



1 October 2015

KINGSFORD

Tim Wilson  
Human Rights Commissioner  
Australian Human Rights Commission  
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LEGAL CENTRE

**By email:** [rights@humanrights.gov.au](mailto:rights@humanrights.gov.au)

Dear Human Rights Commissioner,

**Religious Freedom Roundtable – call for submissions**

Kingsford Legal Centre (KLC) welcomes the opportunity to provide a submission to inform the Australian Human Rights Commission's Religious Freedom Roundtable.

We have provided comments below on the following issues that you have identified:

- Government laws and regulations that limit the right to religious freedom.
- Preserving religious freedom when an organisation receives taxpayers' money to provide a public service.
- Balancing the right to religious freedom and equality before the law.

In summary, KLC submits:

- Commonwealth anti-discrimination laws do not interfere with religious freedom.
- Permanent exemptions in Commonwealth anti-discrimination laws should be replaced by a general limitations clause.
- Commonwealth anti-discrimination laws should include religion (including no religion) as a protected attribute.

**Kingsford Legal Centre**

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KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas in Sydney since 1981. KLC provides general advice on a wide range of legal issues, and undertakes casework for clients, many of whom without our assistance would be unable to afford a lawyer. In 2014, KLC provided 1725 advices and opened 271 new cases.

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

## **Government laws and regulations that limit the right to religious freedom**

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We note the Australian Law Reform Commission's (ALRC) recent detailed report on this subject. We support their finding that 'Australians are not constrained in the exercise of religious freedom. There are only a few provisions in Commonwealth laws that interfere with religious freedoms.'<sup>1</sup> We recommend that the Religious Freedom Roundtable be informed by the ALRC's research and report.

In particular, the ALRC identifies anti-discrimination law and the *Marriage Act 1961* (Cth) solemnisation laws as laws that may be characterised as interfering with the freedom of religion and that are in need of further consideration. The ALRC states that exemptions in the *Sex Discrimination Act 1984* (Cth) do not interfere with religious freedom, rather they protect religious freedom.<sup>2</sup> It notes that some stakeholders argue that more protection is needed.

KLC supports the ALRC's views that the exemptions do not interfere with religious freedom. Further, we believe that the current exemptions should be removed as they do not strike an appropriate balance between religious freedom and the right to live free from discrimination. Instead, we propose a general limitations clause and the inclusion of religious belief and activity as a protected attribute under Commonwealth anti-discrimination laws. Our reasons for these recommendations are outlined below.

KLC also notes the ALRC's discussion of anti-discrimination protections in the *Fair Work Act 2009*.<sup>3</sup> We support protections against discrimination in relation to modern awards, enterprise agreements, adverse action and termination (sections 153, 195, 351 and 772). We note and support the existing *Fair Work Act* protection against discrimination on the grounds of religion. We also note that a religious exemption exists in the relevant sections. Our arguments against religious exemptions under Commonwealth discrimination law also apply to the *Fair Work Act*.

### **Preserving religious freedom when an organisation receives taxpayers' money to provide a public service**

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KLC supports the removal of existing exemptions for religious organisations in Commonwealth anti-discrimination laws, especially for organisations that receive taxpayers' money to provide a public service. One fundamental right should not be automatically privileged above others by the granting of a permanent blanket exception. Removing religious exemptions and introducing a general limitations clause, as well as religion as a protected attribute, would ensure that freedom of religion is not privileged over and above the other rights but is still adequately protected.

Permanent exemptions from Commonwealth discrimination law exist for religious organisations for the protected attributes of age, sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities. The exemptions permit religious organisations to discriminate against individuals where it is necessary to avoid injury to the sensitivities or susceptibilities of the adherents of a religion.<sup>4</sup>

Many religious organisations, including schools, receive public funding for performing a service on behalf of government. A vast range of social and welfare services are managed by faith-based organisations. These services include aged-care, education, adoption, employment assistance and child welfare services. The exemptions are particularly concerning for organisations which receive government funding for the provision of essential goods and services.

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<sup>1</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws: Interim Report*, July 2015, p 119.

<sup>2</sup> Above, p 107.

<sup>3</sup> Above, p 105.

<sup>4</sup> *Age Discrimination Act 2004* (Cth) s 35; *Sex Discrimination Act 1984* (Cth) ss 37, 38.

Religious exemptions remove protections against discrimination for a large number of people who access or are employed by government funded services. For example, 1,127,014 students attended non-government schools in 2009, and 90% of these students were in religious schools.<sup>5</sup> In 2009, approximately \$6.3 billion in government funding was allocated to non-government schools.<sup>6</sup> Religious education institutions are a significant employer in Australia. For example, the Catholic Education Office employs more than 9,000 people in the Sydney Archdiocese,<sup>7</sup> while the Sydney Anglican School Corporation employs nearly 2,000 staff.<sup>8</sup>

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

KLC supports removing all permanent exemptions and instead introducing a general limitation clause that deems discriminatory actions or conduct to be lawful when they are a reasonable, necessary and proportionate means of achieving a legitimate aim. Such a clause would allow a more thorough examination of human rights in conflict and consideration of how they might be balanced. KLC's support for a general limitations clause is subject to the following conditions:

- the general limitations clause must replace all current exemptions;
- the general limitations clause should not apply to the protected attribute of race;
- the judiciary must be required to consider the relevant Act's objectives when determining the application of the general limitations clause;
- the judiciary determining discrimination complaints must have specialist training and knowledge of the beneficial nature of discrimination law;
- AHRC have the power to initiate discrimination complaints;
- organisations must be able to initiate representative complaints; and
- the defence of unjustifiable hardship must be a separate provision, distinct from a general limitations clause.

### **Balancing the right to religious freedom and equality before the law**

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Federal legislation does not effectively prohibit discrimination on the ground of religion. The *Australian Human Rights Commission Act 1986* (Cth) only protects against religious discrimination if it has the effect of impairing equality of opportunity or treatment in employment or occupation.<sup>9</sup> Moreover, there are no enforceable remedies for this.

KLC believes that religious belief and activity (including no religion) should be a fully protected attribute in Commonwealth discrimination law. This would ensure that the right to freedom of religion is adequately protected.

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<sup>5</sup> Centre for Independent Studies, Jennifer Buckingham, *The Rise of Religious Schools*, 2010 at page 3 (<http://www.cis.org.au/images/stories/policy-monographs/pm-111.pdf>).

<sup>6</sup> Department of Education, Employment and Workplace Relations, *Financial Assistance Provided to Each State in respect of 2009, 2010* <<http://www.deewr.gov.au/Schooling/RecurrentGrants/NonGovSchools/Documents/GreenReport09.pdf>>.

<sup>7</sup> Catholic Education Office, *Employment* (2015) <<http://www.ceosyd.catholic.edu.au/Employment/Pages/Home.aspx>> accessed 29 January 2015.

<sup>8</sup> Sydney Anglican School Corporation, *Annual Report 2014*, p 8.

<sup>9</sup> *Australian Human Rights Commission Act 1986* (Cth) s 3(1).

**Case study: Ali**

*Ali is a young Muslim man in prison. He was given external leave to undertake studies at an educational institution. At the educational institution, Ali regularly prayed in outdoor areas. He was told that he was not allowed to pray there. When he continued to pray, Ali's education leave was cancelled and he was not allowed to continue his studies. This caused significant distress to Ali and his family. We advised Ali that he would not be able to successfully make a discrimination complaint, as the law does not protect a person from discrimination on the basis of their religion.*

**Case study: Jake**

*Jake is a student at a Catholic high school. He believes that he is being treated unfairly because he is not Catholic. Jake was not allowed to attend overseas trips with school, and his nomination for the Student Representative Council was removed by the school. We advised Jake that a discrimination complaint would be unlikely to succeed, as religion is not a protected attribute in discrimination law.*

The law should also be amended to prohibit vilification and harassment on the ground of religion, in order to protect people from harm and distress caused by religious hatred. In particular, Muslims in Australia have suffered significant vilification and harassment in recent times, with little legal remedy available.

In the last five years, we have advised 12 clients about religious discrimination, vilification and harassment. We have had to tell these clients that there is no remedy under federal anti-discrimination law, and often no remedy under NSW anti-discrimination law, because there is no protection against religious discrimination, vilification or harassment.

Please contact us on (02) 9385 9566 if you would like to discuss our submission further.

Yours sincerely,  
KINGSFORD LEGAL CENTRE



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