

The *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*: its application to religious freedom and the right to non-discrimination in employment

This is an information paper only. It is intended to provide general guidance. It is not a legally binding document and is not a substitute for independent legal advice. It is limited to the role and function of the Human Rights and Equal Opportunity Commission as contained in the legislation establishing the Commission.

The paper has been prepared after extensive consultations with interested parties whose views have been taken into consideration in the finalisation of the paper.

Introduction

The rights to freedom of religion and belief and freedom from discrimination on the basis of religion are highly valued in Australia and have been protected constitutionally and legislatively by the Commonwealth in Section 116 of the Commonwealth Constitutionⁱ, the *Human Rights & Equal Opportunity Commission Act 1986 (Cth)* (“the HREOCA”), the *Racial Discrimination Act 1975 (Cth)*ⁱⁱ and the *Workplace Relations Act 1996 (Cth)* and by several States and Territories in anti-discriminationⁱⁱⁱ and Commonwealth and State industrial relations legislation.

This paper addresses both the right of individuals and religious organisations to practise and express their religion and the right of individuals not to be discriminated against because of their religious beliefs (or non-belief) in employment only within the context of the HREOCA. **The protection of those rights under other legislative enactments and in other contexts are beyond the scope of this paper.**

This paper makes reference to a number of international treaties and declarations. These international instruments do not automatically form part of Australia’s domestic law. However, they have important implications for Australian law, some of which are explained in this paper.

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1. The jurisdiction and complaint-handling process of the Human Rights and Equal Opportunity Commission

The Commission administers four different laws. These laws are the:

- *Racial Discrimination Act 1975*
- *Sex Discrimination Act 1984*
- *Disability Discrimination Act 1992*
- *Human Rights and Equal Opportunity Commission Act 1986*.

The *Human Rights and Equal Opportunity Commission Act 1986* provides the statutory schema for HREOC to consider :

- allegations that an act or practice of the Commonwealth is inconsistent with any human right as defined in section 3 of HREOCA (**Part II Division 3**)
- allegations of discrimination in employment or occupation based on the grounds of religion, political opinion, social origin, age, criminal record, sexual preference or trade union activity. (**Part II Division 4**)
- allegations of unlawful discrimination (under the *Disability Discrimination Act 1992 (Cth)*, *Racial Discrimination Act 1975 (Cth)* and *Sex Discrimination Act 1984 (Cth)*) on the basis of disability, race, or sex in employment, education, the provision of goods and services and a range of other fields of public life (**Part IIB**)

Matters that are the subject of complaint under **Part II Division 3 and Part II Division 4** of the HREOCA are not unlawful. The difference between these sections and **Part IIB of the HREOCA** is that if the President terminates a complaint of sex, race or disability discrimination the complainant may proceed to the Federal Court or Federal Magistrates Service to have the matter heard and determined.

The complaint handling process in relation to allegations under **Part II Divisions 3 and 4** is fully described in **Appendix A**. In brief the process is as follows:

The President may either decide not to continue to inquire into a complaint for a reason set out in the HREOCA, or may conciliate the complaint,^{iv} or may, after further inquiry, find that the allegations of discrimination or breaches of human rights are substantiated, or unsubstantiated. If the President finds that a complaint is substantiated, the President must, after giving notice of the findings to the respondent, report to the Attorney-General concerning the President's findings, reasons and any recommendations. This Report must be tabled in Parliament. This process may be the subject of judicial review.

This Paper concerns only the inquiry functions of the Commission under Part II Divisions 3 and 4.

2. How is the right to religious freedom addressed in the HREOCA?

One of the Commission's functions under section 11(1)(f) of the HREOCA is to inquire into and attempt to conciliate allegations that an act or practice of the Commonwealth is inconsistent with any human right. In furtherance of this, Part II Division 3 provides that a complaint may be made alleging that an act or practice is inconsistent or contrary to any human right (s.20(1)(b)). "Human rights" are defined in s.3 of HREOCA to mean the rights and freedoms recognised in the international instruments which are declared or scheduled to the HREOCA.^v

Two of the international instruments which are scheduled to the HREOCA have special relevance to the freedom of religion and belief:

- the *International Covenant on Civil and Political Rights* (1966) ("the ICCPR") and
- the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) ("the Religion Declaration").^{vi}

The **ICCPR** provides in article 18 that:

1. *Everyone shall have the right to freedom of thought, conscience and religion^{vii}. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which shall impair his freedom to have or adopt a religion of his belief or choice.*
3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.^{viii}*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

The ICCPR also provides that:

- advocacy of religious hatred which amounts to incitement to discrimination, hostility or violence must be prohibited by law (article 20);
- everyone is entitled to equality before the law and equal protection of the law without discrimination on the ground of religion among other grounds (article 26); and
- minority groups are entitled to profess and practise their own religion (article 27).

The **Religion Declaration** prohibits unintentional and intentional acts of discrimination and defines discrimination in article 3 as:

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

Article 6 of the Religion Declaration stipulates that the religious community's joint or shared expression of its beliefs is protected equally with the individual's right and protects manifestation of religion or belief including, but not limited to,

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

The complaint mechanism under section 20(1) could be utilised, for example, when an individual or group complains that the Commonwealth, or an agency of the Commonwealth performed an act or practice which was somehow inconsistent with or contrary to their right to (for example) freedom of religious expression, solicit financial support, build and/or maintain places of worship, etc.

3. How is the right to freedom from discrimination in employment on the basis of religion addressed in the HREOCA?

The rights of individuals and religious groups to act in accordance with their beliefs free from interference by the government have often been balanced against prohibitions on discrimination in employment based on religion or belief. Australia's international obligations in this regard are grounded in the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* ("ILO Convention 111")^{ix} which is scheduled to the HREOCA.

ILO 111 specifically prohibits discrimination on the ground of religion in employment and occupation (article 1.1). It also provides that discrimination on the ground of religion may be exempt in relation to employment of people by religious institutions where such discrimination is required by the tenets and doctrines of the religion, is not arbitrary and is consistently applied or where religion is "an inherent requirement of a particular job" (article 1.2). The terms "employment or occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment (article 1.3).

In addition, in relation to the freedom from religious discrimination in employment, the ICCPR:

- guarantees the enjoyment of human rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (article 2.1)
- provides that everyone is equal before the law. It requires that everyone be guaranteed equal and effective protection against discrimination (article 26).

Part II Division 4 of the HREOCA confers functions on the Commission in relation to the investigation of complaints of discrimination in employment or occupation on a prescribed ground (including religion) in pursuance of ILO 111.

For the purpose of Part II Division 4, "discrimination" is defined in s 3 of HREOCA as follows:

"Discrimination, except in Part IIB, means:

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(b) any other distinction, exclusion or preference that:

(i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(i) *has been declared by the regulations to constitute discrimination for the purposes of this Act;*

but does not include any distinction, exclusion or preference:

(c) *in respect of a particular job based on the inherent requirements of the job;*
or

(d) *in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed."*

Unlike the *Racial Discrimination Act 1975 (Cth)* and the *Sex Discrimination Act 1984 (Cth)*, the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* does not contain separate prohibitions on direct and indirect discrimination. However, Justice Katz of the Federal Court held in *Commonwealth of Australia v Human Rights and Equal Opportunity Commission and Hamilton* [2000] FCA 1854 that the definition of discrimination in section 3 of the HREOCA encompassed both direct and indirect discrimination, notwithstanding that it does not expressly refer to the distinction.

An example of what is commonly understood as "direct discrimination" would be where religion is the reason for refusing to hire an applicant (and the inherent requirement and religious susceptibilities exceptions do not apply).

Example: A manufacturer advertised for a new storeman. One suitable job applicant was refused employment when the interviewing manager discovered he was a Jehovah's Witness.

An example of what is commonly understood as "indirect discrimination" would be where there is a requirement, rule, policy or practice that appears to be the same for everyone but has an unequal and disproportionate effect on one particular group and is not a reasonable requirement even if there is no intention to discriminate. This sort of discrimination may occur when employers are inflexible about making appropriate adjustments to allow for employees' religious practices which do not conform to the pattern of most employees and neither the inherent requirement nor the religious susceptibilities exception applies.

Example: A rule that no employee may leave work before 5 pm. This rule affects Orthodox Jews in winter because they must leave work with enough time to reach home before sundown to observe the Sabbath. Orthodox Jews who are refused flexible scheduling could be forced to choose between their religion and their jobs.

Exceptions

If a complaint is made against a religious or non-religious organisation that it made a distinction on the basis of the religious belief of a job applicant or employee, that institution may be able to argue that the distinction, although based on a proscribed ground, does not breach the requirements of

the Act if it is a distinction in respect of a particular job based on the **inherent requirements of the job**.

Religious organisations may also be able to avail themselves of a second exception. Section 3(d) of the HREOCA provides that a distinction on the basis of the religious belief of a job applicant or employee although based on a prescribed ground, does not breach the requirements of the Act if it is a distinction in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order **to avoid injury to the religious susceptibilities of adherents of that religion or that creed**.

The inherent requirements exception

Not all distinctions, exclusions and preferences are discriminatory. Measures taken by an employer based on the inherent requirements of a particular job are not discriminatory.

The inherent requirements of a particular job include not only the duties of the employee but also the circumstances in which the particular employment is to be carried out.^x

An example of where this exception may be raised is when an organisation requires that an applicant must be a practising member of a particular religious group.

For an attribute such as a particular religious belief or adherence to a particular religious faith to be an inherent requirement of the job, an organisation should be able to demonstrate:

- why an individual needs to possess that particular belief to be able to perform the duties of that particular position; for example by reference to the duty statement of that position, the expectations in the work culture or environment, the organisation's Mission Statement, the interplay of the Mission Statement and management style and expectations.
- why the individual was unable to perform the duties of that particular position; for example, why an individual who is sympathetic to the values of the organisation and could demonstrate a capacity to operate in a manner consistent with them would be unable to perform the position.

The religious susceptibilities exception

This exception only applies to religious institutions. There has been no direct judicial consideration of this exception under the HREOCA. It permits "a distinction, exclusion or preference in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed".

There are three elements to this exception:

1. The employer institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.
2. The religious distinction, exclusion or preference is imposed in good faith.
3. It is imposed to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

In relation to the first element, the employer should be able to show that the institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed. The exception cannot be claimed merely on the basis that the organisation or persons associated with it have certain religious views or affiliations. The organisation must be one in which the religious doctrines, tenets, beliefs and teachings inform, or are required for, the day to day operation of the organisation. This is a question of fact and degree and will depend on the particular case under consideration.

In relation to the second element, the employer should show that the religious distinction was made in good faith. Clearly, a distinction made in bad faith does not gain the protection of the section. This would be the case where the distinction is applied capriciously, arbitrarily or randomly. It would also be the case where a distinction, ostensibly made on religious grounds, is really based on extraneous personal or other reasons that have no basis in religious doctrine or teaching.

The “good faith” element must be read in conjunction with the final element: the distinction should be made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed. This is not an entirely subjective requirement. Religious organisations clearly can determine what would injure the religious susceptibilities of adherents of that religion or creed. However, there should be some objective evidence that the selection of an employee who is not of a particular religious persuasion would offend the doctrines, tenets, beliefs or teachings of that religion.

4. Checklist

When advertising a position or promotion, all employers should:

- identify the inherent or essential requirements of every position in the organisation
- ensure that job advertisements and other selection documents are designed in accordance with the inherent requirements of the particular job.

Employers, including religious organisations, who regard membership of a particular religious group, evidence of church attendance or some other religious qualification as an inherent requirement of any position should:

- only consider setting a religious criterion in the light of the requirements of individual positions and not as a blanket criterion for all positions.
- ensure that the religious qualification is an inherent requirement of the position in that it is necessary in order for the individual to effectively discharge the duties of the position. To do this, employers should:
 - analyse why an individual needs to possess that particular religious qualification to be able to perform the duties of that particular position; for example by reference to the duty statement of that position, the expectations in the work culture or environment, the organisation's Mission Statement, the interplay of the Mission Statement and management requirements, style and expectations.
 - evaluate whether an individual who is sympathetic to the values of the organisation and could demonstrate a capacity to operate in a manner consistent with them would be unable to perform the duties of that particular position;

Religious organisations employing staff and considering setting a religious criterion to avoid offending the religious susceptibilities of adherents should:

- clearly identify the established doctrines and tenets of the religion on which the organisation is based
- consider whether these doctrines and tenets are central to the day to day work of the organisation
- ensure that the religious criterion is necessary to avoid offending the religious susceptibilities of adherents of that faith; and
- ensure the criterion is set in good faith to avoid offending the religious susceptibilities of adherents of that faith.

For further information

If you would like to obtain further information about issues in this paper please contact:

Human Rights and Equal Opportunity Commission

GPO Box 5218

Sydney NSW 1042

Complaints Infoline: 1300-656-419

Facsimile: 02-9284-9611

TTY: 1800-620-241

Home page: <http://www.humanrights.gov.au>

Appendix A

Under Part II of the **HREOCA** the Commission may inquire into complaints that either:

- allege discrimination in employment based on the person's religion. The Commission can accept complaints about discrimination in employment against Commonwealth, State, Territory and local government employers and by private sector employers; and/or
- allege that an act or practice carried out by the Commonwealth, on behalf of the Commonwealth or by an authority of the Commonwealth, is inconsistent with the right to freedom of religion.

The complaints process is flexible and each case is carefully assessed to determine the best way to handle it. Generally, however, most complaints are dealt with in the following way:

All complaints are assessed by the Director, Complaint Handling. The Commission tries to get an initial idea of the nature of the complaint and decides whether it is covered by the law. The Director may make an initial recommendation to commence the inquiry.

The complaint is then forwarded to the President of the Commission (or Delegate) for consideration. The President notes receipt of the complaint and may approve the recommendation to commence inquiry.

At the next step, Commission staff may contact the complainant for further information. After that the Commission will write to the respondent and seek its comments on the complaint and ask particular questions relating to the circumstances of the complaint. The respondent will also be asked to make submissions in relation to any exemption, exception or defence that may apply.

Once all the relevant information and documentation is obtained the complaint will be reviewed and the President (or Delegate) will decide if:

? The complaint should be declined for any of the reasons outlined in the law – ie the complaint is lacking in substance, or the complaint has been adequately dealt with by another statutory authority, or, in relation to a complaint of discrimination in employment, that an exception applies and therefore the alleged acts are not discriminatory.

? Attempts should be made to try and settle the complaint through conciliation whereby both parties have an opportunity to resolve the complaint on their terms.

If the complaint is declined, the President advises the complainant of this in writing and explains the reasons. The respondent will also be notified of the decision.

The parties may then access rights of review available to them in the Federal Court.

If a complaint that has not been declined for one of the statutory reasons and is considered to be not conciliable, the President may undertake further inquiry. The President makes a preliminary

finding which is forwarded to the parties who are invited to make submissions, either orally or in writing, in relation to the complaint.

If, after receipt of these submissions and further consideration of the matter, the President (or Delegate) finds that the practice **does not** constitute discrimination or that there has been no human rights breach, the President (or Delegate) will issue a report containing her findings and reasons to the parties but not to the Attorney- General.

However if, after this further inquiry, the President (or Delegate) finds that the practice **does** constitute discrimination or that there has been a human rights breach, the President (or Delegate) will serve a notice on the respondent setting out the findings, the reasons for the findings and any recommendations as a result of the findings. The respondent will be given 28 days to advise what action it has taken or proposes to take in response to the findings and recommendations.

Again the parties may then access rights of review available to them in the Federal Court.

After receipt of this advice from the respondent the President (or Delegate) will then forward a **report** to the parties and to the Attorney-General which will include her findings and recommendations together with details of any action taken or proposed to be taken by the respondent as a result of those findings or recommendations.

The Attorney-General must table this report in Parliament.

5. Endnotes

ⁱ “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”.

ⁱⁱ The *Racial Discrimination Act 1975* (Cth) (“RDA”) provides some limited protection against discrimination on the basis of religion. If a religious group can also be classified as an “ethnic” group, the RDA may cover direct and indirect discrimination and vilification under the racial hatred provisions of the Act. Even if a religious group cannot be classified in that way, the RDA arguably covers discrimination on the basis of religion in certain circumstances such as indirect race discrimination.

ⁱⁱⁱ The *Equal Opportunity Act 1995* (Vic), the *Anti-Discrimination Act 1991* (Qld), the *Equal Opportunity Act 1984* (WA), the *Discrimination Act 1991* (ACT), the *Anti-Discrimination Act 1996* (NT) ⁱⁱⁱ. The *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on the ground of “race” which also includes ethno-religious background.

^{iv} The definition of “complaint” in section 3 of the HREOCA provides that: “complaint” except in Part IIC, means a complaint lodged under Division 1 of Part IIB”. This section was inserted by the *Human Rights Legislation Amendment Act 1999* (No 1) (“the Amendment Act”) which inserted new provisions into the HREOCA for handling complaints of unlawful discrimination. The definition appears to relate to complaints of “unlawful discrimination” lodged under that Part. These are acts, practices, or omissions that are unlawful under the *Racial Discrimination Act*, the *Sex Discrimination Act* or the *Disability Discrimination Act*. There was no analogous section in the HREOCA prior to the enactment of the Amendment Act and it appears that the definition of “complaint” in section 3 is meant to apply to complaints under Division 1 of Part IIB only. While the definition is not explicit to this effect and, indeed, explicitly exempts Part IIC and not Part II from its scope, the legislation read as a whole does not make sense if “complaint” in s.20 (part II Division 3) and indeed section 32 (Part II Division 4) is read according to the newly inserted definition in section 3. In order to ensure that the complaint provisions of Part II are not rendered otiose or absurd by a definition recently inserted the Commission’s view is that the definition in section 3 must be read as applicable only to those parts newly inserted into the HREOCA - that is, Parts IIB and IIC - with the explicit exception of Part IIC. This view is confirmed by the Explanatory Memorandum for the Amendment Act which provides that “this Part of the Schedule [which inserts the changes to the HREOCA] makes a number of amendments to the new HREOCA to deal with the changes to the handling of complaints of unlawful discrimination under the DDA, the RDA and the SDA ...” (para 89).

^v These are: International Covenant on Civil and Political Rights, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Declaration of the Rights of the Child, Declaration on the Rights of Mentally Retarded Persons, Declaration on the Rights of Disabled Persons, and the Convention on the Rights of the Child.

^{vi} The Convention on the Rights of the Child (CROC) also prescribes that States parties shall respect the right of the child to freedom of thought, conscience and religion, (article 14.1) and that the State shall respect the rights and duties of the parents and, when applicable, legal guardians, to

provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child (article 14.2). Although the CROC and the ICCPR are not directly implemented in Australia and do not therefore form part of Australian law, they have been ratified by Australia and so are legally binding on Australia in international law. They affect domestic law to the extent that where legislation permits a discretion that discretion should be exercised in conformity with Australia's international treaty obligations. The Religion Declaration is not a treaty but is a valuable tool for interpreting the scope of ICCPR article 18.

^{vii} The freedom of thought, conscience and religion covers theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.

^{viii} Although there are no limitations on the freedom to believe, the freedom to manifest one's religion or beliefs is subject to limitations, set out in ICCPR article 18.3. However, this limitations clause was given a restrictive interpretation by the United Nations Human Rights Committee in General Comment No. 22, (1993) which stated that:

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

So, unlike the freedom of religion itself, the freedom of religious practice or 'manifestation' can be limited by law provided the limitation is necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

^{ix} Ratified by Australia in 1973. The ILO 111, like the ICCPR, is not directly implemented in Australia and does not form part of Australian law though, like the ICCPR, it has been ratified by Australia and is legally binding on Australia in international law. It also affects domestic law where legislation permits a discretion: it is accepted that discretion should be exercised in conformity with Australia's international treaty obligations.

^x Justices Gummow and Hayne in *X v The Commonwealth* (1999) 167 ALR 529.