Bill was passed: see The Parliament of the Commonwealth of Australia, *Racial Hatred Bill 1994*, Report by the Senate Legal and Constitutional Legislation Committee, Australian Government Publishing Service, Canberra, March 1995.
- 62 [1988] EAT 86.
- 63 Brian S Ashen, Co-ordinator, Social Policy Unit, Buddhist Council of Victoria Inc., *Submission R/239*.
- 64 Colston Vowles *Submission R/208*.
- 65 See, for example, *Crimes Act 1900* (NSW) section 199.
- 66 *R v Cahill* [1978] 2 NSWLR 453. The argument that the accused's intentions offended public morality was irrelevant to the offence: *Halsbury's Laws of Australia*, Volume 9 'Criminal Law' (Title Co-Ordinator, C R Williams), General Doctrines, Conspiracy, Butterworths, 1995, page [249,557].
- 67 *Crimes Act 1914* (Cth) section 86(1).
- 68 For example, *Criminal Code 1899* (Qld) section 52(1) (conspiracy to commit sedition), section 309 (to commit murder), and section 543 (other offences such as conspiracy to injure or harm persons or property); *Criminal Code* (NT) section 285 (to carry out seditious enterprises) and section 287 (to commit murder); *Criminal Code 1924* (Tas.) section 297(1).
- 69 *Crimes Act 1958* (Vic.) section 321F(1). In the ACT, NSW and SA the common law in relation to conspiracy still applies.
- 70 *Crimes Act 1914* (Cth) section 7A(a); *Crimes Act 1900* (NSW) (for ACT) section 348; *Criminal Code 1924* (Tas.) section 298; *Crimes Act 1958* (Vic.) sections 321G-321I; *Criminal Code 1913* (WA) sections 553 and 555A.
- 71 *Crimes Act 1914* (Cth) section 7A.
- 72 *Crimes Act 1914* (Cth) sections 24A-F.
- 73 *Id.*, section 24F(1).
- 74 *Criminal Code 1924* (Tas.) sections 66- 68 (it is an offence to knowingly publish any words or writing, expressive of a seditious intention as defined in the Code); *Criminal Code* (NT) section 46 (the common law offence remains but it is also a statutory offence); *Defamation Act 1974* (NSW) section 49(2) (provides that the section does not affect the law relating to blasphemous, seditious or obscene libel). It is a misdemeanour in Queensland and WA: *Criminal Code 1924* (Qld) section 52(1) and *Criminal Code 1913* (WA) section 52(2). In Victoria the common law offence is retained and the seizure and destruction of documents containing libel is regulated by *Crimes Act 1958* (Vic.) section 469AA.
- 75 Dr Juliet Sheen *Submission R/245*, attachment C *Balancing the Act*, page 142.
- 76 Uniting Church Board for Social Responsibility *Submission R/228*.
- 77 Reverend Eric H Smith, Hobart City Centre Parish, Uniting Church of Australia, *Submission R/215*.
- 78 Many submissions from Scientologists considered that 'deprogramming' or 'exit counselling' (as discussed in Chapter 3) constitutes vilification on the basis of religion or belief. However, as these practices involve private rather than public acts they have not been considered in the context of this chapter
- 79 See, for example, Richard Gibbs *Submission R/14*; Phyllis Boyd *Submission R/128*; E Seaton *Submission R/130*; Jim Joyce *Submission R/131*; Roger and Anne Marks *Submission R/195*; M Milne, Assembly Action, Frankston Community Church, *Submission R/219*; Roslyn Phillips, Research Officer, Festival of Light (SA), *Submission R/231*.
- 80 *Confidential Submission R/34*.

- 81 Colonel Joe Noland, The Salvation Army, Australia Eastern Territory, *Submission R/206*.
- 82 Ewan Gellert *Submission R/112*.
- 83 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, Kehl am Rhein, 1993, page 336.
- 84 *Ibid.*
- 85 Dr Michael Hains *Submission R/254*.
- 86 Human Rights Committee, General Comment No. 10 (1983), paragraph 3.
- 87 Human Rights Committee, General Comment No. 10 (1983), paragraph 4 (emphasis added).
- 88 Human Rights Committee, General Comment No. 11 (1983), paragraph 2.
- 89 Australia has also entered a similar statement in reference to the similar provision in the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD). Article 4(a) of CERD provides in part '[States parties shall] declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof ...'
- 90 Donna Sullivan, 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance', (1988) 82 *American Journal of International Law* 487, page 506.
- 91 *Gallagher v Durack* (1983) 152 CLR 238, page 243.
- 92 *Ibid.*
- 93 *Australian Capital Television v Cth* (1992) 108 ALR 577. See also *Nationwide News v Wills* (1992) 108 ALR 681 invalidating a provision of the federal *Industrial Relations Act 1988* which permitted commentators on the Industrial Relations Commission to be punished for contempt of the Commission if their comments brought the Commission into 'disrepute'. Fair comment is protected by the constitutional right to freedom of political speech. In relation to limits on that freedom see *Theophanous v The Herald and Weekly Times Limited and Another* (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation* (1997) 145 ALR.
- 94 *Australian Capital Television v Cth*, *id*, per Chief Justice Mason at page 597; Justice Gaudron at pages 656-657; and Justice McHugh at pages 669-670. *Nationwide News v Wills*, *id*, per Justice Brennan at page 705; Justices Deane and Toohey at pages 726-727; and Justice Gaudron at page 741.
- 95 *Racial Hatred Bill 1994, Report by the Senate Legal and Constitutional Legislation Committee*, The Parliament of the Commonwealth of Australia, March 1995 at page 7. Quote Mr Mark Leibler, Evidence.
- 96 *Racial Discrimination Act 1975* (Cth) section 17 re incitement to discrimination on the ground of race, colour, descent, national origin or ethnic origin but not religion or belief except as incorporated within the concept of ethnicity; *Anti-Discrimination Act 1977* (NSW) section 52 re causing, instructing, inducing, aiding or permitting discrimination on the ground of ethno-religious origin and other grounds, but not religion as such; *Equal Opportunity Act 1984* (SA) section 90 re causing, instructing, inducing or aiding a contravention of the Act including discrimination on the ground of race but not religion; *Equal Opportunity Act 1984* (WA) section 160 as for South Australia and including discrimination on the ground of religious conviction or lack of a religious conviction; *Discrimination Act 1991* (ACT) section 108H as for Western Australia; *Anti-Discrimination Act 1992* (NT) section 111 as for South Australia but including discrimination on the ground of religious belief or activity.
- 97 *Racial Discrimination Act 1975* (Cth) Part IIA; *Anti-Discrimination Act 1977* (NSW) Part 2 Division 3A; *Anti-Discrimination Act 1991* (Qld) Section 126; *WA Criminal Code (1913)* Chapter XI.
- 98 For example in a case brought under the racial hatred provisions of the *Racial Discrimination Act 1975* (Cth), the President dismissed as 'frivolous, vexatious, misconceived or lacking in substance' a complaint that the use of the word 'Pommy' in the context of a humorous news article was offensive behaviour: *Bryant v Queensland Newspapers Pty Ltd*, (1997) unreported, H97/38. Similarly, in a case brought under the NSW *Anti-Discrimination Act 1977* comments made by a television presenter regarding the French and their apparent lack of personal hygiene was dismissed as trivial and outside the purpose of the Act: *Harou-Sourdon v TCN Channel Nine Pty Ltd* (1994) EOC 92-604.

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- 99 Sir Ronald Wilson, 'Human Rights from a Religious Viewpoint', speech to the World Conference on Religion and Peace, 2 February 1991, Monash University, unpublished speech notes, page 27 and 28.
- 100 The Very Rev Boak Jobbins, Chairman, Social Issues Committee, Anglican Church Diocese, *Submission R/240*.
- 101 Edward Glennie-Infield *Submission R/37*.
- 102 Dr Reid Mortensen *Submission R/244*.
- 103 Edward Glennie- Infield *Submission R/37*.
- 104 Dr Reid G Mortensen *Submission R/244*.
- 105 The NSW Council for Civil Liberties *Submission R/252* expressed similar concerns.
- 106 Sir Ronald Wilson, 'Human Rights from a Religious Viewpoint (with particular reference to religious liberty)', World Conference on Religion and Peace, 2 February 1991, Monash University, unpublished speech notes, page 29.
- 107 Mr Daryl Haslam *Submission R/189*.
- 108 *Racial Discrimination Act 1975* (Cth) section 18C. The provisions commenced in October 1995 with the commencement of the *Racial Hatred Act 1994* (Cth).
- 109 *Racial Discrimination Act 1975* (Cth) section 18C(2). A workplace has also been held to be a public place for the purposes of that section: *Rugema v J Gaden Pty Ltd t/a Southcorp Packaging* (1997) EOC 92-887.
- 110 Dr Reid Mortensen *Submission R/244*.
- 111 Mr Bill Keir, Victorian Secular Society, *Submission R/12*. See also Robyn Edwards, Secretary, Humanist Society of WA, *Submission R/162*.
- 112 *Racial Discrimination Act 1975* (Cth) section 18D.
- 113 *Racial Hatred Bill 1994*, Report by the Senate Legal and Constitutional Legislation Committee, The Parliament of the Commonwealth of Australia, Canberra, March 1995. The Bill proposed to create three criminal offences - the first and second dealing with threats made to people or property because of race (proposed sections 58 and 59) and the third dealing with the intentional incitement of racial hatred (proposed section 60).
- 114 *Anti-Discrimination Act 1977* (NSW) section 20B.
- 115 *Anti-Discrimination Act 1977* (NSW) section 20D. See also *Anti-Discrimination Act 1991* (ACT) section 67. The WA *Criminal Code 1913* was amended by the *Criminal Code Amendment (Racist harassment and incitement to racial hatred) Act 1990* (WA). The inserted provision, Chapter XI - Racist Harassment and Incitement to Racial Hatred, prohibits the publication and circulation of *written material* which intends to incite hatred towards a particular racial group because of the group's race.
- 116 *Anti-Discrimination (Racial Vilification) Amendment Bill*, Second Reading, Mr Dowd, Attorney-General, Legislative Assembly 4 May 1989, page 7490.
- 117 *Id*, *Majority Report*, page 16, quotes from Evidence of Mr Peter Bailey (L&C 305) and Mrs Jackson (L&C 271-2).

Appendix 1 Religion Declaration

Declaration on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UN Resolution 36/55

The General Assembly,

Considering that one of the basic principles of the Charter of the United Nations is that of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action in co-operation with the Organization to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights and the International Covenants on Human Rights proclaim the principles of nondiscrimination and equality before the law and the right to freedom of thought, conscience, religion and belief,

Considering that the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations,

Considering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed,

Considering that it is essential to promote understanding, tolerance and respect in matters relating to freedom of religion and belief and to ensure that the use of religion or belief for ends inconsistent with the Charter of the United Nations, other relevant instruments of the United Nations and the purposes and principles of the present Declaration is inadmissible,

Convinced that freedom of religion and belief should also contribute to the attainment of the goals of world peace, social justice and friendship among peoples and to the elimination of ideologies or practices of colonialism and racial discrimination,

Noting with satisfaction the adoption of several, and the coming into force of some, conventions, under the aegis of the United Nations and of the specialized agencies, for the elimination of various forms of discrimination,

Concerned by manifestations of intolerance and by the existence of discrimination in matters of religion or belief still in evidence in some areas of the world,

Resolved to adopt all necessary measures for the speedy elimination of such intolerance in all its forms and manifestations and to prevent and combat discrimination on the ground of religion or belief,

Proclaims this Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief:

Article 1

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.
3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Article 2

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.
2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Article 3

Discrimination between human being on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.

Article 4

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

Article 5

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.
2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.
3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.
4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.
5. Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.

Article 6

In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;

Appendix 1 Religion Declaration

- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

Article 7

The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.

Article 8

Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.

Appendix 2 Questions posed in the discussion paper

1. Discrimination in Employment

Discrimination in employment based on religious belief

Have you ever been denied a job or promotion due to your religious beliefs? If so, what were the circumstances?

Discrimination in employment based on religious non-belief

Have you ever been denied a job or promotion in the workplace due to the absence of religious beliefs? If so, what were the circumstances?

Reasonable accommodation

Does your workplace allow for special dietary or dress requirements due to your religion or beliefs? If so, how? If not, what were the circumstances?

Have you ever been refused leave from work for the purposes of worship, for special religious days or for special religious events/ceremonies? If so, what were the circumstances?

Have you received any other form of less favourable treatment in the workplace due to your religion or beliefs? If so, what were the circumstances?

2. Discrimination in Other Areas of Public Life

Goods and services

Have you ever been denied goods or services (including government services) due to your religion or beliefs? If so, what were the circumstances?

Accommodation

Have you ever been denied accommodation or housing due to your religion or beliefs. If so, what were the circumstances?

Club membership

Have you ever been denied access to or membership of a club due to your religion or beliefs? If so, what were the circumstances?

Education

Have you ever been denied access to or received less favourable treatment by an educational institution due to your religion or beliefs? If so, what were the circumstances?

3. Planning and Environment Laws

Has your religious community had difficulty in obtaining approval to build a place for worship or obtaining approval for any other uses of land for religious purposes? If so, what was the nature of the difficulties?

4. Violence, Intimidation and Harassment

Have you ever been publicly attacked (physically or verbally), intimidated, harassed or subjected to any other kind of public acts of hatred due to your religion or beliefs? If so, what were the circumstances?

5. Indigenous Beliefs

Is the current level of legislative protection of Indigenous beliefs, customs and sacred sites adequate? If not, what amendments to the current legislative regime would you suggest?

6. Legislation

Discrimination

Do you consider national legislation prohibiting discrimination on the ground of religion and belief in the areas of employment, goods and services, accommodation, clubs, education and land use is warranted?

What exceptions to the principle of non-discrimination and equality before the law would be appropriate and why?

Intolerance

Do you think national anti-vilification or hatred laws on the ground of religion and belief are warranted?

Should such laws provide for any exemptions and, if so, what?

7. Other Matters

Are there any other issues you wish to raise concerning freedom of religion and belief?

Appendix 3 List of Submissions

Organisation	Representative	State	Submission No.
Anglican Diocese of Melbourne, Social Responsibilities Committee	Reverend Ray Cleary	Vic	50
Anglican Church Diocese of Sydney, Social Issues Committee	Reverend Boak Jobbins	NSW	240
Annandale Christian School	Graeme Turton, Principal	NSW	230
The Atheist Club of Sydney	Stephen Maxwell	NSW	23
Atheist Foundation of Australia	Keith Cornish	SA	203
Atheist Foundation of Australia	Frances Loeber, Keith Cornish	SA	255
The Australian Coptic Association	S Fahed, Chairman	NSW	209
Buddhist Council of Victoria, Social Policy Unit	Brian Ashen, Co-Ordinator	Vic	239
Christian Community High School	Neville Pollard	NSW	48
Church of Scientology	Henry Bartnik	NSW	232
Church of Scientology Official Affairs	Reverend Mark Hanna, Director	NSW	6
Church of Scientology Department of Special Affairs	Brian Johnston, Researcher	Vic	247
Church of Scientology	Virginia Stewart, Public Affairs Director	NSW	33
The Coptic Centre of Culture & Art	D Fam, Chairman	NSW	210
Council of Australian Humanist Societies	Ray Dahlitz, President	Vic	223
Cult Information & Family Support	C Webster, Secretary	NSW	213

Appendix 3 List of Submissions

Organisation	Representative	State	Submission No.
CultAware	Joan & Tony McClelland	NSW	250
CultAware	Joan McClelland	NSW	251
Department of Criminology, University of Melbourne	Stanley Johnston	Vic	36
E.L.E. Trust	Reverend Sidney Hunter	Qld	32
Executive Council of Australian Jewry	Jeremy Jones, Executive Vice-President	NSW	236
Festival of Light	Roslyn Phillips, Research Officer	SA	231
Frankston Community Church	M Milne, Assembly Action	Vic	219
Humanist Society of WA	Robyn Edwards, Secretary	WA	162
Humanist Society of Victoria	Halina Strnad, Vice-President	Vic	224
Katoomba Gospel Trust	Mark Simpson Cedric Mansley, Trustee	NSW	156
Islamic Council of Victoria	Salaheddin Bendak	Vic	218
Kawana Waters Uniting Church	Reverend Colin Munns	Qld	43
Launceston Seventh-day Adventist Church	Pastor Don Fehlberg, Religious Liberty Secretary	Tas	241
Lutheran Church of Australia Board for Lutheran Schools	A J Jericho, National Director	–	225
Manningham Christian Centre	Pastor John Porter	Vic	207
Nanango Christian Faith Centre	Trevor Sullivan, Senior Minister	Qld	216
NSW Council for Civil Liberties	Mr Ken Buckley, Secretary	NSW	252
Pagan Alliance Inc	Chel Bardell, Administrator	NSW	220

Organisation	Representative	State	Submission No.
Pagan Alliance NSW	Adrienne Harris, NSW Regional Councillor	NSW	222
Presbyterian Church	R P Dunlop, Session Clerk	NSW	205
Presbyterian Church of Victoria Church and Nation Committee	Reverend Greg Fraser, Convenor	Vic	234
The Public Policy Assessment Society	Alex Proudfoot, Secretary	ACT	41
Rationalist Society of Australia	Lesley Vick, President	Vic	235
Religious Freedom Institute	John Swan, Vice-President	NSW	233
The Religious Society of Friends	Michael Corbett, Regional Meeting Clerk	Qld	204
Rookwood Necropolis	L R Squires, Executive Manager	NSW	238
Salt Shakers	Peter and Jenny Stokes	Vic	217
The Salvation Army Australian Eastern Territory	Colonel Joe Noland, Chief Secretary	NSW	206
Servants of the Elder Gods	Louise Bowes, Secretary	–	221
Seventh-day Adventist Church	Ray Coombe, Director, Public Affairs and Religious Liberty	NSW	49
Seventh-day Adventist Church	Ray Coombe, Director, Public Affairs and Religious Liberty	NSW	237
Seventh-day Adventist Church	Reverend Robert Miller, Minister	Qld	52
Southern Chalice Associates	Dawn Thomas	Tas	38
The Thomas More Centre	Richard Egan, WA Secretary	WA	211

Appendix 3 List of Submissions

Organisation	Representative	State	Submission No.
Uniting Church Hobart City Centre Parish	Reverend Eric Smith Uniting Church in Australia	Tas	215
Board For Social Responsibility	Reverend Ann Wansbrough	NSW	228
The University of Queensland Chaplaincy Centre	Reverend Geoff Hoyte, Anglican Chaplain. Dr Ken Smith, Baptist Representative.	Qld	212
Victorian Council of Churches	Reverend Hamish Christie-Johnston	Vic	229
Victorian Secular Society	Bill Keir, President	Vic	12
Victorian Secular Society	Bill Keir, President	Vic	227
Victorian Council of Churches and the Trades Hall Council, Church and Trade Union Committee	Louis van Laar, Secretary	Vic	243
Watchtower Bible and Tract Society of Aust	W M Lloyd, Vice-President	NSW	253
Wesleyan Methodist Church	Albert Brownsey, Secretary	Qld	35

Individual Submissions	State	Submission No.
Reverend Walter Abetz	Vic	20
T Adams	NSW	15
J M Addison	Vic	30
Philip Adermann	Qld	105
Ibra Alaraby	–	190
John Allpress	Vic	22
Robyn Arielli	WA	117
B Ashby	Qld	94
Zelda Bailey	Qld	46
Kenneth Baker	Qld	159
Louden Bayly	NSW	176
Elizabeth Beven	Tas	141
Ralph Bowler	Qld	56
Phyllis Boyd	Vic	128
M Boyle	Qld	106
Marcelle Bradbury	WA	11
Constance Bridger	NSW	21
Pastor Phillip Brown	Vic	175
C J Buchanan	Qld	75
E M Buchanan	Qld	76
Ian Cairns	NSW	167
Samantha Carter	Qld	89
Andrea Case	Qld	66
David Conley	Qld	91
R E Cooper	Qld	142
R J Corbett	Qld	93
Miranda Corbett	Qld	80
M Cottrell	Qld	138
Russell Cox	Tas	135
Gillian Cunningham	NSW	109

Individual Submissions	State	Submission No.
Lucia D'Andrea	NSW	172
Des and Judy Dale	NSW	157
K Davies	Qld	90
Michelle Deans	Qld	72
Rosemary Denning	Qld	71
Helen and Stephen Doven	NSW	182
D M Duffield	SA	155
Joyce Dunwell	Qld	86
Jeffrey Dutton	ACT	180
A H Evans	Qld	147
V Farrugia	NSW	173
Dr Laadan Fletcher	WA	115
Peter Gaal	NSW	246
J Gallagher	Qld	70
Richard Garrett	Vic	148
Elizabeth Garth	Vic	114
Dr David M. Gawler	Vic	149
Evan Gellert	Vic	112
Andrew George	Qld	78
Richard Gibbs	Tas	14
Eddie Girgis	NSW	150
Edward Glennie-Infield	Qld	37
E W Gooden	SA	179
Richard Gosden	NSW	3
Richard Gosden	NSW	26
David Guinea	Qld	83
Dr Michael Hains	NSW	254
Daniel and Lois Hales	NSW	29
Adrienne Harris	NSW	153
Daryl Haslam	Vic	189

Individual Submissions	State	Submission No.
R G Hassall	NSW	178
George Hazell	NSW	198
Martin Hinves	NSW	120
Craig Hitch	WA	111
R Hollands	Qld	60
E Hollands	Qld	61
Stephen Hopkins	Qld	81
Douglas Hornsey	Vic	110
John Humber	Tas	39
M Hunkin	Qld	77
Kevin Imberti	WA	134
Michelle Ingram	Qld	73
E Ingram	Qld	74
Laurence Ingram	Qld	102
Rosslyn Ives	Vic	139
R Bruce Jackson	WA	127
Margaret Jones	Qld	97
Maureen Jongebloed	Vic	17
Warwick Joyce	SA	185
Jim Joyce	NSW	131
Odette Keinzley	Qld	82
Richard Kelsey	Vic	183
Neil Kennard	NSW	197
Greg King	SA	177
Peter and Christine Kipps	NSW	249
Ken Klæbe	NSW	122
B J Lambert	Vic	113
Andrew Lawson	Qld	62
M Lawson	Qld	88
W A Leith	Qld	58

Individual Submissions	State	Submission No.
P Leith	Qld	69
Jeanette McHardy	Vic	143
Margaret McMillan	Qld	68
Dr S L Lo	ACT	181
R D MacGregor	Qld	151
Andrew Mackenzie	NSW	242
K Mackenzie	NSW	5
K Mackenzie	NSW	18
Iain MacKinnon	Vic	124
Dr David Maddison	Vic	202
Dr M A Malik	NSW	166
Roger and Anne Marks	Vic	195
Reverend Dr David Millikan	NSW	2
Alex Mills	NSW	199
Morgan	NSW	51
Dr Reid Mortensen	Qld	244
W F Morrison	NSW	8
Leah Myerson	USA	194
John Myhill	ACT	158
Jeane Nad	Qld	59
Michael Neubauer	Qld	92
Andrew Nott	Vic	200
V O'Brien	Qld	24
Michael O'Callaghan	Vic	186
Ben Ohlmeyer	Vic	161
Dr Maqsud Omar	NSW	9
Dr Maqsud Omar	NSW	19
Sylvia Oostewegel	NSW	164
Michael Ovey	NSW	145
Ron Parsons	Qld	174

Individual Submissions	State	Submission No.
M Pchuz	Qld	64
Neville Peck	NSW	1
Meagan Phillipson	Qld	25
Peter Plane	Vic	54
Warwick Poole	NSW	13
Adrian Prince	Qld	85
John Pryor	NSW	123
Lee Riley	NSW	196
Stuart D Riley	Qld	170
Dr Prince Roman	NT	4
T Rusesaame	Qld	57
Michael Rustichelli	Qld	84
Nicola Saad	Qld	55
Lisa Schaffers	Qld	65
E Seaton	Vic	130
Rosalie Seren	Vic	165
B Seton	Qld	96
C Seton	Qld	95
L V Shaw	–	132
Dr Juliet Sheen	NSW	245
Roy Short	Qld	100
Mandy Skinner	Qld	98
Joseph Slaughter	USA	28
M and M Sloper	Qld	101
Reverend S Slucki	NSW	214
E M Smith	Qld	87
Dr Ken Smith	Qld	154
B Smith	Qld	10
Wilma Smulders	Vic	146
John Sowerby	SA	108

Individual Submissions	State	Submission No.
Helen Spence	Qld	103
Robert Spence	Qld	104
Glenn Stevens	NSW	7
Judy Tampion	Vic	168
R W Taylor	Qld	133
Edward Teiffel	NSW	152
Michelle Thomas	–	187
Alec Thomson	WA	16
David Tribe	NSW	119
Lillian Van der Molen	Vic	191
Sara Verrier	SA	121
Colston Vowles	NSW	208
Keran Vucetic	Qld	63
Neville Wainwright	WA	201
Bill Wallis	WA	137
J Warren	Qld	67
Kathryn Warren	NSW	45
John Way	Vic	171
H Wheeler	Vic	47
Rev John Wheeler	Qld	31
David Wigg	Tas	40
Esther Willis	Qld	79
Richard Winkel	USA	27
Ron Wise	Vic	129
Ron Wise	Vic	116
Pamela Yarrow	Qld	99

Anonymous Submissions	State	Submission No.
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Anonymous	–	53
Anonymous	Qld	107
Anonymous	–	188
Anonymous	USA	193

Confidential Submissions	State	Submission No.
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Confidential	NSW	34
Confidential	NSW	42
Confidential	Qld	44
Confidential	NSW	118
Confidential	NSW	125
Confidential	Qld	126
Confidential	NSW	136
Confidential	NSW	140
Confidential	NSW	144
Confidential	Qld	160
Confidential	ACT	163
Confidential	ACT	169
Confidential	SA	184
Confidential	NSW	192
Confidential	NSW	248

Appendix 4 Workshop Groups and Participants

Organisation	Representative
	Grace Culachi
	Alex Mills
Anglican Church Diocese of Sydney Social Issues Committee	Reverend Boak Jobbins
Anglican Diocese of Melbourne Social Responsibilities Committee	Reverend Ray Cleary
Anglican Youth and Education	Grant Maple
Atheist Association of NSW Inc.	Peter Hanna
The Atheist Club of Sydney	Stephen Maxwell
Atheist Foundation of Australia	Richard Lead
Australian Bahai Community	Michael Costigan
Baptist Union	Noel Edwards
Buddhist Council of NSW	Graeme Lyall
Buddhist Council of Victoria Social Policy Unit	Brian Ashen, Co-Ordinator
Catholic Archdiocese of Sydney	Father Brian Lucas
Church of Scientology	Henry Bartnik
Coptic Orthodox Church	Gamil Helmy
Coptic Orthodox Church	Ibrahim Lofty
Cult Information and Family Support	C Webster, Secretary
CultAware	Tony McClelland
Ethnic Communities Council of NSW Inc.	Angela Chan

Organisation	Representative
Ethnic Communities Council of NSW Inc.	Dr Tony Pun, Chairperson
Executive Council of Australian Jewry	Jeremy Jones, Executive Vice-President
Festival of Light	Reverend Peter Barnes
Indigenous Law Centre, UNSW	Mick Dodson
Pagan Alliance Inc.	Chel Bardell, Administrator
Pagan Alliance NSW	Adrienne Harris, NSW Regional Councillor
Presbyterian Church	Reverend Stephan Slucki
Rationalist Society of Australia	Lesley Vick, President
Rationalist Association of NSW	Victor Zammit
Religious Freedom Institute	John Swan, Vice President
Religious Society of Friends (Quakers)	Pat Firkin
RIGPA	Ann Pickering
The Salvation Army, Australian Eastern Territory	Major Kenneth Sanz
Seventh-Day Adventist Church	Pastor Peter Joseit
Seventh-Day Adventist Church	Dr Harley Stanton
Uniting Church in Australia, Board for Social Responsibility	Reverend Ann Wansbrough
Victorian Council of Churches and Trades Hall Council	Reverend Robert Stringer
Victorian Secular Society	Peter Plane
Watchtower Bible and Tract Society of Australia	John Mouritz
Wesley Mission	Dr Keith Suter
World Conference on Religion and Peace	Dr Juliet Sheen

Appendix 5 Inquiry Participants

Commissioner

Chris Sidoti

Research and writing
(Discussion Paper)

Richard Bennett
Eva Veileborg Hald
Jon Porter
Shahyar Roushan

Research and writing
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David Robinson
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Additional research

Saku Akmeemana
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Ken Birch
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Ole Pedersen

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A Amor

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