

Issues paper – ‘Religious or political conviction’

Section 53 of the Act protects against discrimination on the ground of the religious or political conviction of the aggrieved person, a characteristic that appertains generally to persons of the religious or political conviction of the aggrieved person, or a characteristic that is generally imputed to persons of the religious or political conviction of the aggrieved person. Section 4(3) of the Act provides that religious or political conviction includes a lack or absence of religious or political conviction. There is no further definition of the meaning of ‘religious or political conviction’.

With the exception of NSW and South Australia, all Australian jurisdictions protect against discrimination based on religious and political conviction (sometimes by reference to the associated notions of religious and political beliefs, affiliations and activities). A summary of the laws of other Australian jurisdictions is on page 44 of the Discussion Paper.

The Commonwealth Acts provide limited protection against discrimination based on political belief or activity. The Commonwealth’s Religious Discrimination Bill proposes to make it unlawful to discriminate on the ground of religious belief or activity in a range of areas of public life. The Religious Discrimination Bill seeks to ensure that the ability of people to express their religious beliefs in good faith is protected from the operation of Commonwealth, State and Territory anti-discrimination laws. The Bill follows the form of other anti-discrimination laws by containing provisions relating to indirect and direct discrimination in various areas of public life, by identifying exceptions to the general prohibitions and by permitting exemptions to be given from the general prohibitions. Under clause 42(1) of the Religious Discrimination Bill, a statement of belief, whether oral or in writing, does not constitute discrimination under any Commonwealth, State or Territory anti-discrimination law, unless it is malicious, or would or is likely to harass, threaten, seriously intimidate or vilify another person or group or is such that a reasonable person would conclude that it counsels, promotes, encourages or urges a serious criminal offence. Clause 5 provides that a statement is a statement of belief if it is: (a) of a religious belief held by a person, made by the person in good faith, and of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the person’s religion; or (b) made by a person who does not hold a religious belief, of a belief that a person who does not hold a religious belief could reasonably consider to relate to the fact of not holding a religious belief, made in good faith and about religion.

Numerous issues arise for the Commission’s consideration in relation to protections for religious or political convictions. The first issue is whether ‘religious or political conviction’ should be defined in the Act. It may be that it is sufficiently understood in the community so as to not require an exclusive or even inclusive definition. However, it could also be said that the phrase is not sufficiently prescriptive to be clear, which might result in uncertainty when applying the Act.

The second issue is, if the phrase requires definition in the Act, how should it be defined? The Human Rights Law Alliance submits that the meaning of ‘religious conviction’ should be consistent with the meaning of ‘religion’ discussed by the High Court of Australia decision of *Church of the New Faith v Commissioner of Pay-Roll Tax*. It highlighted the following two meanings from that decision:

(a) Per Mason ACJ and Brennan J: ‘[T]he criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.’

(b) Per Wilson and Deane JJ: ‘One of the most important indicia of ‘a religion’ is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has ‘a religion’. Another is that the ideas relate to man’s nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific

practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium ... is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.'

Arguably, the more critical question is how should 'conviction' be defined? That is, what does it mean under the Act to have a religious or political 'conviction'? There appears to be, at least, two options. First, 'religious conviction' and 'political conviction' could each be defined by reference to beliefs and activities of the relevant kind. Second the Ground itself could be amended so that it protects against 'religious beliefs and activities' and 'political beliefs and activities', and those phrases can then be defined in section 4.

Christian Schools Australia suggests that the term 'religious conviction' should be replaced by 'religious activities and beliefs' and suggests that religious beliefs or activities include past, future and presumed religious beliefs or activities.

Amendments to the Act such as those suggested may eliminate potential ambiguity attending the Ground, which would aid more consistent interpretation and application of the Ground. However, it could be that defining exclusively the meaning of the phrase 'religious or political conviction' could unnecessarily limit the scope of the Ground. That argument may lack force, however, if the definitions adopted were inclusive rather than exclusive.

A second matter that arises for consideration is whether any definition of 'religious conviction' (or beliefs or activities) should include reference to the 'cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander people', which is akin to the definition of 'religious conviction' in the ACT Act. It is arguable that this may appropriately highlight and protect the important and unique heritage and practices of Aboriginal and Torres Strait Islanders. Without limiting the scope of submissions, the Commission's work would be greatly enhanced by submissions from Aboriginal and Torres Strait Islander people and groups as to how the Act might best address the important and unique heritage and practices of Aboriginals and Torres Strait Islanders.

The Islamic Council of WA raises a third issue for the Commission to consider. It suggests that the use of the term 'generally' in the Ground is inadequate as it suggests that the 'characteristic' has to be prominent in the particular religion, or socially accepted for it to be protected. It submits that the fact a certain characteristic is not prominent should not allow employers to prevent a person from practicing that aspect of their religion, where it is appropriate.

The fourth issue that arises for the Commission's consideration is whether the Act protects against discrimination based on religious appearance or dress and, if not, whether and how it should so extend. In this regard, the Commission notes that the South Australian Act creates a specific ground covering protecting these religious appearance or dress. There is some basis for concluding that religious appearance or dress is protected by the Act under the religious or political conviction Ground, as it protects against discrimination on the basis of a characteristic that appertains generally or is generally imputed to persons of the religious or political conviction of the aggrieved person. However, there may remain some uncertainty on the point.

The fifth issue is whether the Act should make it unlawful to discriminate against the relatives or associates of a person who has been discriminated against (in whatever form) on the religious or political conviction Ground.

The Human Rights Law Alliance suggests that implementation of various provisions reflected in the exposure draft of the Religious Discrimination Bill should be implemented in the Act, for example, by extending the protections in the Act for religious conviction to apply to associates of a person holding a particular religious conviction. It suggests inserting a provision to the effect that statements of belief do not constitute discrimination.

The sixth issue is whether the protections should be extended to all areas of public life covered by the Act. Currently, discrimination on the grounds of religious and political conviction is unlawful in all areas except access to places and vehicles, and land. In the 2007 Review, the EOC recommended that the Ground of religious and political conviction be extended to all the areas currently covered by the other grounds.

The Commission seeks submissions as to any or all of the above issues and following questions:

- 1. Should the protections for religious or political conviction be defined or clarified?**
- 2. Should the protections for religious or political conviction expressly include religious and political beliefs and activities?**
- 3. Should the protections for religious or political conviction expressly include religious appearance or dress?**
- 4. Should the protections for religious or political conviction be extended to relatives or associates of a person protected by the Ground?**
- 5. Should the protections for religious or political conviction be extended to all areas covered by the Act?**

A full discussion of these issues is in the Discussion Paper at pages **20, 44, 99-100, 111-114**.