

‘IT’S NOT BECAUSE YOU WEAR HIJAB, IT’S BECAUSE YOU’RE MUSLIM’ - INCONSISTENCIES IN SOUTH AUSTRALIA’S DISCRIMINATION LAWS

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Amendments to the Equal Opportunity Act 1984 (SA) have been proposed which would introduce a new prohibition on discrimination on the ground of religious appearance and dress in the state. However, there remains no prohibition on discrimination based on religious belief or practice. This paper examines the reasons for this curious state of affairs, and considers its consequences for religious groups in South Australia. The legislation regarding religious discrimination in other jurisdictions is considered, as are alternative means that members of religious groups in South Australia may seek protection from discrimination against them. In particular, the link between the characteristics of religion and race are considered, and the different protections offered to religious and racial groups under anti-discrimination legislation is analysed.

The Parliament of South Australia is currently considering amendment to the *Equal Opportunity Act 1984* (SA), which is the primary legislative instrument which regulates discrimination in the state.¹ Of particular interest is the proposal to incorporate into the state discrimination regime a prohibition on discrimination on the basis of a person’s religious dress or appearance, while failing to include a prohibition on discrimination on the basis of an individual’s religious belief or practice.²

The issue of religious discrimination has been receiving increasing attention internationally over the past decade. In Europe, the European Commission introduced the Equality Framework Directive in November 2000, which prohibits discrimination based on religion or belief.³ This directive was required to be implemented by member

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¹ The proposed amending legislation is the Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA).

² Proposed s 85T(1)(h) of the *Equal Opportunity Act 1984* (SA) (see s 60 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA)).

³ European Commission, *Directive Establishing a General Framework for Equal Treatment in Employment and Occupation* (27 November 2000) 2000/78/EC, Arts 1 and 3.

states by 2 December 2003. As a result of this directive, prohibitions against religious discrimination have proliferated across Europe,⁴ as have controversial cases regarding their application. For example, Khan, who was a bus cleaner at NIC Hygiene, successfully claimed he had been discriminated against based on his religion, after he was sacked for gross misconduct. Khan's employer alleged that he had, without authorisation, used his holiday entitlement and a further week of unpaid leave in order to make the once-in-a-lifetime pilgrimage required by his faith.⁵ Mr Khan claimed that he had sought permission from his employer but, when he did not receive a reply, his manager said that if he did not hear anything further, he should assume leave had been granted. In a second controversial case Mrs Williams-Drabble, a committed Christian, was able to establish that a shift system which required all staff to work on their fair share of Sundays amounted to indirect religious discrimination as it had an adverse impact on a considerably greater number of Christians than others.⁶

These cases are not alone. Indeed, the sheer number of cases regarding religious discrimination in the United Kingdom and European Community suggest that it is a frequent ground of discrimination. In light of this, South Australia's failure to prohibit discrimination based on religion deserves to be carefully considered.

In the second reading speech for the Equal Opportunity (Miscellaneous) Amendment Bill 2006, on 26 October 2006, the Attorney General Michael Atkinson stated that its purpose:

is not to introduce the ground of religious discrimination in general. The Government in 2002 consulted on this idea and learned that many South Australians strenuously oppose it. We decided not to do it. The purpose of the present amendment is simply to ensure that people who dress or present themselves in a particular way for religious reasons are not debarred from participating in school or work activities. We pride ourselves on being a multi-cultural society. We do not expect people to give up their cultural or religious identity to become South Australians.⁷

Mr Atkinson's statements raise two issues. First – is the opposition to a prohibition on religious discrimination to which he refers one that can be justified? And secondly, will the amendments as proposed be enough to ensure that individuals do not have to 'give up their cultural or religious identity to become South Australians'? In order to answer this second question, it is necessary to consider how much protection religious groups receive from the existing legislation – particularly the prohibition against racial discrimination. Each of these questions will be analysed in turn.

I OPPOSITION TO PROHIBITION OF RELIGIOUS DISCRIMINATION

⁴ For example, the UK implemented the directive by introducing *The Employment Equality (Religion or Belief) Regulations 2003* (UK). This builds upon the introduction of a prohibition against religious discrimination which was first introduced in the UK in the *Human Rights Act 1998* (UK), which, in turn, implemented the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR).

⁵ *Mohammed Khan v NIC Hygiene*, (Leeds Employment Tribunal, 13 January 2005).

⁶ *Williams-Drabble v Pathway Care Solutions and another* (Nottingham Employment Tribunal, 10 January 2005 (2601718/04)).

⁷ South Australia, *Parliamentary Debates*, House of Assembly, 26 October 2006, Second Reading Speech: Equal Opportunity (Miscellaneous) Amendment Bill 2006 (The Hon M J Atkinson, Attorney-General).

In 2006 Mr Atkinson stated that the reason for the failure to include a prohibition on religious discrimination in the current round of amendments was that the state's majority Christian population did not want it. He said:

the main Western Christian denominations, the Greek Orthodox archdiocese and the Greek Evangelical Church, opposed it [a prohibition on religious discrimination], as did many Christian schools. They feared the new laws would prevent them from freely preaching and practising their religion and from seeking to convert others.⁸

Mr Atkinson also admitted that Muslim, Jewish, Buddhist, Hindu, Seventh Day Adventist and Scientology leaders were in favour of the introduction of a prohibition.⁹

In order to determine whether the reasons for opposition to the prohibition of discrimination based on religious belief or practice suggested above are reasonable, it is necessary to consider what the scope of such a prohibition (if any had been implemented) was likely to be. This can best be done by analysis of the form and scope of legislation around Australia.

Every jurisdiction except South Australia, New South Wales¹⁰ and the Commonwealth¹¹ prohibits religious discrimination. In most jurisdictions, the prohibition is created by incorporation of religion into a general list of characteristics on which it is prohibited to discriminate.¹² An example is Victoria, where 'religious belief or activity' is included in a list of 16 such characteristics.¹³ 'Religious belief or activity' is then defined as-

- a) holding or not holding a lawful religious belief or view;
- b) engaging in, not engaging in or refusing to engage in a lawful religious activity.¹⁴

Other jurisdictions have chosen a different legislative format to achieve the same end, and have addressed discrimination on the basis of religious belief in separate sections

⁸ Jeremy Roberts, 'Christian Pressure Waters Down Bill', *The Australian*, 20 November 2006.

⁹ Ibid.

¹⁰ In New South Wales discrimination based on 'ethno-religious or national origin' is prohibited: *Anti-discrimination Act 1977* (NSW) s 4 and s 7. This ground has been specifically considered in relation to a complaint made by a Muslim person that he has been discriminated against because he was denied halal food in prison. The NSW Administrative Decisions Tribunal found that being a Muslim was not sufficient to constitute 'ethno-religious origin', and that there must be a close tie between faith, race nationality or ethnic origin for the prohibition to operate: *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131.

¹¹ Under the *Human Rights and Equal Opportunities Commission Act 1986* (Cth) (HREOC Act) religion is dealt with in two ways. First, the Commission is given power to investigate and attempt to conciliate allegations that an act or practice of the Commonwealth is inconsistent with human rights, which includes the right to hold and manifest religious beliefs: HREOC Act s 11(1)(f) and s 3(1), and art 18 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1967). Second, the Commission can investigate and conciliate complaints of discrimination in employment or occupation on a number of specific grounds, including religion: HREOC Act s 31(b). However, no enforceable decision can be made under either of these areas.

¹² See *Anti-discrimination Act 1991* (Qld) s 7(1)(i); *Anti-discrimination Act 1998* (Tas) ss 16(o) and (p), *Equal Opportunity Act 1995* (Vic) s 6(j); *Racial and Religious Tolerance Act 2001* (Vic) s 3; and *Anti-discrimination Act 1992* (NT) s 19(1)(m).

¹³ *Equal Opportunity Act 1995* (Vic) s 6.

¹⁴ *Equal Opportunity Act 1995* (Vic) s 4.

(rather than listing it among the prohibited grounds of discrimination).¹⁵ For example, in the ACT the *Discrimination Act 1991* (ACT) provides:

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.¹⁶

In Western Australia the *Equal Opportunity Act 1984* (WA) provides:

(1) For the purposes of this Act, a person (in this subsection referred to as the ‘discriminator’) discriminates against another person (in this subsection referred to as the ‘aggrieved person’) on the ground of religious or political conviction if, on the ground of:

- (a) the religious or political conviction of the aggrieved person;
- (b) a characteristic that appertains generally to persons of the religious or political conviction of the aggrieved person; or
- (c) a characteristic that is generally imputed to persons of the religious or political conviction of the aggrieved person,

the discriminator treats the aggrieved person less favourably than in the same circumstances or in circumstances that are not materially different, the discriminator treats or would treat a person of a different religious or political conviction.¹⁷

The commonality between these approaches is a focus on the relevant characteristic – religious belief and/or religious activity. A further basis of similarity between the legislative provisions is their scope – the areas in which they prohibit discrimination based on the relevant characteristic. In each jurisdiction with a prohibition on religious discrimination, the prohibition extends (inter alia) to employment, education, access to goods services and facilities and accommodation.¹⁸

Whether introduced by means of inclusion of religion in a list of relevant characteristics (such as in Victoria), or by provisions dealing specifically with discrimination based on religion (such as the Australian Capital Territory and Western Australia), it would appear logical that any legislation introduced in South Australia would have been equivalent in scope to this national coverage. That is, a prohibition would have focused on religious belief and practice and applied (at least) in the areas of employment, education, access to goods services and facilities and accommodation. However, the amendments relating to religion which have been proposed in South Australia do not follow this pattern. Instead, the amendments which are being considered are limited in two ways. First, as discussed above, there is no general prohibition on discriminating

¹⁵ *Discrimination Act 1991* (ACT) ss 7(1)(h), 8(1), 11; and *Equal Opportunity Act 1984* (WA) ss 53-65.

¹⁶ *Discrimination Act 1991* (ACT) s 11.

¹⁷ *Equal Opportunity Act 1984* (WA) s 53.

¹⁸ See *Anti-discrimination Act 1991* (Qld); *Anti-discrimination Act 1998* (Tas) s 22; *Equal Opportunity Act 1995* (Vic) ss 13, 14, 37, 42, 49-52, *Anti-discrimination Act 1992* (NT) ss 29, 31, 41 and 38; *Discrimination Act 1991* (ACT) ss 10, 11, 18, 20 and 21; and *Equal Opportunity Act 1984* (WA) ss 54-65.

because of a person's religious belief or practice. Instead, a prohibition restricted to discrimination on religious dress or appearance has been suggested. Second, this limited protection is not proposed to apply to all of the areas in which discrimination is normally prohibited in Australia (see discussion above). Instead, the protection of the new prohibition (if implemented) will apply to applicants and employees,¹⁹ agents and independent contractors,²⁰ contract workers,²¹ within partnerships,²² and to discrimination in education.²³ It will *not* apply to discrimination by associations,²⁴ or discrimination in relation to land, goods, services and accommodation.²⁵ The limited scope of the new prohibition will clearly restrict its potential to control discriminatory activity. Of particular concern is the failure to extend the coverage of the prohibition to the provision of goods, services and accommodation.

Having considered the legislative forms of protection around Australia, it is possible to try and assess the accuracy of fears that imposing such a prohibition in South Australia would prevent religious groups 'freely preaching and practicing their religions and seeking to convert others'.²⁶ This can be done by considering the consequences on religious practice of a 'typical' prohibition. That is, a prohibition based on the general scope and coverage of the prohibitions around Australia (in effect, a lowest common denominator of the coverage across Australia).

If any new South Australian prohibition of discrimination based on religious belief or practice was restricted to those areas in which the new provisions regarding discrimination on the basis of religious appearance and dress will apply, or *even* if such a prohibition was extended to include discrimination in relation to land, goods, services and accommodation, the fear expressed by Christian groups appear unfounded. Even the broader prohibition could not prevent members of a religion 'freely preaching and practising their religion and from seeking to convert others'.²⁷ Such activity does not either:

- (a) relevantly discriminate between individuals based on their religious practice or belief, or
- (b) where it may so discriminate does not appear likely to be discrimination in an area which is usually covered by a legislative prohibition.

For example, a religious service which suggests that those of a different religious persuasion will not have access to an afterlife as prescribed by a specific religion does

¹⁹ Proposed new s 85V of the *Equal Opportunity Act 1984* (SA) (see s 60 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA)).

²⁰ Proposed s 85W of the *Equal Opportunity Act 1984* (SA) (see s 60 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA)).

²¹ Proposed s 85X of the *Equal Opportunity Act 1984* (SA) (see s 60 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA)).

²² Proposed s 85Y of the *Equal Opportunity Act 1984* (SA) (see s 60 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA)).

²³ Proposed ss 85ZD-85ZE of the *Equal Opportunity Act 1984* (SA) (see s 60 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA)).

²⁴ Proposed ss 85ZA-85ZC of the *Equal Opportunity Act 1984* (SA) (see s 60 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA)).

²⁵ Proposed div 5 of the *Equal Opportunity Act 1984* (SA) (see s 60 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA)).

²⁶ Roberts, above n 9.

²⁷ *Ibid.*

not appear to amount to discrimination.²⁸ Similarly, proselytising (trying to convert someone to a new religion) does not appear to be a discriminatory action.²⁹ Other actions, which may be discriminatory, are not within the scope of the relevant legislative prohibitions. For example, a decision not to allow a Muslim to lead the prayers of a Christian congregation, even though discriminatory, would not be in the areas of employment, education, or access to goods services and facilities and accommodation in which discrimination is usually prohibited.³⁰

Further, to the extent that holding a particular religious belief is a genuine occupational requirement, it should be anticipated that well drafted legislation in South Australia would make allowances for this. This is the case in other Australian jurisdictions, where common exceptions to the prohibition on religious discrimination include:

- the holding of a particular religious belief where that belief is a genuine occupational requirement (it may, for example, be a genuine occupational requirement that an Anglican Minister believe in the teachings of the Anglican Church);
- discrimination in relation to participation in religious practice (for example, the exclusion of non-believers from a religious ceremony);
- access to sites of religious significance (for example, the prevention of the uninitiated from entering a sacred site);
- as well as discrimination in relation to teaching and studying in religious educational institutions.³¹

²⁸ The Appeal Panel in *Commissioner of Corrective Services v Aldridge* (EOD) [2000] NSWADTAP 5 (considering the *Anti-Discrimination Act 1977* (NSW)) held a threshold component to establishing direct discrimination is differential treatment. Preaching of the type described does not involve any differential treatment, and therefore does not appear to be a discriminatory act. Instead, this appears to be a mere statement of opinion, which would not empower any individual or group to make a claim of discrimination. However, such statements may (if extreme) amount to prohibited religious vilification in some jurisdictions.

²⁹ In Victoria there has been concern that proselytising may amount to prohibited vilification – however recent amendments to *Racial and Religious Tolerance Act 2001* (Vic) s 11 clearly exclude proselytising from the scope of that prohibition. This is consistent with Justice Morris’ observations in *Fletcher v The Salvation Army Australia* [2005] VCAT 1523.

³⁰ See *Anti-discrimination Act 1991* (Qld); *Anti-discrimination Act 1998* (Tas) s 22; *Equal Opportunity Act 1995* (Vic) ss 13, 14, 37, 42, and 49-52; *Anti-discrimination Act 1992* (NT) ss 29, 31, 41 and 38; *Discrimination Act 1991* (ACT) ss 10, 11, 18, 20 and 21; and *Equal Opportunity Act 1984* (WA) ss 54-65.

³¹ See *Anti-discrimination Act 1991* (Qld) s 25 (genuine occupational requirements), s 41 (religious educational institutions), s 48 (access to land or a building of cultural or religious significance), s 90 (accommodation with religious purposes), and s 109 (selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice); *Anti-discrimination Act 1998* (Tas) s 51 (participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment) and s 52 (participation in religious observance), *Equal Opportunity Act 1995* (Vic) s 38 (discrimination based on religion for religious educational organisations), s 75 (bodies established for religious purposes), s 76 (religious schools), s 77 (where discrimination is necessary for a person to comply with their genuine religious beliefs or principles); *Anti-discrimination Act 1992* (NT) s 35 (genuine occupational qualification), s 37A (religious educational institutions), s 43 (religious sites), s 51 (selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice); *Discrimination Act 1991* (ACT) s 32 (selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice), s 33 (religious education), s 44 (discrimination in education or health employment where the duties of the employment or work involve participation in the teaching,

Such exceptions specifically permit religious bodies to discriminate in relation to:

- a) ordination or appointment of priests, ministers of religion or members of any religious order; or
- b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
- c) the selection or appointment of people to exercise functions for the purposes of, or in connection with, any religious observance or practice; or
- d) any other act or practice of a body established for religious purposes.³²

If exceptions along these lines were introduced in South Australia it would mean that, even if a decision was made which was both discriminatory and within the scope of any relevant prohibition (for instance, a decision relating to employment - not to hire a religious leader, because they are not of the same religious belief as the congregation) this would specifically be covered the exemption.

It is therefore possible to conclude that the Christian communities' reasons for opposing a prohibition on religious discrimination (as provided by Mr Atkinson on 20 November) are unfounded. A conservatively drafted prohibition on religious discrimination, with the normal scope and exceptions, would not prevent the free practice of religion.

However, regardless of the cogency (or otherwise) of the reasons for not including a prohibition on discrimination based on religion, the clear fact that no such prohibition has been proposed remains. In light of that, what is the position with regard to religious discrimination in South Australia?

II THE CURRENT STATE OF THE LAW

As stated above, the *Equal Opportunity Act 1984* (SA) does not currently contain a prohibition on discrimination based on religious belief or practice. Nor is such a provision included in the current bill. However, some provisions relating to religion do exist.

The amendments to the South Australian *Equal Opportunity Act 1984* (SA) which are currently proposed include the introduction of a new s 85T(1)(h) and (9):

85T—Criteria for establishing discrimination on other grounds

...

(9) For the purposes of this Act, a person discriminates on the ground of religious appearance or dress—

- (a) if he or she treats another unfavourably because of the other's appearance or dress and that appearance or dress is required by, or symbolic of, the other's religious beliefs; or
- (b) if he or she requires a person to alter the person's appearance or dress and that appearance or dress is required by, or symbolic of, the other's religious beliefs; or

observance or practice of the relevant religion), and *Equal Opportunity Act 1984* (WA) s 66, which provides an exception for education and health where 'the duties of the employment or work are for the purposes of, or in connection with, or otherwise involve or relate to the participation of the employee in any religious observance or practice'.

³² *Discrimination Act 1991* (ACT) s 32 – a typical exemption provision relating to religious practice.

- (c) if he or she treats another unfavourably because of the appearance or dress of a relative or associate of the other and that appearance or dress is required by, or symbolic of, the relative or associate's religious beliefs.³³

In the second reading speech, Mr Atkinson stated:

The Bill also proposes to cover discrimination on the ground that a person, for religious reasons, wears particular dress or adornments or presents a particular appearance. Examples include the hijab worn by Muslim women, the turban worn by Sikh men or the cross worn by some Christians. It could include any kind of dress, adornment or other features of a person's appearance that are required by or symbolic of the religion.³⁴

The limited coverage of the proposed prohibition is obvious – it will not prohibit discrimination based on religion where there are no material physical features linked with that religion. In particular, the new prohibition will not cover discrimination against members of religious groups who are not required to abide by a specific dress code or otherwise have a distinct appearance (or who chose not to comply with such a requirement). The consequence of this is that, for example, discrimination against Muslim women wearing hijab may be prohibited, but discrimination against Muslim men who do not adopt a characteristic dress will most probably not be prohibited.

Another consequence of the limited scope of the amendment is that it may be possible to avoid its application by arguing that any alleged discrimination is not based on the religious dress or appearance, but is, instead, based on religious belief or practice. For instance, rather than refusing to hire a Sikh who wears a turban on the basis that a turban is not consistent with a workplace's dress code (which appears to be prohibited conduct under the proposed amendments) could an employer legitimately refuse to hire the Sikh *because of his religion*? Similarly, while the proposed legislation would prohibit a school refusing to accept a Muslim student who wears a veil because her dress fails to comply with the school's uniform, could a school legitimately introduce a general policy against the admission of Muslims *because they are Muslim*? Such an argument may be farfetched, but appears possible under the proposed legislation.

What does this mean for religious groups in South Australia? The new prohibition may be useful for those whose religious belief requires that they maintain a certain characteristic appearance or dress, or who chose to maintain a dress or appearance symbolic of their religious belief. However, for other religious communities, or for all religious communities if a defence of discriminatory conduct based on religious belief or practice (rather than appearance) is successful, the amendments will not offer any protection from blatantly discriminatory acts based on religion. Instead, such religious groups will be required to seek protection from such discrimination, and redress when discrimination occurs, elsewhere.

III ALTERNATIVE SOURCES OF PROTECTION

³³ To be inserted by s 60 Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA).

³⁴ South Australia, *Parliamentary Debates*, House of Assembly, 26 October 2006, Second Reading Speech: Equal Opportunity (Miscellaneous) Amendment Bill 2006 (The Hon M J Atkinson, Attorney-General).

For some religious groups an alternative source of protection may be available under the *Equal Opportunity Act 1984 (SA)* provisions prohibiting discrimination based on race.³⁵ Race is defined in that Act as follows:

'race' of a person means the nationality, country of origin, colour or ancestry of the person or of any other person with whom he or she resides or associates.³⁶

The consideration of nationality, colour and ancestry³⁷ in this definition is consistent with other anti-discrimination legislation in Australia,³⁸ and internationally.³⁹ However, a common element in definitions of race in other jurisdictions is (as well as nationality, colour and country of origin) reference to ethnicity, which does not appear in the South Australian definition. In fact, South Australia is the only Australian jurisdiction in which the anti-discrimination legislation does not make reference to 'ethnicity', 'ethnic group' or 'ethnic origin' in the definition of race. The South Australian definition is also a non inclusive definition (the definitive 'means' is used rather than 'includes'), suggesting that ethnicity cannot be incorporated as an aspect of race.

South Australian case law does not assist with interpreting the meaning of 'race' in the *Equal Opportunity Act 1984 (SA)*. The majority of the available decisions focus on discrimination against aboriginal people, and include no analysis of whether aboriginals are a 'race' – this is assumed.⁴⁰ One South Australian decision concerning racial discrimination against a non-aboriginal person is *Richard Kahn v State of South Australia*.⁴¹ In that case a man of Pakistani origin argued that he had been discriminated against when his application for an Aboriginal Education Worker Traineeship was rejected. While the Tribunal appears to have accepted that this was, indeed, discrimination on the basis of his Pakistani ancestry, the discrimination was not unlawful because the traineeships were a scheme for the benefit of persons of Aboriginal or Torres Strait Islander descent.

Despite the exclusion of ethnicity in the definition of race under the *Equal Opportunity Act 1984 (SA)*, a current fact sheet on race discrimination produced by the South Australian Equal Opportunity Commission states:

³⁵ Prohibition of discrimination on the ground of race, *Equal Opportunity Act 1984 (SA)* pt 4.

³⁶ *Equal Opportunity Act 1984 (SA)* s 5. It is proposed that this definition will be replaced with the following: *race* of a person means the nationality (current, past or proposed), country of origin, colour or ancestry of the person; s 5(6) *Equal Opportunity (Miscellaneous) Amendment Bill 2006 (SA)*.

³⁷ In some legislation the word 'descent' appears as well as or instead of 'ancestry'.

³⁸ See, for example: Dictionary, *Discrimination Act 1991 (ACT)* ['race' includes— (a) colour, descent, ethnic and national origin and nationality; and (b) any 2 or more distinct races that are collectively referred to or known as a race] *Anti-discrimination Act 1977 (NSW)* s 4 ['race' includes colour, nationality, descent and ethnic, ethno-religious or national origin] and *Racial Discrimination Act 1975 (Cth)* s 9 which applies to 'race, colour, descent or national or ethnic origin'.

³⁹ See for example *Race Relations Act 1976 (UK)* s 3 ['racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins] and Art 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), which defines 'racial discrimination' as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'.

⁴⁰ See, for example: *Abdulla v Berkeley on Hindley Street P/L* [2005] SAEOT 2.

⁴¹ (2000) EOC ¶93-098.

What is race discrimination? Direct race discrimination is unfairly treating people because of their race, which includes their colour, country of birth, ancestry, *ethnic origin* or nationality.⁴² [emphasis added]

This creates practical uncertainty about how the Equal Opportunity Commission will interpret the term 'race' in South Australia, and whether it will consider ethnicity as an aspect of race. This is problematic, because there is significant and consistent case law discussing the meaning of 'ethnic origin' for the purposes of defining a racial group (which will be discussed below). If the legal analysis arising from these cases applies in South Australia, the meaning of 'race' in this jurisdiction is much clearer.

IV DEFINING ETHNIC GROUPS

There are two decisive international decisions regarding the definition of an ethnic group. The first is the New Zealand case *King-Ansell v Police*.⁴³ The definition of an ethnic group formulated by the Court in *King-Ansell* involves consideration of one or more of characteristics such as a shared history, separate cultural tradition, common geographical origin or descent from common ancestors, a common language (not necessarily peculiar to the group), a common literature peculiar to the group, or a religion different from that of neighbouring groups or the general community surrounding the group.⁴⁴

The question of which groups could be covered by English racial discrimination legislation was considered by the House of Lords in *Mandla v Dowell Lee*.⁴⁵ That case concerned the refusal to admit a Sikh into a private school, because wearing a turban would violate the school's dress code. It was argued that this amounted to unlawful racial discrimination pursuant to the *Race Relations Act 1976* (UK). Lord Fraser of Tullybelton applied the test developed in *King-Ansell* and held that:

For a group to constitute an ethnic group in the sense of the 1976 Act, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these:

- (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive;
- (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant;
- (3) either a common geographical origin, or descent from a small number of common ancestors;
- (4) a common language, not necessarily peculiar to the group;
- (5) a common literature peculiar to the group;

⁴² Equal Opportunity Commission SA Pamphlet, *Race Discrimination* (2006) <http://www.eoc.sa.gov.au/site/tools_resources/fact_sheets.jsp> at 21 November 2006.

⁴³ [1979] 2 NZLR.

⁴⁴ Ibid 531 (Richardson J).

⁴⁵ [1983] 2 AC 548.

- (6) a common religion different from that of neighbouring groups or from the general community surrounding it;
- (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.⁴⁶

On the basis of this analysis Lord Fraser held that Sikhs could constitute an 'ethnic group' and were therefore entitled to the protection of the *Race Relations Act 1976* (UK). This case has been applied in Australia in the context of determining whether Jewish people are protected by the *Racial Discrimination Act 1975* (Cth).⁴⁷

Internationally, the consequences of applying Lord Fraser's test in order to determine whether a group is a racial group is that Jews and Sikhs have been held to be covered by the protection of prohibitions on racial discrimination,⁴⁸ as have Romani (gypsies).⁴⁹ It has been decided that Rastafarians do not yet have sufficient shared history to be considered a racial group,⁵⁰ and that Muslims do not satisfy the test as a racial group because they are drawn from too diverse a range of backgrounds.⁵¹

V CONSEQUENCES IN SOUTH AUSTRALIA

If a claim of racial discrimination arose in this jurisdiction where the claimant did not belong to a group already recognized as a racial group (currently, Aboriginal or Pakistani), an analysis similar to that performed in other jurisdictions for 'ethnic origin' could be performed under the term 'ancestry' used in the South Australian definition of race. However, until such an analysis has occurred, it is not possible to anticipate with any certainty what the conclusion would be. This means that access to protection under the racial discrimination prohibition is potentially more restricted in South Australia than in other jurisdictions which include ethnicity in the definition of race. Even those religious groups which also receive protection as ethnic groups under the racial discrimination legislation in other Australia states, under the Commonwealth legislation, and in the United Kingdom, may find themselves unable to satisfy the South

⁴⁶ *Mandla v Dowell Lee* [1983] 2 AC 548, 562.

⁴⁷ See, for example: *Miller v Wertheim* [2002] FACFC 156, [14]; and *Jones v Scully* (2002) 120 FCR 243, 272. *Mandla v Dowell Lee* [1983] 2 AC 548 has also been considered in the context of whether people with pale skin constitute a racial group in Australia under the *Racial Discrimination Act 1975* (Cth): *McLeod v Power* (2003) EOC ¶93-266. Both *Mandla v Dowell Lee* and *King-Ansell v Police* were also referred to in the Explanatory Memorandum to the Racial Hatred Bill 1994 (Cth), [which amended the *Racial Discrimination Act 1975* (Cth) to include a prohibition on racial vilification] 2-3.

⁴⁸ *Seide v Gillette* [1980] IRLR 427 (EAT) (UK); *Mandla v Dowell Lee* [1983] 2 AC 548 (UK).

⁴⁹ *Commission of Racial Equality v Dutton* [1989] 1 QB 783 CA (UK).

⁵⁰ *Dawkins v Department of Environment* [1993] IRLR 284 CA (UK); *Tariq v Young* 247738/88, *EOR Discrimination Case Law Digest No 2* (UK); and *JH Walker Ltd v Hussain & Others* [1996] IRLR 11 (UK).

⁵¹ See for example *Nyazi v Ryman* [1988] unreported EAT/6/88 (UK). In *Abdulrahman v Toll Pty Ltd T/As Toll Express* (2006) EOC ¶93-445 the New South Wales Administrative Decisions Tribunal Equal Opportunities Division held that a Lebanese Australian who was also a Muslim, who had been the subject of taunting in the workplace (some of which was based on the fact he was a 'terrorist'), had been the subject of racial discrimination as a non-Muslim and would not have been treated in the same fashion. However, this was based on the expansive *Anti-discrimination Act 1977* (NSW) s 4 definition of race as including 'ethno-religious' groups and is therefore not applicable to jurisdictions where race is differently defined.

Australian definition of race and consequentially without any protection in South Australia.

However, even if the term ancestry in the South Australian legislation was to be interpreted in line with the case law on 'ethnic origin' substantial religious groups, including Muslims, are unlikely to receive any protection from direct discrimination under this legislation.⁵²

In contrast to the *Equal Opportunity Act 1984 (SA)*, the definition of race in the *Racial Vilification Act 1996 (SA)* does include ethnicity:

'race' of a person means the nationality, country of origin, colour or *ethnic origin* of the person or of another person with whom the person resides or associates.⁵³ [emphasis added]

VI CONCLUSIONS

A major theme which in the international discussion of discrimination is that intolerances are often related. In 1978 the United Nations Educational, Scientific and Cultural Organization's (UNESCO's) Declaration on Race and Racial Prejudice recognised that 'religious intolerance motivated by racist considerations' is a form of racism.⁵⁴ More recently the Council of Europe has also recognised that religious intolerance can be used as a pretext for racism. The First Additional Protocol to the Council's 2001 Cybercrime Convention defines 'racist and xenophobic material' to mean:

any written material, image, or any other representation of thoughts and theories, which advocates, promotes or incites hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent, or national or ethnic origin, as well as religion if used as a pretext for any of these factors.⁵⁵

The overlap of ethnic and religious groupings has also been recognised by the United Nation's Special Rapporteur on religious intolerance, Abdelfattah Amor:

[T]he distinctions between racial and religious categories ... are not clear ...

There are borderline cases where racial and religious distinctions are far from clear -cut. Apart from any discrimination, the identity of many minorities, or even large groups of people, is defined by both racial and religious aspects. Hence, many instances of discrimination are aggravated by the effects of multiple identities.

[R]eligious status is often difficult to dissociate from the cohesion of a social group in terms of its identity or ethnic origin and largely covers minority status. Discrimination, measures of intolerance and xenophobic practices cannot be defined or dealt with

⁵² Note that the NSW Tribunal decision *Abdulrahman v Toll Pty Ltd T/As Toll Express* (2006) EOC ¶93-445 stands alone in determining that Muslims are a race.

⁵³ *Racial Vilification Act 1996 (SA)* s 3.

⁵⁴ *Declaration on Race and Racial Prejudice*, UN Doc. E/CN.4/Sub.2/1982/2/Add.1, annex V, art 3 (entered into force 27 November 1978).

⁵⁵ *Ibid* art 2.1.

separately. The discrimination is aggravated because it is difficult in some instances to dissociate ethnic aspects from religious aspects.⁵⁶

Despite this international focus on the relationship between racial and religious discrimination, some Australian jurisdictions including South Australia, have no prohibition on discrimination based on religion.⁵⁷

This failure in coverage of Australia's anti-discrimination legislation is problematic. Why should discrimination on the basis of such an important aspect of personal identity be permitted? And why should behaviour that is prohibited in one state be permissible across a border? The lack of consistent protection also creates an environment which distinguishes *between* religions. In jurisdictions which do not specifically prohibit discrimination based on religion, religious groups must turn to other characteristics in a search for legal protection from discrimination. If a religious group can convince the court that they are also a *racial or ethnic group*, then discrimination against the group may be prohibited on that basis. At first the idea of reclassifying a religious group as a race seems an elegant solution to the failure in legislative cover. However, this has not proved to be the case, as courts around the world have determined that some religious groups are also ethnic groups (such as Jews and Sikhs), while others (such as Muslims and Christians) are not.

The situation in South Australia is made even more complex by the unique (in Australia) failure to include ethnicity in the definition of race, which may have the consequence that even groups (such as Sikhs and Jews) which can establish status as an ethnic group and receive the protection of the prohibition against racial discrimination in other jurisdictions may not receive protection in South Australia.

All members of society deserve of protection from discrimination based on personal characteristics which are integral to their identity. Everyone should have equal opportunity in the fields of work, education, qualifications, access to goods and services, lodging, landholding and membership of associations. The proposed amendments to the *Equal Opportunity Act 1984* (SA) to extend the prohibition of discrimination to include religious appearance or dress may go part of the way to addressing this concern.⁵⁸ However, the proposed amendments fail to deal with a fundamental problem – discriminatory action which is based on religious belief and practise of that belief. A focus on appearance and dress is important, but is only a peripheral matter. The failure to protect individuals from discrimination based on religious belief will still permit significant and damaging discrimination. It also has the potential to foster division within society, both by failing to prohibit discriminatory actions, but also by creating inequity between religious groups. In an era of increasing international tension which is being reflected domestically (particularly in increased levels of anti-Arab and anti-Muslim prejudice since 11 September 2001) this failure to address the existing hole in

⁵⁶ Abdelfattah Amor, *Racial Discrimination and Religious Discrimination: Identification and Measures* [29], UN Doc A/CONF.189/PC.1/7 (2000).

⁵⁷ Under the *Human Rights and Equal Opportunities Commission Act 1986* (Cth) the Commission can investigate and attempt to conciliate come allegations of discrimination, however no enforceable decision can be made. HREOC Act s 11(1)(f) and s 3(1); s 31(b).

⁵⁸ Two recent examples of publicity surrounding religious discrimination in the United Kingdom involve items of religious dress – the wearing of a crucifix by a British Airways employee, and the wearing of a headscarf by a teacher.

South Australia's anti-discrimination legislation is troubling.⁵⁹ This continuing gap is South Australia's discrimination regime means it does not go far enough to ensure that individuals do not have to 'give up their cultural or religious identity to become South Australians'.⁶⁰

⁵⁹ Reports of race discrimination to the Equal Opportunity Commission have risen significantly in the three years to 2005: moving from 9% to 18% of all accepted complaints. Equal Opportunity Commission, *Annual Report 2005-2006* (2006) 11 <http://www.eoc.sa.gov.au/site/tools_resources/annual_reports.jsp> at 21 November 2006. In a recent report the Human Rights and Equal Opportunity Commission has also reported increasing incidents of anti-Arab and anti-Muslim prejudice since 2001: HREOC, *Listen: National Consultations on eliminating prejudice against Arab and Muslim Australians* (2004) 3-5.

⁶⁰ South Australia, *Parliamentary Debates*, House of Assembly, 26 October 2006, Second Reading Speech: Equal Opportunity (Miscellaneous) Amendment Bill 2006 (The Hon M J Atkinson, Attorney-General).