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Human Rights, Public Law & International Law Committees

Freedom of Religion and Belief in the 21st Century

30 February 2009

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To Whom It May Concern,

Freedom of Religion and Belief in the 21st Century
Australian Human Rights Commission

The Human Rights Committee **(HRC)**, the Public Law Committee **(PLC)** and the International Law Committee **(ILC)** of the NSW Young Lawyers are grateful for the opportunity to make a submission to the Australian Human Rights Commission relating to *'Freedom of Religion and Belief in the 21st Century'.*

NSW Young Lawyers is made up of law students and legal practitioners who are in their first 5 years of practice or under the age of 35.

As a collective of the NSW Young Lawyers, the HRC, PLC and the ILC enclose our submission in relation to this enquiry. The submission may be treated as public, can be published on the website of the Australian Human Rights Commission and has not been marked confidential for the purposes of the *Freedom of Information Act 1982* (Cth).

If you have any questions in relation to the matters raised in this submission, please contact Carolina Riveros Soto, Co-Vice Chair of the NSW Young Lawyers Human Rights Committee (hrc.vicechair@younglawyers.com.au) or Louise Jardim, President of the NSW Young Lawyers (president@younglawyers.com.au).

Yours faithfully,

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INTRODUCTION

1. The NSWYL expresses its 'in principle' support for efforts to legislatively entrench a right to freedom of religion and belief under Australian law.

2. The NSWYL, however, firmly takes position that the definition, implementation and scope of that right as specified under Australian law must be consistent with international law, including obligations arising under any treaty to which Australia is a party and customary international law.

3. Any discrimination on the ground of religion and belief can only be permitted under Australian law insofar as and to the same extent as allowed under international law.

4. In respect of Australia's statement of interpretation concerning Article 20, the NSWYL notes that a 'statement of interpretation' may, in certain circumstances, amount to a reservation whose permissibility and effect must be assessed against the International Covenant on Civil and Political Rights **(ICCPR)** to which Australia is a Party (including the object and purpose of that instrument, international human rights law and customary international law).

5. The NSWYL considers that Australia could retain its statement of interpretation, provided that Australia fully and in good faith discharges its obligations arising under international law, including under the Covenant. These obligations include the requirement under Article 2,

   "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant" and to adopt measures to give effect to the rights recognized under the Covenant.

6. Furthermore, it is reiterated that the ICCPR is currently reproduced as schedule 2 of *the Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

7. The NSWYL notes that for the Australian Parliament to annex a treaty text to legislation is suggestive of an intention to grant that instrument a privileged status. It is also 'strongly arguable' that annexing a treaty to legislation may render it a source of Australian law, particularly where exercising a discretion may be contemplated.[1]

8. At the same time, the NSWYL is also mindful of the prevailing view that the effect of annexing or scheduling a treaty to an Act does not have the effect of creating justiciable rights for individuals.[2] We accordingly suggest that efforts to legislatively entrench the right to freedom of religion and belief are to be supported.

9. Lastly, the NSWYL considers that the right to freedom of religion and belief (to the extent that it exists as a right under customary international law) is also a right which exists under Australian law.

10. The NSWYL notes suggestions that customary international law automatically forms part of Australian law.[3] We also note the 'true view…that international law is not a part, but is one of the sources' of Australian law'.[4] Australian courts may therefore be called upon to consider whether a particular international legal rule has been received into, and so become a source of, Australian law. In that sense a

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[1] See the dicta of Nicholson CJ in *Re Jane* (1988) 94 FLR 1 and *Re Marion* (1990) 14 Fam LR 427, 451. See also *R v Stolpe* (1987) 10 AYBIL 512 (Robson J, NSW Dist Ct); *R v Carbone* (1995) 82 A Crim R 1, 17 (Legoe AJ); *Collins v South Australia* [1999] SASC 257 (Millhouse J).

[2] *Dietrich v The Queen* (1992) 177 CLR 292, 305 (Mason CJ & McHugh J) & 359-360 (Toohey J). See also *Kioa v West* [1985] HCA 81, [40] (Brennan J); *Minogue v Williams* [2000] FCA 125, [21]-[25] (Ryan, Merkel & Goldberg JJ).

[3] *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479, 495 (Griffiths CJ), 506-7 (Barton J) & 510 (O'Connor J); *Polites v Commonwealth* (1945) 70 CLR 60, 80-81 (Williams J); *Bonser v La Macchia* (1969) 122 CLR 177, 214 (Windeyer J). Per contra *Re Jane* (1988) 12 Fam LR 662 (Nicholson CJ).

[4] *Chow Hung Ching v The King* (1949) 77 CLR 449, 477 (per Dixon J).

universally recognized international legal principle would similarly be applied by Australian courts.[5]

11. Therefore, the NSWYL considers that, insofar as customary international law includes the right to freedom of religion and belief, that right under customary international law is a 'source' of Australian law. The NSWYL does not express a concluded view on the existence and scope of the right to freedom of religion and belief as it currently subsists under customary international law.

12. The NSWYL encourages the Commission to have regard to the practice of other States in determining the existence and content of the right to freedom of religion and belief under customary international law. Such an approach is consistent with that of Australian courts which may have regard to the practice of influential States within the international community and more particularly common law jurisdictions including Canada, the United Kingdom and the United States.

1: EVALUATION OF 1998 HREOC REPORT ON *ARTICLE 18: FREEDOM OF RELIGION AND BELIEF*

Question 3

Is there adequate protection against discrimination based on religion or belief, and protection of ability to discriminate in particular contexts?

13. NSWYL believes that religious bodies should be given the necessary freedom to allow them to preserve their religious identity and to organise themselves through organisations that are run according to their philosophical and ethical understandings. The provision of exceptions to anti-discrimination legislation is a key requirement in adequately protecting freedom of religion.

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[5] *Chow Hung Ching v The King* (1949) 77 CLR 449, 462 (Latham CJ).

14. Exceptions to anti-discrimination legislation allow faith-based communities the ability to make decisions based on religious identity and individual conduct which allows them to preserve their identity and live according to their shared beliefs. As Reid Mortensen argues:

The value pluralism underlying religious freedom and other liberties of conscience endorses the capacity of sub-groups and sub-cultures to make judgments about the moral significance of factors like sex, gender, sexuality and marital status that society-at-large, through its elected Parliaments, may well judge differently. Evidently, the right to discriminate on religious grounds is essential to the freedom as the group could not exist as a distinctive religious entity without it.[6]

15. It should be noted that many other groups are provided with exceptions to anti-discrimination legislation to allow them to preserve their distinct identity. For example, the NSW Anti-Discrimination Tribunal **(ADT)** granted an exemption to the *Anti-Discrimination Act 1977* (NSW) to allow an arts organisation to discriminate on the grounds of race in employing Indigenous staff members to provide services to the Indigenous community.[7]

16. Furthermore, the NSWYL draws the Commission's attention to an exemption granted by the Victorian Civil and Administrative Tribunal **(VCAT)** to the *Equal Opportunity Act 1995* (Vic) to allow a gay club to discriminate on the grounds of sexuality (to allow the club to preserve its distinct identity and create an environment where it could meet the needs of its patrons).[8]

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[6] Mortensen, Reid, 'A reconstruction of religious freedom and equality : gay, lesbian and de facto rights and the religious school in Queensland' (2003) 3(2) *Queensland University Of Technology Law And Justice Journal* 1 at 4 <http://www.law.qut.edu.au/about/ljj/editions/v3n2/pdf/mortensen.pdf>.
[7] Anti-Discrimination Board *Exemptions granted under section 126 of the Anti-Discrimination Act 1977* <http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_exemption_126> at 16 December 2007.
[8] *Peel Hotel Pty Ltd (Anti Discrimination Exemption)* [2007] VCAT 916 (24 May 2007).

17. The NSWYL considers that similar exceptions to anti-discrimination legislation should be provided to religious educational institutions, charities and other religious organisations so that they can also preserve their identity, meet the religious needs of adherents and address the discrimination that various religious groups may confront.

18. The importance of freedom of religion and the obligations imposed on a State to refrain from interfering with religious freedom was emphasised by the Human Rights Committee **(HRC)** in a General Comment issued on the obligations imposed on States under Article 18 of the ICCPR. The Committee stated that:

    In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18.

19. The Committee observed that paragraph 3 of Article 18 is to be strictly interpreted. That is, restrictions are not allowed on grounds not specified there (even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security[9]).

Religious Schools

20. The NSWYL reiterates the importance of allowing exceptions to anti-discrimination legislation in the area of education so that freedom of religion in Australia can be adequately protected. Religious educational institutions play an essential role in the life of many religious

[9] UN Human Rights Committee, *General Comment No 22: Article 18 (The Right to Freedom of Thought, Conscience and Religion) (1993)*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (8 May 2006) 181, section 8 (emphasis added).

communities through fulfilling the educational, social and spiritual needs of students, their parents and other members of the religious community.

21. The importance of respecting religious freedom in the area of education is recognised by a number of international human rights instruments. For example, Article 26 of the *Universal Declaration of Human Rights* **(UDHR)** declares that,

'[p]arents have a prior right to choose the kind of education that shall be given to their children'.[10]

22. Furthermore, the NSWYL refers to Article 18(4) of the ICCPR which imposes an obligation on Australia:

'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'.[11]

23. In addition, the NSWYL refers to the Human Rights Committee in a General Comment issued on the ability of States to restrict the freedoms guaranteed under Article 18 emphasised that:

Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.[12]

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[10] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (10 December 1948).
[11] *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[12] UN Human Rights Committee, *General Comment No 22: Article 18 (The Right to Freedom of Thought, Conscience and Religion) (1993)*, as contained in *Compilation of General Comments and*

Religious Leaders

24. The NSWYL firmly believes that it is also important for the State to provide appropriate protection for freedom of religion in relation to the selection, training and appointment of religious leaders.

25. The Human Rights Committee has affirmed that this is a key aspect of religious freedom stating that,

    'the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.[13]

26. The NSWYL affirms, therefore, that it is appropriate that exceptions are provided to anti-discrimination legislation to provide the necessary freedom to religious groups to select, train and appoint their religious leaders in accordance with their religious tradition.

Employment

27. The area of employment is another key situation where freedom of religion needs to be protected. The NSWYL suggests that an exception to anti-discrimination legislation should be provided to religious employers in the same way that exceptions have been provided to employers on other grounds such as race, sexuality and gender. Such an exception is required so that the religious organisations can

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General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.8 (8 May 2006) 181, section 8 (emphasis added).

[13] UN Human Rights Committee, *General Comment No 22: Article 18 (The Right to Freedom of Thought, Conscience and Religion) (1993)*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (8 May 2006) 181, section 4.

preserve their religious identity and the distinct purpose of their organisations.

28. In addition to the exception being justified on the grounds of religious freedom, the NSWYL believes that there are also practical reasons for providing an exception to many religious organisations.

29. The practical importance of such an exception can be demonstrated by the example of food shelters run by organisations based on a particular religion. Both adherents and non-adherents of that religion would likely be motivated to be involved in the organisation as it provides them with an opportunity to help the disadvantaged.

30. There are, of course, other sources of motivation for being involved including providing them with an opportunity to express their faith in action, to promote the public image of their religion and to socialise with other people who share their faith. A failure to provide an exception to allow such an organisation to preserve its religious identity would likely result in a loss of membership as many of the reasons motivating individuals to become involved with the organisation would be removed.

31. The impairment of such faith based organisations would be a loss to the particular religious community, the disadvantaged served by those organisations and the wider community.

32. The NSWYL strongly believes that the Government, corporations and non-government organisations should not be permitted to discriminate on the grounds of religion in any employment related decision.

33. There should be accommodation within the workplace of the specific religious needs of individuals especially in relation to the distinct dietary, clothing and behavioural requirements of particular religions. It is accepted that there may be situations where the employer cannot

reasonably accommodate the specific religious needs of an employee for a variety of reasons[14]. Although these situations may arise, it is important to ensure that employers do not abuse the exceptions and that there genuinely are legitimate grounds for not being able to meet the religious needs of the employee.

Question 5

How well have the recommendations of *Article 18: Freedom of Religion and Belief* been implemented by the various state and federal governments?

34. Unfortunately, the majority of the recommendations set out by the Human Rights and Equal Opportunity Commission (now known as the Australian Human Rights Commission) **(AHRC)** have not been adopted at either the state or federal level.

35. The AHRC's primary recommendation (the introduction of a national Religious Freedom Act) has not been implemented in the 10 years since the Inquiry.

36. In fact, eight of the twenty six recommendations relate to the introduction of a federal Religious Freedom Act that would affirm the right of all religions and organised beliefs to exist and organise their own affairs in accordance with the law.

37. Further, many of the recommendations that have been implemented, though important, are relatively minor in light of the whole Inquiry.

38. In 2002, the Howard Government announced it had no intention of passing such an act and to date, the Rudd Government has not made

[14] Unjustifiable economic hardship, conflict with the rights of other employees, for example

any indication that it wishes to take up the AHRC's recommendations either.

Incorporation of Article 18 of the ICCPR and Articles 1, 5 and 6 of the Religion Declaration

39. Despite the rejection of a Religious Freedom Act, the Australian Capital Territory (ACT) and Victoria have introduced respective human rights instruments. These include:

- *Human Rights Act 2004* (ACT)
- *Charter of Human Rights and Responsibilities Act 2006* (Vic)

40. Both of the abovementioned legislative instruments, the NSWYL submits, incorporate, for the most part, Article 18 of the ICCPR. In particular, both acts substantially incorporate Articles 18(1) and 18(2), and include modified version of Article 18(3).

41. It should be noted, though, that although the ACT Consultative Committee recommended inclusion of Article 18)(4), it did not make it pass the legislature in either State.

42. Furthermore, the only Articles within the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief*[15] **(Religion Declaration)** are the ones that correspond to Article 18 of the ICCPR (that is Articles 1(1) and 1(2)) have been incorporated in the ACT and Victoria. Article 6 of the *Religion Declaration* has not been explicitly adopted in the acts, and it is unclear whether the right shall be thus interpreted at common law.

[15] United Nations 73rd Plenary Meeting, Resolution 36/55 of 25 November 1981

43. It is similarly unclear whether ‘religion and belief’ under these instruments are to be interpreted in the same way as recommended by the Commission in line with Recommendation 2.5.

Discrimination on the Ground of Religion and Belief

44. As a Religious Freedom Act has not been adopted, Recommendation 4.1 has likewise not been adopted.

45. The NSWYL further notes that, in the absence of a Religious Freedom Act, Recommendation 5.3 has not been adopted (incitement to hatred on the basis of religion and belief).

Indigenous Heritage

46. In relation to the issue of Indigenous heritage, the four recommendations relating to this area have been effectively rejected by the Federal Government.

47. In fact, the 1996 recommendations made by the Hon. Elizabeth Evatt continue to remain absent from the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) **(Heritage Act)** and *the Aboriginal and Torres Strait Islander Heritage Protection B*ill 1998, which would have adopted 20 of the 58 or so recommendations, lapsed as of 8 October 2001.

48. The NSWYL regretfully confirms that a set of minimum standards to ensure consistent treatment and protection of Indigenous heritage across State, Territory and Commonwealth jurisdictions has not been adopted nor discussed.

49. While the Heritage Act maintains the Commonwealth as the last resort for claims, no changes have been made to enable it to be the ‘effective federal avenue’ recommended by the AHRC. The Heritage Act, has,

however, been amended to allow Victoria to pass its own Aboriginal cultural heritage legislation,[16] bringing it up to speed with the other States and Territories.

50. The NSWYL notes, with regret, that Australia was one of only four countries that voted against the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* 2007[17] **(Indigenous Peoples Declaration).**

51. The NSWYL does note that the Rudd Government has indicated its support of the Indigenous Peoples Declaration and has sought the views of the Aboriginal and Torres Strait Islander Social Justice Commissioner (Mr Tom Calma) and other stakeholders regarding demonstration of formal support.

Indigenous Burials

52. The NSWYL draws the Commission's attention to the fact that none of the recommendations relating to the establishment of a National Working Group to develop standards on the preservation of traditional burials and associated rituals have been addressed or adopted. Approaches to Indigenous burials thus remain a very much state-based institution.

Autopsies

53. The Standing Committee of the Attorneys-General **(SCAG)** has not set up a Committee to develop and encourage the adoption of best practice standards in relation to autopsies.

54. Whilst the Australian Health Minister's Advisory Council (under the direction of the Australian Health Ministers) produced 'The National

[16] *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 2006* (Cth).
[17] Adopted by the General Assembly Resolution 61/295 on 13 September 2007

Code of Ethical Autopsy Practice' **(the Code)** in 2002, it does not explicitly include that cultural and religious sensitivity of the deceased and his/her family should be addressed.

55. The Code states, *inter alia*, that a non-coronial autopsy can only be carried out with the permission of the next-of-kin; the family *must* be consulted and given the opportunity to be involved; and respect must be shown towards the deceased and their families at all times.

56. The NSWYL affirms that the ACT[18] and Queensland[19] are currently the only two jurisdictions that explicitly mention religious and cultural attitudes and/or beliefs in relation to autopsies.

Coercion in Religious Belief and Practice

57. The NSWYL affirms that, to date, no such dialogue as proposed in Recommendation 3.15 has been conveyed by the Federal Attorney General, nor any of its proposed goals discussed, in relation to coercion in religious beliefs and practice.

58. We do note, however, that an informal interfaith dialogue between the National Council of Churches Australia, the Australian Federation of Islamic Councils and the Executive Council of Australian Jewry has been continuing since 2003.

Incitement to Hatred on the Basis of Religion and Belief

59. To date, it is not evident that Recommendations 5.1 has been adopted as the laws relating to blasphemy in New South Wales, Victoria, South Australia and Tasmania remain unchanged since 1998. Similarly, Recommendations 5.2 and 5.4 have also been rejected.

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[18] *Coroners Act 1997* (ACT), s 28.
[19] *Coroners Act 2003* (Qld), s 19(5)(b).

2. RELIGION AND THE STATE – THE CONSTITUTION, ROLES AND RESPONSIBILITIES

Question 2.1.1

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

Is this section an adequate protection of freedom of religion and belief?

60. The NSWYL strongly submits that in order to determine whether Section 116 of the Australian Constitution is an adequate protection of freedom of religion and belief, it is necessary to explore the purpose of the provision.

61. The NSWYL agrees with Professor Keyzer's comments in relation to the Australian Constitution:

    "contains few express guarantees of fundamental rights or freedoms from legislative power"[20].

62. One such power he notes is,

    "the freedom of religion guaranteed by s116"[21].

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[20] Professor Patrick Keyzer in *Constitutional Law* (2nd edition), Butterworths Tutorial Series, 2004 at 303

[21] ibid.

63. However, while Section 116 certainly seems to allow certain freedoms, or rather, prohibits the Commonwealth from imposing certain conditions, to suggest that s116 provides a *carte blanche* freedom for the exercise of religion and belief, according to NSWYL, is problematic.

64. Justice Stephen noted that 116 provides,

"important safeguards for religious freedom for Australians, at least so far as that freedom might be otherwise in jeopardy from the laws of the Commonwealth"[22].

65. A succinct and perhaps more accurate summary of section 116 can be found in the judgment of Justice Gaudron in *Kruger and Others v Commonwealth of Australia*[23]. In that case, Gaudron J held that,

'By its terms, s 116 does no more than effect a restriction or limitation on the legislative power of the Commonwealth. It is not, "in form, a constitutional guarantee of the rights of individuals". It does not bind the States: they are completely free to enact laws imposing religious observances, prohibiting the free exercise of religion or otherwise intruding into the area which s 116 denies to the Commonwealth. It makes no sense to speak of a constitutional right to religious freedom in a context in which the Constitution clearly postulates that the States may enact laws in derogation of that right'.

66. The NSWYL notes that Gaudron J's interpretation of the section is consistent with previous High Court decisions.

67. In the 'DOGS case', Chief Justice Barwick found that,

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[22] *Attorney-General (Vic); Ex Rel Black v Commonwealth* ("DOGS case") [1981] HCA 2; (1981) 146 CLR 559(2 February 1981) at 610: 20

[23] *Kruger and Others v Commonwealth of Australia* (1997) 146 ALR 126

"[w]hat the Constitution prohibits is the making of a law for establishing a religion. This…does not involve a prohibition of any law which may assist the practice of a religion…"[24]

68. While the section prohibits the Commonwealth from making laws which prohibit "the free exercise of religion", the prohibition itself is not without limitations. The "free exercise of religion" was qualified, NSWYL notes, in the 'Jehovah's Witnesses case'[25].

69. In that case, Starke J noted that

…[t]he Parliament is given no express power to legislate with respect to religion, but it has many other legislative powers. And [while] those powers cannot be exercised in contravention of the provision for religious liberty or freedom protected by the Constitution… liberty and freedom in an organized community are relative and not absolute terms[26]*.*

70. In the same case, Rich J found that,

'*Any regulations…which empower the Government to prevent persons or bodies from disseminating subversive principles or doctrines or those prejudicial to the defence of the Commonwealth or the efficient prosecution of [war] do not infringe s116. The peace, good government and order of the Commonwealth may be protected at the same time as the freedom of religion is safeguarded. Freedom of religion is not absolute. It is subject to the powers and restrictions of government essential to the preservation of the community. Freedom of religion may not be invoked to cloak and dissemble subversive opinions or practices and operations dangerous to the common weal'.*

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[24] ibid at 584: 35

[25] *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth* ("Jehovah's Witnesses case") [1943 HCA 12; 1943 67 CLR 116 (14 June 1943)

[26] ibid at [3]

71. The NSWYL submits that from the three cases with reference to section 116, it is apparent that the section is not, of itself, sufficient to provide adequate protection of freedom and religion or belief in Australia.

72. The legal complexity that lies ahead, in the view of NSWYL is, should the matter be left to the States, or is broader, uniform coverage more appropriate? Furthermore, important considerations, such as 'what constitutes freedom of religion?'.

73. The NSWYL notes that Queensland, Victoria and Tasmania recently tried to determine what doesn't constitute freedom of religion[27] by enacting anti-religious vilification legislation[28]. The result of which has seen both the public and academic spheres criticized, thus, hindering rather than fostering religious freedom[29].

74. The challenge, the NSWYL submits, will be finding the balance between the exercise of religious freedom, the fostering of religious tolerance (which as Justice Gummow noted in *Kruger v The Commonwealth* included "the toleration both of religion and the absence of religion"[30]), the management of religious dissent and the peaceful administration of society.

Question 2.1.2

How should the Australian Government protect freedom of religion and belief?

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[27] Professor Parkinson notes, that "What is prohibited in these jurisdictions is not merely the incitement of hatred but also serious contempt and severe ridicule". See Parkinson, Patrick, 'Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different' in (2007) 81 *ALJ* 954 at 955

[28] *Racial and Religious Tolerance Act 2001* (Vic); *Anti-Discrimination Act 1991* (Qld), s 124A (1); and *Anti-Discrimination Act 1998* (Tas), s 19A.

[29] See Blake, Garth, 'Promoting religious tolerance in a multifaith society: Religious vilification legislation in Australia and the UK' in (2007) 81 *ALJ* 386; Tauati Adhar, Rex, 'Religious Vilification: confused policy, unsound principle and unfortunate law' in *The University of Queensland Law Journal* (2007) Vol 26 (2): 293; and Parkinson, Patrick, 'Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different' in (2007) 81 *ALJ* 954

[30] *Kruger and Others v Commonwealth of Australia* (1997) 146 ALR 126 at 232

75. NSW Young Lawyers believes that freedom of religion and belief should be protected by uniform national legislation. The details of how that legislation should operate are dealt with below, under separate headings. Before turning to the detail however, there are four overarching points that need to be made. We believe these issues should be kept in mind throughout any consideration of the enquiry.

76. First, the government should ensure that any protection of religion and belief does not unreasonably interfere with the freedoms of citizens, and most importantly in this context, freedom of speech, which is itself an essential right recognised under international human rights law.[31]

77. Second, religious and non-religious beliefs should have equal protection.

78. Third, the protection of freedom of religion and belief should not be permitted to trump anti-discrimination laws which protect race, gender, sexuality and disability.

79. Fourth, because of the special nature of religion and belief, this area should be protected differently than the fundamental protections against discrimination based on race, gender, sexuality and disability (as abovementioned).

Protection against religious vilification

80. The NSWYL maintains that individuals should be legally protected from religious vilification. In particular, incitement to commit violent or unlawful acts against people of a particular belief or religion should be unlawful. This necessarily entails restricting freedom of speech to a limited, but legitimate extent:

[31] International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 ('ICCPR'), Art 19(2).

Suppressing speech which proximately encourages violence is a justifiable restriction in a democratic society, since the protection of life is a higher normative and social value which momentarily trumps free expression – but only to the extent strictly necessary to prevent the greater harm.[32]

81. Anti-vilification laws relating to religion do exist in some jurisdictions.[33] This creates a problem of national inconsistency, because in some jurisdictions there are no such laws,[34] or laws of limited application,[35] and some where the scope of those laws is unclear.[36] Clearly this inconsistency between jurisdictions is undesirable. Accordingly, the NSWYL submit that law reform in this area is needed.

82. Inciting another person to commit an offence is already an offence in almost all jurisdictions, either under statute or common law,[37] and there is a question of whether there is need for a separate offence of inciting religious hatred.

83. A more universally accepted approach is perhaps to only prohibit the incitement of hatred. This is the approach taken in the United Kingdom:

> *(1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.*[38]

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[32] Ben Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28(3) *University of New South Wales Law Journal* 868, 883.
[33] Queensland: *Anti-Discrimination Act* 1991 (Qld), s 124A; Victoria: *Racial and Religious Tolerance Act* 2001 (Vic), s 8; Tasmania: Anti-Discrimination Act 1998 (Tas), s 19.
[34] South Australia, Western Australia, ACT and NT.
[35] In NSW, religious vilification must be linked to ethnicity: *Anti-Discrimination Act* 1977 (NSW), s 4(1).
[36] Such as the application of federal anti-vilification laws to Muslims: Human Rights and Equal Opportunity Commission, *Isma—Listen: National Consultations on Eliminating Prejudice Against Arab and Muslim Australians* (2004), 30.
[37] See, e.g. *Crimes Act* 1958 (Vic) s 321G; *Criminal Code* 2002 (ACT) s 47.
[38] *Racial and Religious Hatred Act* 2006 (UK), s 29B.

84. Significantly, the UK legislation states:

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of *antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents*, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.[39] (Emphasis added)

Difficulty of distinguishing between an attack on belief and a person

85. NSWYL concedes that it can be very difficult to differentiate between criticising a belief and criticising people who follow a belief.

86. In one of the only cases to emerge in Australian religious anti-vilification law jurisprudence, the Victorian Court of Appeal said that it was,

> *"essential to keep the distinction between hatred of beliefs and hatred of their adherents steadily in view."*[40]

87. However, for many religious individuals, their beliefs are so interwoven with their life that they can feel that an attack on their beliefs is an attack on them personally. Indeed, it may often be implicit when criticising a belief that the critic is incidentally criticising those who follow it.

88. Hence, when the threshold becomes lowered to "severe ridicule" and "severe contempt", it will often be unclear what a person intends to do. Moreover, it may be very difficult for a person to harshly criticise a

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[39] *Racial and Religious Hatred Act* 2006 (UK), s 29J.
[40] *Catch the Fire* [2006] VSCA 284 [34] (Nettle JA).

religion or belief without also, incidentally, disparaging the followers of that religion or belief.

Increased Litigation

89. NSWYL submits that a lower threshold for vilification both: (a) increases litigation; and (b) creates uncertainty of legal outcome. The outcome of the litigation will be uncertain because terms such as "serious contempt" and "severe ridicule" are vague and capable of different interpretations.

90. The risk of expensive and protracted litigation is increased by the vagueness of the law. Precisely at what point along the continuum one violates the law is very difficult to know.[41]

A chilling effect on legitimate religious activity

91. The NSWYL draws the Commission's attention in relation to religious vilification laws. One of which is that they may have a 'chilling effect' on religious activity (even if that activity is lawful).

92. As Patrick Parkinson has said:

The punishment imposed by religious vilification laws does not lie in the penalties imposed by courts or tribunals for breaches of the law, but in the necessity to defend oneself from plausible claims that the law has been breached. The cost of defending such cases, employing an appropriately qualified legal team, can run into the hundreds of thousands of dollars – far beyond the capacity of small religious communities or organisations. A religious organisation may be put to

[41] Rex Tauati Ahdar, 'Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law' (2007) 26(2) *University of Queensland Law Journal* 293, 298.

considerable expense even if the claim is utterly unmeritorious and is summarily dismissed.[42]

93. Conversely, the NSWYL expresses its concern in relation to well-financed institutions, including some large churches, could exert power through the threat of legal action in order to restrain freedom of expression they perceive as hostile.

Blasphemy

94. NSWYL draws attention to the considerations of the New South Wales Law Reform Commission in its Report on Blasphemy (1994).[43]

95. The NSWYL adopts and agrees with the Commissions' reasons and the finding that the offence should be abolished. This conclusion was also reached by the Human Rights and Equal Opportunity Commission (1998 report).[44]

Protection against discrimination on the ground of religion or belief

96. NSWYL believes that there should be uniform legislation protecting individuals from discrimination on the ground of religion or belief in all spheres of public life. In particular, anti-discrimination law should cover the areas of education, employment, and provision of goods and services.

Education

97. One issue concerning freedom of religion and belief is the question of the proper role of religious teachings in state schools. The history and

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[42] Patrick Parkinson, 'Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different' (2007) 81 *Australian Law Journal* 954, 959.
[43] New South Wales Law Reform Commission, *Blasphemy*, Report 74 (1994).
[44] Human Rights and Equal Opportunity Commission, *Article 18 Freedom of Religion and Belief* (1998) 139.

role of world religion and belief systems may well be a legitimate area of study for students and taught in a general and comparative format. [45]

Employment

98. Two issues arise in the employment context: potential discrimination in the hiring of employees and potential discrimination in the treatment of employees.

99. NSWYL believes that an employer should be prohibited from discriminating against job applicants on the grounds of religion or belief. There should however, be an exception for religious bodies (as discussed above).

100. Accordingly, it should be an exception to discriminating on the grounds of religion in the employment context in situations involving:

- the ordination or appointment of priests, ministers of religion or members of a religious order;
- the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order;
- the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice.

100. Currently, there are legislative provisions in some jurisdictions exempting religious bodies from discrimination laws that protect race, gender, sexuality and disability in these employment situations.[46] For

[45] A subject titled ' Studies of Religion' is currently taught at Year 11-12 level in NSW. A copy of the syllabus is available at http://www.boardofstudies.nsw.edu.au/syllabus_hsc/syllabus2000_lists.html, which lists its objectives as developing knowledge and understanding about the nature of religion and belief systems in local and global contexts; the influence and expression of religion and belief systems in Australia and religious traditions and their adherents.
[46] *Equal Opportunity Act* 1995 (Vic), s 75.

example, a church could refuse to appoint a female or homosexual priest if it was not in line with religious beliefs. Obviously, the NSWYL submits, it would be highly desirable for these exemptions to be removed in all jurisdictions. However, we recognise that such a change is politically unattainable.

101. NSWYL advocates an approach relevantly identical to Queensland legislation, which explicitly curtails any such general exemptions for religious bodies so that those exemptions do not excuse discrimination in the areas of employment or education.[47]

102. NSWYL also identifies the issue of religious practice during work hours. The NSWYL refers to the balanced approach to religious prayer undertaken by the ACT and found within ACT legislation[48].

103. The ACT legislation provides, inter alia, that:

> It is unlawful for an employer to discriminate against an employee on the ground of religious conviction by refusing the employee permission to carry out a religious practice during working hours, being a practice –
>
> (a) of a kind recognised as necessary or desirable by people of the same religious conviction as that of the employee; and
>
> (b) the performance of which during working hours is reasonable having regard to the circumstances of the employment; and
>
> (c) that does not subject the employer to unreasonable detriment.

NSWYL suggests that the above provision is sufficiently flexible to accommodate a variety of different practices and workplaces.

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[47] *Anti-Discrimination Act* 1991 (Qld), s 109(2).
[48] *Discrimination Act* 1991 (ACT), s 11.

Goods and Services

104. In addition to this, NSWYL believes that individuals should be protected from discrimination by businesses when purchasing goods or services. However, exemptions are obviously needed in this area and Queensland provisions provide a sensible model.[49]

General Exemptions for Religious Bodies

105. Any anti-discrimination law exemptions for religious individuals and bodies should be limited to employment in a religious institution (as abovementioned).

106. In Victoria, there is an exemption that applies and provides the following:

'Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles[50]*'.*

107. The NSWYL does express concern in relation to the Victorian exemption in terms of its wide application. For instance, under the current exemption, discrimination against a particular racial group would not be unlawful if the discriminatory belief was part of the person's belief system.

Question 2.1.5

Would a legislated National Charter of Rights add to these freedoms of religion and belief?

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[49] *Anti-Discrimination Act* 1991 (Qld), Division 4.
[50] *Equal Opportunity Act* 1995 (Vic), s 77.

108. The NSWYL notes that the current debate concerning a legislated National Charter of Rights is a prominent issue in current political and legal frameworks.

109. NSWYL notes that this is a complex legal issue and one that requires comprehensive analysis and consultation.

110. Nevertheless, NSWYL expresses concern that human rights are not adequately protected under existing laws. In fact, Australia does not have a constitutionally entrenched freedom of religion and section 116 of the Australian Constitution has been narrowly construed so as to preclude such a rights.

111. Indeed, the 1998 AHRC Inquiry reiterated the NSWYL concern that, freedom of religion and belief are not sufficiently protected in Australian.

112. NSWYL proposes that a legislated Charter of Rights should include the right to freedom of religion and belief. This same right is guaranteed under Article 18 of the ICCPR (to which Australia is a signatory.

113. NSWYL submits that the codification of such rights will provide citizens with rights that are currently lacking protection at both State and National levels.

114. NSWYL emphasises the importance of understanding the interpretation of freedom and religion in other jurisdictions. For instance, in the case of Canada, Courts have interpreted freedom of religion and belief within the *Canadian Charter of Human Rights and Freedoms*. Section 2(a) of the Canadian Charter specifically prevents the Legislature from discriminating against religious minorities.[51]

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[51] Shannon Ishiyama Smithey, 'Religious Freedom and Equality Concerns under the Canadian Charter of Rights and Freedoms' (2001) 34 *Canadian Journal of Political Science/Revue canadienne de science politique* 85, 87.

115. The NSWYL firmly supports, therefore, a legislated Charter of Human Rights and its ability to add to the freedom of religion and belief in Australia.

5. THE INTERFACE OF RELIGIOUS, POLITICAL AND CULTURAL ASPIRATIONS

Question 2

How should the Government manage tensions that develop between aspirations?

116. NSWYL understands that Australia is a highly multicultural nation and one that allows its citizens a substantial degree of freedom. It is conceded that such a plurality of beliefs and values can, sometimes, give rise to conflict and disagreement.

117. In terms of establishing the best ways in which to manage aspirations between groups, particularly in the context of regulating freedom and religion, the NSWYL submits that the Government should protect freedom of religion and belief only where necessary.

118. Furthermore, the Government should protect freedom of religion only to the Extent that such protection does not unreasonably interfere with freedom exercised by its citizens.

119. Moreover, whilst the plurality of beliefs in Australian society should not be unnecessarily interfered with through government action, it will be necessary to intervene in certain instances. As Starke J said in *Adelaide Company of Jehovah's Witnesses v The Commonwealth*:

'The liberty and freedom predicated in s 116 of the Constitution is liberty and freedom in a community organized under the Constitution. The constitutional provision does not protect unsocial actions or actions subversive of the community itself[52]'.

120. NSWYL submits that whilst groups and individuals should be given a high degree of freedom to pursue their own goals and ends, that freedom is not absolute. Reasonable limits must be allowed to ensure the peace and security of Australian society. These limits, such as anti-discrimination and anti-vilification laws, help to assuage the tensions that develop between aspirations.

Question 5

What do you think should be the relationship between the right to gender equality and the right to religious freedom in Australia?

121. NSWYL submits that in considering the relationship between the right to gender equality and the right to religious freedom, the willingness to adapt certain religious practices to increase gender equality without compromising the integrity of the practice may become necessary.

122. Proportionality and consideration are necessary in the relationship between these two rights.

123. In relation to the right to gender equality, NSWYL refers to the United Nations Convention on the Elimination of Discrimination Against Women **(CEDAW).** This Convention provides, inter alia, a number of specific protections for women in the areas of work, health, marriage and family life, politics and education.

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[52] (1943) 67 CLR 116, 155

124. As Australia is a signatory to this Convention, it is important when implementing such protections to examine all areas of society to determine when and where women are not being accorded sufficient protection, so that steps can be taken to fulfil our obligations.

125. While there is no separate Convention on the right to freedom of religion, this right is protected under Article 18 of the International Convention on Civil and Political Rights (ICCPR), to which Australia is also a signatory, which provides for freedom of religious belief and practice, limited only by laws which protect the fundamental rights and freedoms of others. Therefore while it is widely recognised that both sets rights can be limited or abrogated to a certain extent by other rights if necessary, there is no situation in which one right should be entirely abrogated in the service of another right.

126. There are many examples of non-gender equality in religious practices. Some of which include, but not limited to, Jewish restrictions what aspects of religious ceremonies they can participate in, Islamic restrictions on female clothing and Christian restrictions on contraception.

127. The NSWYL submits that it is not feasible nor advisable to argue that Australia should remove all gendered distinctions in religious practice, as this would not only remove the right to religious freedom entirely, but also would do so without consideration of what effect these restrictions have on women and men, and the rationales behind them in terms of religious doctrines.

128. An area which highlights some of the issues surrounding gender equality and religion is circumcision. Female circumcision, otherwise known as genital mutilation, is, in fact, a criminal offence in many parts of Australia. Male circumcision, on the other hand, still remains very prevalent and recognised rite of passage.

129. As gender equality is something that Australia should be actively working towards, the NSWYL is concerned that legislation is in place in relation to female circumcision only.

130. Full gender equality includes allowing both men and women to have control and integrity over their body and its component parts.

131. The debate around the abortion drug RU486 in 2006 in Federal Parliament, and the acceptance of a 'conscience vote' in relation to this drug, indicates how religious views have overtaken the otherwise scientific issues in this area.

132. In conclusion, the relationship between these two rights needs to be examined as closely as the relationship between other rights, and neither gender nor religion should be used as a method of avoiding proper analysis or examination of contemporary Australian society.

Question 6

Citizenship and Australian values have emerged as central issues, how do you balance integration and cultural preservation?

133. NSWYL emphasises the importance of defining the term 'integration' in an Australian cultural context. The Macquarie Dictionary, defines 'integration' as,

'the amalgamation[53] of an ethnic or religious minority group with the rest of the community.'

134. NSWYL submits that, 'integration', be it of an individual who belongs to a particular ethnic group, or of an ethnic group in general, assumes a prior cultural detachment between that person or group with the

[53] Amalgamation is defined as ' to mix so as to make a combination; blend; unite; combine.'

surrounding community. In amalgamating with that community, the person or group is taken to 'mix' with that community, such that the person or group, formerly detached from the community, is now blended or united with that community.

Citizenship

135. A person is born with Australian Citizenship, by virtue of the person being born in Australia, to at least one parent who is either an Australian Citizen or an Australian permanent resident.[54] Australian Citizenship, if not automatically obtained at birth, may also be obtained on a person by application.[55]

136. It is with respect to applications for Australian Citizenship that this response is most interested, as invariably persons who apply for Australian Citizenship do so having been raised in a country other than Australia, with a different cultural identity.

Integration

137. Multiculturalism by its nature however does not suppose that the members of a society do not share a national identity. Rather, multiculturalism has come to reflect the prominence of a diversity of ethnicity held by many people in the Australian society, be they Australian citizens, permanent residents, or otherwise.

138. In fact, in 2007, multiculturalism was regarded by the Acting Race Discrimination Commissioner as,

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[54] 'Permanent resident' is defined by s 5 of the *Australian Citizenship Act* 2007 (Cth) and generally includes someone who holds a 'permanent visa' as defined in s 5 and sub-s 30(1) of the *Migration Act* 1958 (Cth).

[55] See Division 2 of Part 2 of the *Australian Citizenship Act* 2007 (Cth).

'a principled and practical response to the reality of cultural diversity in Australia.'[56]

139. Integration propounds acceptance of cultural differences, and, as the Acting Race Discrimination Commissioner put it, *'is about building bridges between communities'.*

Australian Values

140. In relation to the concept of citizenship, the NSWYL refers to the current 'Citizenship Test' currently in place. Section 23A of the *Australian Citizenship Act* 2007 provides that:

(1) The Minister must, by written determination, approve a test for the purposes of subsection 21(2A) (about general eligibility for citizenship).

Note: The test must be related to the eligibility criteria referred to in paragraphs 21(2)(d), (e) and (f).

Eligibility criteria for sitting the test

(2) A determination under subsection (1) may set out the eligibility criteria a person must satisfy to be able to sit the test.

Note: The eligibility criteria for sitting the test cannot be inconsistent with this Act and in particular subsection 21(2) (about the general eligibility criteria for becoming an Australian citizen).

[56] 'Multiculturalism - A Position Paper by the Acting Race Discrimination Commissioner' August 2007.

(4) For the purposes of subsection (3), the determination may provide that a person is not eligible to sit the test unless the person is a permanent resident and the Minister is satisfied of the identity of the person.

139. Under the Act, an applicant for Australian Citizenship must first sit and pass the Citizenship Test before making a formal application for Australian Citizenship. In essence, a person could fail the Citizenship Test for not knowing the correct answers to a wide range of trivia relating to the Australian culture, laws, and rights and responsibilities.

140. Australia is certainly not unique in imposing a Citizenship test. Similar tests exist in the UK for persons wishing to become British citizens or even just to become a permanent resident. The United States also has a naturalisation test for prospective citizens. The NSWYL submits that if multiculturalism truly is a modern tenet of Australian culture, it must be so in practice, and not just in theory.

Question 8

Is there a role for religious voices, alongside others in the policy debates of the nation?

141. NSWYL firmly supports the notion that all Australians should be allowed to fully participate in the policy debates of our nation. The religious beliefs of an individual should not in any way limit their ability to fully participate in all public discussions (including those discussions concerning the merits of a proposed law, the proprietary of government activity or the appropriateness of the conduct of other Australians).

142. All Australians should be able to fully advocate their view on a particular issue and to have that view rejected or accepted according to procedures compatible with democratic principles.

143. NSWYL notes that the right of all individuals to fully participate in the intellectual and political life is recognised in a variety of international human rights documents. Article 25 of the ICCPR states that,

'[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions … [t]o take part in the conduct of public affairs, directly or through freely chosen representatives[57]'.

144. The requirement imposed on a State to ensure that all citizens are able to fully participate in the public life of the state was emphasised by the Human Rights Committee as follows:

'Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant[58]'.

145. The NSWYL, therefore, fully supports the notion that there is a role for both religious and non-religious voices in the policy debates of the nation.

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[57] *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[58] UN Human Rights Committee, *General Comment No 25: Article 25 (The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service) (1996)*, as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.8 (8 May 2006) 181, section 1

7: RELIGION, CULTURAL EXPRESSION AND HUMAN RIGHTS

Question 3

How can cultural aspirations and human rights of Aboriginal and Torres Strait Islanders be met?

Question 4

What are the issues impacting Aboriginal and Torres Strait Islanders communities at present, and proposed solutions?

NSWYL firmly believes that there a myriad of issues currently impacting upon Aboriginal and Torres Strait Islanders in Australia. The issues effecting Indigenous Australians

Question 6

How is diverse sexuality perceived within faith communities?

146. NSWYL has general comments in relation to how diverse sexuality is perceived within faith communities.

147. Generally speaking, some of the world's largest religions generally view sex prior to marriage, adultery and homosexuality negatively. The diverse views held by those within the faith or outside it, inevitably affects a persons participation (or lack thereof) in terms of which religion (if any) he or she chooses.

148. In terms of the Australian context, approximately 1.2% of the Australian population identify themselves as homosexual or lesbian and 1.4% of women and 0.9% of men are bisexual [1].

149. In the Jewish faith, homosexual sex is prohibited. Gradually the faith has moved towards accepting a person's right to choose and express his or her sexuality, but still prohibit the sexual act.

150. In fact, in March 1992, the Committee on Jewish Law and Standards released a "Consensus Statement of Policy Regarding Homosexual Jews in the Conservative Movement" which stated the following[59],

(A) We will not perform commitment ceremonies for gays and lesbians;

(B) We will not knowingly admit avowed homosexuals to our rabbinical and cantorial schools, or the Rabbinical Assembly or Cantors' Assembly.

(C) Whether homosexuals may function as teachers or youth leaders in our congregations and schools will be left to the Rabbi authorized to make halakhic decisions for a given institution in the Conservative movement.

151. The Christian faith has had various perceptions and responses to a person's sexual behaviour. The Ten Commandments directly prohibits adultery. The Church of Jesus Christ of Latter-day Saints also forbid sexual relationships outside of marriage.
The United Methodist Church considers the practice of homosexuality to be incompatible with Christian beliefs and state that homosexuals cannot be ordained. The Presbyterian Church accept homosexuals to become members of the church, but prohibit practising homosexuals from being a minister or serving on church boards.

152. The NSWYL reiterates that the abovementioned comments are purely general in nature and we do not condone or support any particular denominations view on sexuality, or lack thereof.

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[59] http://encylopedia.kids.net.au/page/re/Religion_and_homosexuality - "Religion and homosexuality"

Question 8

Should religious organisations (including religious schools, hospitals and other service delivery agencies) exclude people from employment because of their sexuality or their sex and gender identity?

153. Australia is a State party to the *International Labour Organisation Discrimination (Employment and Occupation) Convention 1958* (**ILO Convention**) (and scheduled to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (**HREOCA**).

154. NSWYL notes that while the Government must "*respect and ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the* [ICCPR] *without distinction of any kind*"[60], there is a recognised exemption relating to the employment of people by "*religious institutions*", where discrimination is:

1. "*required by the tenets and doctrines of the religion, is not arbitrary, is consistently applied*"; or

2. "*is an inherent requirement of a particular job*"[61].

155. The above provision attempts to strike a balance between the human right of non-discrimination in employment and the human right of religious freedom.

156. As highlighted in the earlier stages of this submission, the 1998 HREOC Report on Religious Freedom recommended that a *Religious Freedom Act* be enacted which would make direct and indirect

[60] Article 2 ICCPR.
[61] Article 1.2 *ILO Convention*.

discrimination unlawful subject to the two exemptions as stated above.[62]

Current Law in Australia

157. NSWYL understands that, although, a *Religious Freedom Act* has not come into existence, both provisions have been provided for in both Federal and State/Territory legislation.

158. The first provision, in addition to appearing in the schedule to the HREOCA, has been enacted in all jurisdictions.[63] Furthermore, section 3 of the HREOCA provides that,

"*discrimination*" does not include 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*" where the above are "*made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed*".

159. HREOC thus identified 3 elements to that definition, namely that:

1. the employer institution is conducted in accordance with certain doctrines, tenets, beliefs and teachings of a particular religion or creed;
2. religious distinction, exclusion or preference is imposed **in good faith**; and

[62] HREOC, "Article 18: Freedom of Religion and Belief" (1998), http://www.hreoc.gov.au/pdf/human_rights/religion/article_18_religious_freedom.pdf at [4.5].
[63] S 38(3) *Sex Discrimination Act 1984* (Cth), s 35 *Age Discrimination Act 2004* (Cth), ss 32(d), 33(2) *Discrimination Act 1991* (ACT), s 37A *Anti-Discrimination Act 1992* (NT), s 56(d) *Anti-Discrmination Act 1977* (NSW), s 109(d) (but does not apply in work or education area) *Anti-Discrimination Act 1991* (QLD), s 50(1)(c) *Equal Opportunity Act 1984* (SA), s 52(d) *Anti-Discrimination Act 1998* (TAS), s 75 *Equal Opportunity Act 1995* (VIC), s 72(d) *Equal Opportunity Act 1984* (WA).

3. such distinction, exclusion or preference is imposed **to avoid injury to the religious susceptibilities of adherents of that religion or creed**.[64]

160. In particular, the NSWYL note that the "*good faith*" requirement must be read in conjunction with the third element, in that, rather than being an entirely subjective determination by a religious institution as to what injures the "*religious susceptibilities*" of its adherents, there must be some

"*objective evidence that the selection of an employee who is not of a particular religious persuasion* [or, has a certain sexuality or gender identity, as the case may be] *would offend*" the doctrines, etc. of that religion or creed.[65]

161. The second provision has been enacted in each jurisdiction[66], but applies to religious and non-religious bodies alike, and to all forms of discrimination[67]. However, as it appears in the schedule to the HREOCA, the limited exemption exists which requires a religious institution employer, where it intends to discriminate against a potential candidate for a job on the basis of, inter alia, sexuality/sex and gender identity, to show:

1. why the individual employee needs to possess a particular belief to perform the duties of that particular position; and

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[64] "The *HREOCA 1986* (Cth): its application religious freedom and the right to non-discrimination in employment" (Information Paper), 2006, pp 7-8.
[65] *Ibid*.
[66] S 30 *Sex Discrimination Act 1984* (Cth), Pt II Div 4 *HREOCA 1986* (Cth), s 18 *Age Discrimination Act 2004* (Cth), ss 32, 42, 48, 57A *Discrimination Act 1991* (ACT), s 35(1)(b)(i) *Anti-Discrimination Act 1992* (NT), s 25 *Anti-Discrimination Act 1991* (QLD), ss 34, 56, 71, 85F *Equal Opportunity Act 1984* (SA), ss 14, 31, 49D, 49V, 49ZYJ *Anti-Discrmination Act 1977* (NSW), ss 27, 36, 41, 45, 49, 51 *Anti-Discrimination Act 1998* (TAS), ss 4, 17, 22, 23, 32, 33, 36 *Equal Opportunity Act 1995* (VIC), ss 27, 50 66, 66Q, 66S, 66ZQ *Equal Opportunity Act 1984* (WA).
[67] For instance, not sexuality and/or sex and gender identity specifically

2. why an individual would be unable to perform the duties of that particular position.[68]

162. The NSWYL notes the tension that the legislation attempts to reconcile may be simply stated,

"*on the one hand, allowing a religious group to practise discrimination…*[a]*llows religious groups to keep their beliefs intact. On the other hand, allowing religious groups to discriminate may seriously infringe upon the individual's right to be free from discrimination*"[69].

163. It has been argued that, to a large extent, religious freedom,

"*only takes on real meaning in the extent to which it is lawful for religious groups to discriminate*" and that,

"[t]*he value pluralism underlying religious freedom and other liberties of conscience endorses the capacity of sub-groups and sub-cultures to make judgments about the moral significance of factors like sex, gender, sexuality and marital status that society-at-large, through its elected Parliaments, may well judge differently. Evidently, the right to discriminate on religious grounds is essential to the freedom as the group could not exist as a distinctive religious entity without it*."[70]

164. NSWYL submits that, in light of the current law in place, such freedom has been substantially inhibited. The 1998 HREOC Report on Freedom of Religion concluded that a limited right of discrimination ought to be available because, as religion and spirituality is "*highly personal*". It is reasonable, HREOC concluded, for employees of a religious institution to be expected to have a degree of commitment to and identify with the

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[68] Op.cit. 4, p 7.
[69] R Mortensen, "*Rendering to God and Caesar: Religion in Australian Discrimination Law"* (1994-1995) 18 UQLJ 208 at 229.
[70] R Mortensen, "*A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland*" [2003] QUTLJJ 16.

beliefs, values and teachings of that particular religion and the distinct identity of a religious organisation is an "*important element in any society which respects and values diversity in all its forms*".[71]

165. Furthermore, NSWYL understands that HREOC recommended that the exemption ought to be limited, and made various suggestions as to the types of limitations that ought to be imposed (such as that a religious institution cannot exclude a person from a service directly or indirectly funded by the government on the grounds of "*sexuality and gender status*")[72].

166. HREOC referred to a particular case involving a lesbian candidate for employment by the Catholic Education Office, who had been refused employment due to her alleged high profile as a lesbian (which had been achieved by publicly campaigning against violence and homophobia perpetrated against gay students and teachers).

167. In this case, it was held that the fact that she was openly lesbian and her openness might attract speculation regarding her private activities could not be defined as "*injurious to the religious susceptibilities of adherents of Catholic Christianity*".[73]

168. In particular, it was found that the fact that she was a lesbian did not offend the "*doctrines, tenets, beliefs and teachings*" of the Catholic Church, which condemns the homosexual act rather than the homosexuals themselves. It was further observed that the religious body could only take action if she failed to adhere to her "*Principles of Employment*".[74]

169. NSWYL understands that the current legislative provisions and the narrow approach taken in interpreting the meaning of "*religious susceptibilities*"/ "*inherent requirement*" have operated to severely

[71] Op. cit. 3.
[72] *Ibid.*
[73] *Ibid.*
[74] *Ibid.*

inhibit the freedom of religious institutions to discriminate on the grounds of sex and gender identity in respect of employment.

170. NSWYL reiterates that there does not appear to be an immediate satisfactory solution for the above issue, if indeed such a solution exists. NSWYL submits, however, that this ought not to undermine the notion that, given the moral nature of the views of some religious bodies on sexuality and sex and gender identity, and what appears to be a "*strong*" religious interest in discouraging homosexual practices, religious institutions, to some extent, ought to be able to lawfully discriminate in the field of employment, in order to give effect to their beliefs.

171. Notwithstanding the above issues identified, NSWYL largely adopts the views Of HREOC in its 1998 Religious Freedom Report.

Question 9

Do you consider environmental concern to be an influence shaping spiritualities and value systems?

172. NSWYL considers environmental concern to be an increasingly influential factor in shaping spiritualities and value systems, albeit in some religions more than others.

173. Some eastern religions, notably Buddhism and Hinduism, are tied intrinsically with ecological concerns, being bound to the foundations of their values and teachings on spirituality.

174. A central tenet of Buddhism, for instance, involves the belief that,

"*all things, including humans, exist by interrelationship with all other parts of nature*"[75] and that, therefore, it is important for the individual to live in tune with nature and respect life.

175. Hindu concepts of "*R'ta*" (the sense of fundamental order and balance in the universe) and "*Dharma*" (the "*duty of the warrior*" to act of the sake of good in the world and behave in adherence to the maintenance of order and custom) also ensure that concern for the environment plays a concrete role in shaping spirituality.[76]

176. Indigenous religions, such as that of the Australian Aborigines, are also founded upon a profound respect and sense of intimacy with the environment and the intrinsic connection to mother earth.

177. The religions founded in Judaism (Judaism, Christianity and Islam), however, have (arguably) traditionally adhered to some form or another of "*dominion theory*", (the authority for which was derived from the Book of Genesis) wherein man is the "*master*" of creation.

178. The NSWYL notes that it appears however, that in each of these religions (and their sub-groups), a growing awareness of the current issues regarding the environment has begun to influence and shape their values.

179. In particular, we note that recently, many Christian religions, including the Roman Catholic Church, have begun to "*move environmental concern to the fore of* [their] *social teachings*"[77]. At a 2007 conference on climate change hosted by the Vatican and attended by bishops, scientists and politicians, Pope Benedict XVI stated that creation ought to be respected, while "*focusing on the needs of sustainable*

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[75] "*Environmental Concerns – Buddhist Responses*" (http://www.religioustolerance.org/tomek20.htm).
[76] E Goldsmith, "*The Way*", Themis Books, 1996.
[77] J Vidal and T Kingston, "Protect God's Creation: Vatican issues new green message for world's Catholics", *The Guardian* (27 April 2007).

development"[78]. Furthermore, he has issued public statements that the "*relationship between individuals or communities and the environment ultimately stems from their relationship with God*"[79].

180. In addition to this, Greek Orthodox member of the World Council of Churches stated that,

"[a]*s Christians… we need to recognise and accept the intimate ethical and deeply religious implications of climate change. It is a matter of justice, it is a matter of equity and it is a matter of love: love for God the Almighty, love for the neighbour, love for creation*".[80] There has also been mention of "*wilful damage to the environment*" being considered to constitute "*sin*"[81].

181. NSWYL further notes that, in recent years, religious groups have become more vocal and involved in global conferences on the environment, such as the involvement of religious groups in the recent United Nations General Assembly debate entitled "*Addressing Climate Change: the UN and the World at Work*"[82].

182. NSWYL notes that environmental issues have begun and are beginning to directly influence teachings on spirituality and values in those religions that have not traditionally concerned themselves with the environment, as well as those religions that have always done so.

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[78] *Ibid.*
[79] Pope Benedict XVI, "*Letter of His Holiness Benedict XVI to the Ecumenical Patriarch of Constantinople on the occasion of the Seventh Symposium of the Religion, Science and Environment Movement*", www.vatican.va (1 September 2007).
[80] op. cit. 3 (Elias Abramides).
[81] "Pope Should Talk Climate Change with Bush", *UNEP Articles Related to the Study Seminar on Climate Change* (27 April 2007).
[82] New York, 11-12 February 2008.