2 February 2018

The Expert Panel on Religious Freedom

C/- Department of the Prime Minister and Cabinet

PO Box 6500

CANBERRA ACT 2600

***By email:*** [***religiousfreedom@pmc.gov.au***](mailto:religiousfreedom@pmc.gov.au)

Dear Panel

**RELIGIOUS FREEDOM REVIEW**

The purpose of the Religious Freedom Review is to examine whether Australian law adequately protects the human right to freedom of religion. The Terms of Reference include considering the intersections between the enjoyment of the freedom of religion and other human rights.

The Anti-Discrimination Commission makes this submission to inform the Panel of the Queensland law under the *Anti-Discrimination Act 1991,* and how this law has operated in the protection and enjoyment of religious freedom and other human rights.

The Queensland *Anti-Discrimination Act 1991* (AD Act) commenced in June 1992. The main purpose of the AD Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain objectionable conduct. Parliament’s reasons for enacting the AD Act included extending Commonwealth human rights legislation that was enacted as part of obligations under various international human rights instruments.

The AD Act prohibits discrimination on certain grounds in certain areas of activity, unless an exemption applies. There are 16 grounds (also called attributes) on which discrimination is prohibited. They are: age, breastfeeding, family responsibilities, gender identity, impairment, lawful sexual activity, parental status, political belief or activity, pregnancy, race, relationship status, religious belief or religious activity, sex, sexuality, trade union activity, and association with or relation to a person identified on the basis of any of the grounds.

Other objectionable conduct that is prohibited includes vilification on the grounds of race, religion, sexuality and gender identity.

A person who is subjected to an alleged contravention of the AD Act may complain to the Anti-Discrimination Commission. The function of the Commission is to try to resolve complaints through conciliation. If a complaint is unresolved, it may be referred to a tribunal for hearing and determination.[[1]](#footnote-1)

**Discrimination prohibited**

Discrimination on the basis of religious belief or religious activity is unlawful in all the areas of activity under the AD Act, namely:

* work (including applying for work, voluntary work, and work experience);
* education;
* providing goods or services;
* accommodation (includes residential and commercial premises);
* administering State laws or programs (includes State government departments and statutory authorities performing functions under Queensland legislation);
* club membership and affairs (except not-for-profit associations and clubs);
* superannuation and insurance;
* disposing of land; and
* between local government members performing official functions.

Religious belief and religious activity are defined to include not having a religious belief or engaging in a religious activity.

Some case studies of complaints of discrimination on the basis of religious belief or religious activity are described in the attached Appendix A. The case studies include complaints decided by a tribunal and complaints resolved at conciliation.

Specific exemptions in the *Anti-Discrimination Act 1991* (Qld) allow some discrimination by religious bodies and educational institutions, as well as discrimination in relation to land and buildings that have religious significance. Discrimination on the basis of religious belief or activity is also allowed for certain activities.

**Discrimination allowed**

Discrimination on the basis of religious belief or religious activity is allowed in:

* engaging residential domestic services;[[2]](#footnote-2)
* engaging residential child care services;[[3]](#footnote-3)
* the provision of goods or services by not-for-profit associations.[[4]](#footnote-4)

Many religious entities that provide goods and services will fall under the definition of not-for-profit associations.[[5]](#footnote-5) They are therefore allowed to discriminate on the basis of any of the 16 grounds covered by the AD Act should they wish to do so when supplying goods and/or services.

**Religious bodies**

A body established for religious purposes may discriminate on any grounds, provided the discrimination is in accordance with the doctrine of the religion and is necessary to avoid offending the religious sensitivities of people of the religion, except in the areas of work and education.[[6]](#footnote-6) There are however specific exemptions that apply to work and education.

The AD Act also does not apply to:[[7]](#footnote-7)

* the ordination of appointment of priests, ministers of religion or members of a religious order;
* the training or education of people seeking to be ordained or appointed as priests, ministers of religion or members of a religious order; and
* selecting or appointing people to perform functions in relation to, or participate in, any religious observance or practice.

**Religious-based schools and educational institutions**

An educational institution may be established or operated wholly or mainly for students of a particular sex or religion,[[8]](#footnote-8) and may provide accommodation wholly or mainly for students of that sex or religion[[9]](#footnote-9).

**Working for a religious body, school or other educational institution**

A limited exemption applies to religious bodies, if the work genuinely and necessarily involves adhering to and communicating the body’s religious beliefs, and to educational institutions under the direction or control of a body established for religious purposes (both referred to here as employer).[[10]](#footnote-10)

This exemption is about behaviour rather than a person’s characteristic such as gender, race, or sexuality.

If it is a genuine occupational requirement that a person act in a way consistent with the employer’s religious belief during the course of or in connection with the work, the employer may discriminate if the person openly acts in a way that is contrary to the employer’s religious beliefs. This applies during a selection process, in the course of the person’s work, and in doing something connected with the person’s work.

The discrimination must not be unreasonable in the circumstances, including whether the action is disproportionate to the behaviour and the consequences for both parties.

The exemption does not allow discrimination on the basis of age, race or impairment. It also does not allow seeking information such as a person’s age or sexuality, or whether or not they have children.

In our community engagement work, people raise concerns about some of the work practices in religious-based schools, and tell us about discrimination that occurs and their fears of discrimination.  For example, we have been told of an unmarried woman who was dismissed because she became pregnant, people dismissed because it became known that they were living with their partner but not married, and of homosexual workers who are afraid to disclose their sexuality.  We have also been told that some religious-based schools require their workers to sign contracts of employment that include ‘lifestyle clauses’.  The lifestyle clauses require the employee, whatever their role, to live their personal lives in certain ways.  We rarely however receive complaints about these practices, and consequently there are no tribunal decisions about the behavioural exemption.

There has been a tribunal decision about the general exemption for religious bodies, and being Catholic was not a genuine requirement for a volunteer working for St Vincent de Paul Society (Queensland). A brief summary of the case is included in Appendix A.

**Sites of religious significance**

It is permissible to restrict access to land or buildings of religious significance on the basis of sex, age, race or religion, if the restriction is in accordance with the doctrine of the religion concerned, and is necessary to avoid offending the religious sensitivities of people of the religion.[[11]](#footnote-11)

It is also permissible to discriminate on the basis of sex, age, race, or religion, in the disposition of land, if the interest in the land or a building of religious significance, and the discrimination is in accordance with the doctrine of the religion and is necessary to avoid offending the religious sensitivities of people of the religion.[[12]](#footnote-12)

**Religious vilification prohibited**

It is unlawful to incite hatred towards, serious contempt for, or severe ridicule of a person or group of people because of their religion.[[13]](#footnote-13)

Exceptions ensure the right to freedom of speech is not unduly restricted. The exceptions are:

* a public act done reasonably and in good faith: for purposes in the public interest, including discussion and debate; or for academic, artistic, scientific or research purposes;
* a fair report of a public act; or
* where publication of material would be subject to the defence of absolute privilege in proceedings for defamation.

The vilification provisions have been examined judicially and held not to offend the implied freedom of political expression.[[14]](#footnote-14)

The case of *Deen v Lamb[[15]](#footnote-15)* demonstrates how the exceptions apply in balancing the right to freedom of speech with the right to be free from vilification. Although material disseminated by a candidate in a federal election vilified people who are Muslim, the tribunal said the public has an interest in knowing the opinions of candidates. A brief summary of the decision is included in Appendix A.

Where unlawful vilification includes a threat of harm to person or property, it is a criminal offence called ‘Serious vilification’.[[16]](#footnote-16) Although provided for in the AD Act, serious vilification is dealt with by the police, and a proceeding requires the prior approval of the Director of Public Prosecutions or the Attorney-General. The maximum penalty for a person convicted of serious vilification is six months imprisonment or a fine up to $8,830, and for a company the fine is up to $44,152.[[17]](#footnote-17)

There has been one prosecution for serious vilification in Queensland, which involved racial abuse and threats of harm. The person pleaded guilty and was convicted and sentenced to two months imprisonment, wholly suspended for 12 months.

Religious vilification occurs more commonly than reflected in complaint statistics (see below). In our community engagement work, we often hear of people, particularly Muslim women, experiencing religious vilification. It is rare for any of these people to make a complaint to the Commission. In recent years, there have been many media reports of people experiencing religious or racial vilification on public transport.

We did receive a report of a Muslim woman who was vilified on a bus, because of which she is now too afraid to use public transport. In response to the report, we have been consulting with various agencies to work towards improving behaviour on buses and implementing protocols to address offending behaviour when it occurs.

**Complaint statistics**

Records relating to complaints of religious discrimination and religious vilification accepted by the Commission over the past five years are set out in five tables in Appendix B. Accepted complaints are those that meet the statutory threshold of indicating an alleged contravention of the AD Act.[[18]](#footnote-18)

The tables show:

Table 1: The number of complaints of religious discrimination and religious vilification accepted by the Commission, and their percentage of the total number of accepted complaints.

Table 2: The context of the alleged religious discrimination (areas).

Table 3: The context of the alleged religious vilification (area). An area is not been recorded for six of the 11 complaints. The vilification prohibition is not confined to the areas of discrimination under the Act.

Table 4: The religion of the person making the complaint of religious discrimination. The religion is either unspecified or other than those mentioned, in 17 of the 52 complaints.

Table 5: The religion of the person making the complaint of religious vilification. The religion is either unspecified or other than those mentioned, in two of the 11 complaints.

I trust the information in this submission assists the Panel in its review.

Yours sincerely

*(Signed)*

**KEVIN COCKS AM**

**Anti-Discrimination Commissioner**

**Discrimination**

**Photograph on driver licence**

Two people, whose religious belief prevented them from having their photographs taken, complained of discrimination when the Department of Transport refused to issue them with driver licences without photographs. Their religious belief is based on the Christian 2nd commandment and the books of the Old Testament of the Bible, Exodus and Deuteronomy.

The Department gave evidence that driver licences with photographs were introduced in Queensland in 1986 and had become a primary form of identification, and claimed reliable identification cannot occur without a photograph.

The tribunal found that the requirement to have a photograph on a Queensland driver licence was reasonable, and the complaint was dismissed.

*Emanuel v State of Queensland* [2011] QCAT 731 (30 November 2011)

**No halal meat in prison**

A Muslim prisoner was given the same general food as other prisoners, even though he had informed the prison on his arrival that he only ate meat that was halal. After ten months at the prison, he made a written request for halal meat, but his request was declined. He continued efforts to obtain halal meat, and eventually he was provided with tinned halal meat. The tinned meat was unsatisfactory so he stopped eating it, and he kept trying to obtain fresh halal meat. After two and a half years, he was transferred to a lower security prison. He was again given the general food of other prisoners. After three months, he met with the food supervisor who initially refused his request for fresh halal meat. Instead, it was agreed he would be given food supplements such as eggs, cheese, nuts etc. Eventually the prisoner was given fresh halal meat that he cooked himself for the rest of his time in prison.

The tribunal said that when the prison provided the man with the same food as the general prison population, it imposed a term on him that he eat the general diet provided to prisoners. He could not comply with that term because of his religion.

The prison was able to cater for prisoner diets for numerous other medical and cultural reasons, and was able to meet the cost of supplying fresh halal meat. The fact that the man was serving a long sentence was relevant because providing supplements is a temporary measure. In the circumstances, the term was not reasonable.

When the prison provided the prisoner with a vegetarian diet with supplements and tinned halal meat, it was less favourable treatment of him because of his religion. Although prisoners would find their meals unpalatable from time to time, the man received substantially more unpalatable meals because he was put on a vegetarian diet when he was not a vegetarian. He also did not always receive the supplements he was supposed to receive. The tribunal found he regularly and frequently experienced difficulty with the supply and content of his meals.

The tribunal decided there had been both direct and indirect discrimination of the man, and awarded him compensation of $2,000.

The tribunal recognised that the principle of provision of halal meat to prisoners was significant. By the time of the hearing of this complaint, all Muslim prisoners in Queensland gaols who requested halal meat were being provided with fresh halal meat.

Mahommed v State of Queensland [2006] QADT 21 (24 May 2006)

**Religion not a genuine requirement for position**

A woman worked as a volunteer for the charity, St Vincent De Paul Society. The society’s rules described it as an international Catholic organisation of lay people that seeks to help those who are suffering. The woman was not Catholic, but described herself as a Christian. She worked for the society for six years, and during that time she had been elected president of a conference group. The society knew the woman was not Catholic when she was appointed president.

During a meeting the woman was told that not being Catholic had become a contention, and if she did not become Catholic, she could not continue to work for the society as president of a conference group and would have to either resign as president or resign from working for the society completely. The tribunal held that the ultimatum amounted to direct discrimination.

The tribunal considered whether the general exemption for religious bodies applied (s.109) and whether the genuine occupational exemption applied (s.25). The society was made up of ‘lay faithful’ and only one of its objectives was spiritual. The tribunal decided the society was not a religious body. It also concluded that inculcating the faith was not the society’s primary function and it was not objectively necessary for a president to be Catholic. Spiritual roles were not a primary responsibility of a president, and the duties of a president were much more comprehensive.

The woman was awarded compensation totally $27,500. The tribunal declined to order the society to apologise because it acted on the basis of genuinely held beliefs.

*Walsh v St Vincent de Paul Society Queensland (No. 2)* [2008] QADT 32 (12 December 2008)

**Unable to work on Saturdays**

A man complained that his employer had introduced a new rule that all staff were required to work on Saturdays. He said the rule had forced him to resign, as he was unable to work on Saturdays due to his devout practice as a Seventh Day Adventist.

The employer said he had not intentionally treated the man unfairly on the basis of his religion. The Commission explained that having no intention to discriminate was not a defence.

In conciliation, the employer apologised for any hurt and humiliation the man may have suffered, and agreed to pay him $5,000 to cover his loss of wages and general damages.

**Questions about religion asked during interview**

At a second interview for a position, the interviewer asked the applicant his name and whether he was Muslim. When he said his name, the employer said they would call him ‘George’ because it was easy to pronounce. The interviewer also asked the complainant about his need for a mosque, what country he was from, and whether he understood what slang was. The man was not appointed to the position.

At conciliation, the employer said that he was trying to be friendly, but now understood how the comments and questions could have been perceived. The employer apologised to the man and agreed to pay compensation for the perceived discrimination.

**Respect for faith in prison**

A prisoner alleged he was restricted in his practice of Spiritual Science Judaism. He complained that cardboard icons significant to his worship had been confiscated and that prison staff had mocked him. At conciliation, prison management agreed to allow the prisoner to observe religious days and ceremonies. The prisoner’s request for candles was declined.

**Vilification**

**Public interest exception**

A candidate in a federal election distributed a pamphlet claiming that people who believe in the teachings of the Koran are prone to disobey the laws of Australia when they conform with the teachings, and are prepared to commit murder.

The evidence at the hearing showed that the candidate had produced and distributed the pamphlets in good faith in order to persuade the electors that he deserved their vote.

The tribunal said the public had an interest in knowing the opinion of candidates, even when those opinions are unreasonable or plainly wrong.

The pamphlet was concise and written in moderate language, and only disseminated in the electorate.

The tribunal was satisfied the candidate was entitled to the exception for public acts done reasonably and in good faith for a purpose in the public interest.

*Deen v Lamb* [2001] QADT 20 (8 November 2001)

**Complaints accepted by the Anti-Discrimination Commission Queensland – 2012 to 2017**

**Table 1: Number and percentage of accepted complaints[[19]](#footnote-19) of religious discrimination and religious vilification**

| Blank cell | **Religious Discrimination** | | **Religious Vilification** | |
| --- | --- | --- | --- | --- |
| Blank cell | **No. accepted** | **%** | **No. accepted** | **%** |
| 2012-2013 | 12 | 2% | 5 | 0.8% |
| 2013-2014 | 12 | 1.9% | 1 | 0.2% |
| 2014-2015 | 13 | 2.4% | 3 | 0.5% |
| 2015-2016 | 5 | 1% | 0 | 0% |
| 2016-2017 | 10 | 1.5% | 2 | 0.3% |

**Table 2: Religious discrimination complaints by area\***

|  | **Accomm.** | **State laws & programs** | **Goods or services** | **Work** | **Education** | **Total** |
| --- | --- | --- | --- | --- | --- | --- |
| **2012-2013** | 1 | 1 | 2 | 8 | - | **12** |
| **2013-2014** | 1 | - | 1 | 11 | - | **13** |
| **2014-2015** | - | 4 | 1 | 4 | 6 | **15** |
| **2015-2016** | - | 1 | 2 | 2 | - | **5** |
| **2016-2017** | 1 | 2 | 1 | 5 | 1 | **10** |

\* Shows only the areas relevant to the accepted complaints, i.e. not all of the areas under the Act. In 3 complaints (one in 2013-14 and two in 2014-15) there was more than one area recorded.

**Table 3: Religious vilification complaints by area**

|  | **Accomm.** | **Goods or services** | **Work** | **Not recorded** | **Total** |
| --- | --- | --- | --- | --- | --- |
| **2012-2013** |  |  | 1 | 4 | **5** |
| **2013-2014** | 1 |  |  |  | **1** |
| **2014-2015** |  | 2 |  | 1 | **3** |
| **2015-2016** |  |  |  |  | **0** |
| **2016-2017** |  |  | 1 | 1 | **2** |

**Table 4: Religious discrimination complaints by religion**

|  | **Buddhist** | **Christian** | | | **Christian Total** | Hindu | Jewish | Muslim | Unspecified / Other Religion | **Religion Total** |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  |  | Catholic | Seventh Day Adventist | Unspecified / Other Christian |  |  |  |  |  |  |
| **2012-2013** |  |  |  | 4 | **4** |  | 1 | 3 | 4 | **12** |
| **2013-2014** | 1 | 1 | 1 | 2 | **4** |  |  | 5 | 2 | **12** |
| **2014-2015** |  |  |  |  |  |  | 1 | 3 | 9 | **13** |
| **2015-2016** |  |  |  | 1 | **1** |  |  | 3 | 1 | **5** |
| **2016-2017** |  | 2 |  | 2 | **4** | 1 |  | 4 | 1 | **10** |

**Table 5: Religious vilification complaints by religion**

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **Christian** | | **Christian Total** | **Muslim** | **Unspecified / Other Religion** | **Vilification Total** |
|  | Catholic | Unspecified / Other Christian |  |  |  |  |
| **2012-2013** | 1 | 1 | 2 | 1 | 2 | **5** |
| **2013-2014** | - | - | - | 1 | - | **1** |
| **2014-2015** | - | - | - | 3 | - | **3** |
| **2015-2016** | - | - | - | - | - | **0** |
| **2016-2017** |  | 1 | 1 | 1 |  | **2** |

1. For work-related complaints, the tribunal is the Queensland Industrial Relations Commission. For all other complaints, the tribunal is the Queensland Civil and Administrative Tribunal. [↑](#footnote-ref-1)
2. *Anti-Discrimination Act 1991* (Qld), section 26. [↑](#footnote-ref-2)
3. *Anti-Discrimination Act 1991* (Qld), section 27. [↑](#footnote-ref-3)
4. *Anti-Discrimination Act 1991* (Qld), section 46(2). [↑](#footnote-ref-4)
5. Ibid. [↑](#footnote-ref-5)
6. *Anti-Discrimination Act 1991* (Qld), sections 90 and 109. [↑](#footnote-ref-6)
7. *Anti-Discrimination Act 1991* (Qld), section 109. [↑](#footnote-ref-7)
8. *Anti-Discrimination Act 1991* (Qld), section 41. [↑](#footnote-ref-8)
9. *Anti-Discrimination Act 1991* (Qld), section 89. [↑](#footnote-ref-9)
10. *Anti-Discrimination Act 1991* (Qld), section 25(2) to (8). [↑](#footnote-ref-10)
11. *Anti-Discrimination Act 1991* (Qld), section 48. [↑](#footnote-ref-11)
12. *Anti-Discrimination Act 1991* (Qld), section 80. [↑](#footnote-ref-12)
13. *Anti-Discrimination Act 1991* (Qld), section 124A. [↑](#footnote-ref-13)
14. *Owen v Menzies; Bruce v Owen; Menzies v Owen* [2012] QCA 1170 (22 June 2012). [↑](#footnote-ref-14)
15. [2001] QADT 20 (8 November 2001). [↑](#footnote-ref-15)
16. *Anti-Discrimination Act 1991* (Qld), section 131A. [↑](#footnote-ref-16)
17. For an individual, 70 penalty units; and for a company, and 350 penalty units. A penalty unit is currently $126.15. [↑](#footnote-ref-17)
18. *Anti-Discrimination Act 1991* (Qld), section 136.in [↑](#footnote-ref-18)
19. The Commission accepts approximately 60% of complaints that are received. [↑](#footnote-ref-19)