CHAPTER 7

EXEMPTIONS

Introduction

7.1 Sections 30 to 47 of the Act provide for a number of exemptions from the operation of the Act or circumstances in which different treatment on the basis of protected characteristics such as sex, marital status or pregnancy is permitted. Sections 30 to 43 create permanent exemptions in the following areas:

- sex discrimination due to a genuine occupational requirement (section 30);
- with respect to pregnancy or childbirth (section 31);
- services for members of one sex (section 32);
- accommodation for employees or students (section 34);
- residential care of children (section 35);
- charities (section 36);
- religious bodies (section 37);
- educational institutions established for religious purposes (section 38);
- voluntary bodies (section 39);
- acts done under statutory authority (section 40);
- insurance (section 41);
- new superannuation fund conditions (section 41A);
- existing superannuation fund conditions (section 41B);
- sport (section 42); and
- combat duties (section 43).[1]

7.2 Under section 44 of the Act, HREOC is also empowered to grant temporary exemptions from the operation of the prohibitions on discrimination for a period of up to five years.

7.3 The committee heard from a diverse range of individuals and organisations who supported the removal or restriction of these exemptions. Other groups argued fervently for the retention of particular exemptions. In addition, some witnesses advocated an alternative approach to the existing specific exemptions: namely a general limitations clause which would permit discrimination within reasonable limits.

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1 HREOC, *Submission 69*, pp 154-155.

Permanent exemptions

7.4 Some submissions were critical of the provision of permanent exemptions under the Act and suggested that some or all of the exemptions should be removed, for example, NACLC argued that:

> Exemptions compromise women's rights under CEDAW and other international instruments. Areas that enjoy exemptions are not required to take any steps in eliminating discrimination against women.[2]

7.5 NACLC further submitted that:

> If sporting or religious bodies were granted permanent exemptions from the prohibition of discrimination of the grounds of disability or race there would be vocal condemnation. Such permanent exemptions from sex discrimination prohibitions are equally unacceptable and should be equally condemned.[3]

7.6 Similarly, Ms Melanie Schleiger of the Human Rights Law Centre told the committee that:

> The current blanket exemptions are arbitrary, unreasonable, based on gender stereotypes and unquestioned. An automatic exemption enables certain rights and interests to trump the right to freedom from discrimination without requiring any consideration of how competing rights should be balanced. We submit that the automatic exemptions and exceptions should be removed from the SDA. This does not mean that there would be an absolute right to gender equality. This right could still be restricted in accordance with human rights limitation principles that require that the limitation be proportionate and appropriate.[4]

7.7 Criticism of the permanent exemptions is not new. The Sex Discrimination Commissioner conducted a review of some of the permanent exemptions between 1990 and 1992. She recommended the removal of the exemptions relating to educational institutions established for religious purposes, voluntary bodies and sport.[5] In 1994, the ALRC *Equality Before the Law* report noted:

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2 *Submission 52*, p. 9. See also *Committee Hansard*, 9 September 2008, p. 35; Women's Legal Services Australia, *Submission 44*, p. 2.

3 *Submission 52*, p. 32. See also Job Watch, *Submission 62*, p. 31; Women's Legal Services Australia, *Submission 44*, p. 2.

4 *Committee Hansard*, 10 September 2008, p. 2. See also pp 4-6; Ms Shirley Southgate, NACLC, *Committee Hansard*, 9 September 2008, p. 34.

5 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.12 and 3.73; HREOC, *Submission 69*, p. 163.

> The inclusion of many of the exemptions was part of the compromise and negotiation process in having the Act passed. Their continuance, after ten years of the Act's operation, limits the effectiveness of the SDA.[6]

7.8 HREOC did not support the immediate repeal of exemptions but recommended instead that all permanent exemptions which limit gender equality should be made subject to a three year sunset clause. HREOC suggested that the permanent exemptions then be reviewed during a separate inquiry to see whether they should be retained, narrowed or removed.[7] The Sex Discrimination Commissioner explained the need for additional consultation in relation to the exemptions:

> [W]e are recommending that we have a three-year sunset clause on all the permanent exemptions during which time there will be full consultation. We will have the voices of various stakeholders heard and a determination will be made as to whether or not these exemptions should remain as is, should be narrowed, or should be removed.
>
> In a lot of the exemptions, the right to equality is inherently qualified to the extent that it is necessary to strike an appropriate balance with another human right. We think that just removing all the permanent exemptions would be a significant change to the federal equality laws.[8]

7.9 HREOC suggested that this inquiry could also consider whether the permanent exemptions should be replaced by a general limitations provision.[9]

General limitations clause as an alternative to specific exemptions

7.10 The current approach under the Act is to set out specific circumstances in which otherwise discriminatory conduct is permissible. Associate Professor Simon Rice explained that the alternative to providing for specific exemptions is to have a general limitations clause:

> There is an alternative approach to exceptions that avoids multiple and inconsistent provisions, and that conforms with a human rights-based approach to the SDA: permit discriminatory conduct within 'reasonable limits'. This test is the usual approach to exempting conduct from human rights guarantees...[10]

7.11 Associate Professor Rice elaborated on how a reasonable limits clause would operate:

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6 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.68; HREOC, *Submission 69*, p. 156. See also Ms Schleiger, Human Rights Law Centre, *Committee Hansard*, 10 September 2008, p. 4; Women's Electoral Lobby, *Submission 8*, p. 5.

7 *Submission 69*, pp 151 and 163-164.

8 *Committee Hansard*, 9 September 2008, p. 21. See also *Submission 69*, p. 163

9 *Submission 69*, pp 151 and 163-164.

10 *Submission 53*, p. 7.

> [E]xceptions and exemptions for discriminatory conduct would be permitted after assessing (1) the importance of the objective to be achieved by the discriminatory conduct, (2) whether the conduct was necessary to achieve that objective, (3) whether there were available alternatives to the discriminatory conduct, and (4) [t]he degree of proportionality between the effects of the discriminatory [conduct] and its objective.[11]

7.12 The Human Rights Law Centre argued that a general limitations clause allows for a more detailed and considered approach to balancing human rights.[12] The centre provided the committee with examples of how general limitations provisions have operated in other jurisdictions including Canada, New Zealand and South Africa.[13] Ms Scheilger of the Human Rights Law Centre also gave a hypothetical example of how the clause would operate in practice:

> Take, for example, if a church wanted to exclude women from a particular role in the church. You would look first look at the nature of the right being limited, which would be the right to equality. Then you would look at the reason for restricting women from that role, which would possibly be freedom of religion. You would then look to the connection between the restriction on the right to equality and the purpose of that restriction and you would then consider whether that is a proportionate and reasonable restriction. You would also look to whether it is the least restrictive way of achieving the purpose of freedom of religion.[14]

7.13 Professor Rice argued that a key advantage to the approach of replacing the specific exemptions with a general limitations clause is that "no person or organisation is excluded or protected from the scope of the Act, and all have the opportunity to make a case for excepted conduct."[15]

7.14 Conversely, HREOC submitted that one of the disadvantages of fixed permanent exemptions is that they are inflexible:

> Whilst providing a degree of certainty, permanent exemptions also carry the risk of excluding too much or too little depending on the circumstances. Indeed, some commentators have observed that, in circumstances where an appropriate exemption does not apply, the courts have at times adopted an overly restrictive interpretation of the definition of discrimination to avoid unjust or impractical results on the particular facts, although with adverse consequences for discrimination jurisprudence in the longer term.[16]

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11 *Submission 53*, p. 7. See also Ms Cassandra Goldie, HREOC, *Committee Hansard*, 9 September 2008, p. 25; Human Rights Law Centre, *Answers to questions on notice*, 19 September 2008, pp 2-3.

12 Ms Scheilger, *Committee Hansard*, 10 September 2008, p. 5.

13 *Answers to questions on notice*, 19 September 2008, pp 3-9.

14 *Committee Hansard*, 10 September 2008, p. 5.

15 *Submission 53*, p. 7.

16 *Submission 69*, p. 162.

7.15 Ms Kate Eastman on behalf of the Law Council noted that the issue of exemptions is a difficult one. She also suggested that the disadvantage of permanent exemptions lies in their inflexibility:

> What might have been an appropriate exemption 25 years ago does not necessarily reflect current standards or expectations either of employers, employees or more generally in the areas where the Sex Discrimination Act operates. There is that difficulty about having specific exemptions to deal with particular issues, meaning that the Act might operate inflexibly or inappropriately and not be able to adapt to ever-changing conditions. That is the benefit of having a general exemption clause.[17]

7.16 On the other hand, Ms Eastman acknowledged that the disadvantage of a general limitations clause is that it is vague and requires consideration on a case by case basis.[18] HREOC made a similar observation that the advantage of the existing approach under the Act is that "it seeks to provide a degree of clarity and certainty in advance, so that individuals and businesses can adequately regulate their affairs."[19]

Exemptions for religious organisations

7.17 Other submissions and witnesses expressed views about specific exemptions. The bulk of this evidence concerned the exemptions for religious organisations under sections 37 and 38 of the Act. HREOC explained that:

> There are two permanent exemptions under Division II Part 4 of the SDA which are of a religious nature. Section 37 exempts religious bodies from the operation of the Act and s 38 exempts educational institutions established for religious purposes in some areas of employment from the operation of the Act.
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> These exemptions exist at the intersection of two fundamental human rights, namely the right to practice a religion and belief and the right not to be discriminated against on the basis of sex, marital status, pregnancy or potential pregnancy.[20]

7.18 Several organisations considered that there should not be an automatic exemption for religious organisations. Women members of the General Synod Standing Committee of the Anglican Church of Australia (Women of the Anglican Church) mounted several arguments against these exemptions:

> [W]e seek the removal of automatic exemptions for religious bodies, because they entrench discrimination against women who belong to one of the last remaining significant male-dominated sectors of Australian society. As the exemptions are automatic, religious bodies are not required to justify exemption, or demonstrate if and how they are promoting the equality of

17 *Committee Hansard*, 10 September 2008, p. 54.

18 *Committee Hansard*, 10 September 2008, p. 54.

19 HREOC, *Submission 69*, p. 162.

20 *Submission 69*, p. 165.

> women as far as is possible within the parameters of their doctrines, tenets or beliefs.[21]

7.19 Secondly, Women of the Anglican Church suggested that the exemptions may not be consistent with the Christian faith:

> Automatic exemption is uncomfortable for many Christians because of the implicit assumption that we desire or need it because discrimination is entrenched at the very heart of our faith. On the contrary, discrimination on the basis of sex, race or any other differentiating marker runs counter to the strong thrust of New Testament teaching which supports the intrinsic equality of all human beings.[22]

7.20 Finally, Women of the Anglican Church argued that the automatic exemptions leave female clergy without protection against gender based discrimination:

> While women are now officially accorded full equality in terms of doctrines, tenets and beliefs in the overwhelming majority of dioceses in the Anglican Church of Australia, there is anecdotal evidence that women clergy are at times discriminated against in employment because of their gender in ways that would not be acceptable under the Act if religious bodies were not exempt.[23]

7.21 Women of the Anglican Church noted that this is an issue not only for women employed by the Anglican Church but also for women employed by other churches in both ordained and non-ordained positions:

> More than 1000 women clergy, numbers of female ordination candidates, and many more non-ordained female church workers around Australia are left without any legal protection against gender-based discrimination in their employment because of the Act's exemption for religious bodies.[24]

7.22 Ordination of Catholic Women into a Renewed Ordained Ministry (Ordination of Catholic Women) also supported removal of the automatic exemptions for religious organisations. Dr Marie Joyce of the Ordination of Catholic Women explained that:

> [T]he process of applying for an exemption would put the people who at the moment enjoy those exemptions in a position of having to think through differently and make a clear rationale and justification for their claims in a way that is not required at the moment.[25]

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21 *Submission 7*, p. 1. See also Australian Women's Health Network *Submission 30*, p. 11; NACLC, *Submission 52*, p. 32.

22 *Submission 7*, p. 3.

23 *Submission 7*, p. 3.

24 *Submission 7*, p. 3.

25 *Committee Hansard*, 11 September 2008, p. 30.

7.23 Dr Joyce also argued that, while the exemption in section 37 does not present a legal obstacle to the ordination of Catholic women, it provides cultural support for the existing position of the Catholic Church and enables the Church to persist in stereotyped and discriminatory views.[26]

7.24 In a similar vein, the Collaborative submission argued that the automatic nature of the exemptions has significant flow on effects. The submission stated:

> [T]here is no incentive for an exempted religious body to ensure that it provides significant, let alone mandatory, levels of representation for women in areas that do not conflict with its doctrines, tenets or beliefs. An example would be representation levels of women on lay church bodies. ...
>
> Automatic exemption allows religious bodies to resist re-examination of their beliefs regarding the role of women. If exemption had to be applied for at regular intervals, re-examination would be required from time to time, and female adherents would take encouragement to challenge the status of current beliefs.[27]

7.25 UNIFEM Australia argued that the exemptions for religious organisations are inconsistent with CEDAW, particularly article 5, which requires state parties to take all appropriate measures to eliminate "customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[28] Miss Elnaz Nikibin of UNIFEM also pointed to a conflict between these exemptions and article 11 of CEDAW which recognises that women have the right to work and not to be discriminated against during employment. She argued that the exemptions are not consistent with these obligations under CEDAW because they allow religious institutions to dismiss an individual based on marital status, sex or pregnancy.[29]

7.26 Equally strong views were expressed by organisations seeking the retention of the exemptions for religious organisations. Mr James Wallace, the Managing Director of the Australian Christian Lobby, argued that retention of the exemptions was necessary in order to protect freedom of religion. He noted that freedom of religion is a right protected by international law and submitted that:

> The Sex Discrimination Act is a balancing act between the right to freedom of religion and the right to equal treatment of men and women. Exemptions in sections 37 and 38 effectively strike that balance, providing a necessary safeguard for religious bodies and education institutions established for religious purposes to conduct their business, as the Act says, in accordance with the doctrines, tenets, beliefs or teachings of the particular religion or creed. ...Our second recommendation, therefore, is that the exemptions in

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26 *Committee Hansard*, 11 September 2008, p. 32.

27 *Submission 60*, p. 35. See also Ms Caroline Lambert, YWCA Australia, *Committee Hansard*, 11 September 2008, p. 60.

28 *Submission 19*, p. 8.

29 *Committee Hansard*, 9 September 2008, p. 43.

> sections 37 and 38 must remain in the Sex Discrimination Act. They allow religious organisations to engage in their own theological debates and religious observances without the 'illegitimate' interference of government.[30]

7.27 In relation to the practical impact that removal of the exemptions would have, Mr Wallace told the committee that:

> [T]here is a real concern among a lot of churches that, with the various people applying for jobs in their schools and churches, they might be required to admit into those staffs, for instance, not only people whose theology is inconsistent with that belief system, ...but also people whose way of life may not be consistent with that theology. I know there is a real fear amongst schools and church denominations that they could lose this right to control who works in their schools and churches.[31]

7.28 Clearly, reconciling the right to equality with other rights such as the right to freedom of religion is a complex issue. That complexity was reflected in the submission from the Muslim Women's National Network of Australia which noted:

> [T]here is considerable discrimination against women in the operation of mosques and mosque associations, and many Muslim women seek changes and greater equality in these areas. However, the repealing of the exemptions provided to religious bodies under the Commonwealth Sex Discrimination Act would also remove various beneficial provisions for Muslim women.[32]

7.29 Specifically, the Muslim Women's National Network explained that Islamic schools expect staff to adhere to Islamic values including by not living in a de facto relationship and, ideally, would seek to educate boys and girls separately.[33]

7.30 Nevertheless, Ms Edwina Macdonald of NACLC suggested that the permanent exemptions are not the best approach for resolving the tension between the right to equality and the right to freedom of religion:

> No human right is absolute. They must all be viewed in relation to one another. ...By having a permanent exemption for religion you are prioritising the right to freedom of religion over the right to live free from discrimination. We suggest that you get rid of the permanent exemptions but that you retain a process, or a balancing act must take place. Rather than just saying, 'The freedom to religion will always trump the freedom to live free from discrimination', you can look at it on a case-by-case basis.
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> ...We are not saying that there would never be a case where the right to religious freedom might mean that the right to live free from discrimination

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30 *Committee Hansard*, 11 September 2008, p. 47.

31 *Committee Hansard*, 11 September 2008, p. 50.

32 *Submission 65*, p. 2.

33 *Submission 65*, p. 3.

> needs to be balanced. It is just that there needs to be a process so that we can look at that rather than saying 'In all circumstances this right will be superior.'[34]

7.31 Similarly, Ms Schleiger of the Human Rights Law Centre told the committee:

> The removal of the exemptions and the protection of freedom of religion are not mutually exclusive options. Under international human rights law there is not a hierarchy of rights. ...[O]ur major concern with the current blanket exemptions is that they do not require any justification for favouring the right to freedom of religion over equality in certain circumstances. It is just a given that that will occur even if that is not necessarily a reasonable and proportionate outcome.[35]

Section 38 - Educational institutions

7.32 There were specific criticisms of the exemption under section 38 for educational institutions established for religious purposes. The Australian Education Union was one of several organisations which advocated removal of the exemption in section 38.[36] The union noted that the exemption has been used to dismiss teachers who live in de-facto relationships; and to dismiss gay and lesbian teachers.[37]

7.33 The Collaborative submission argued that, as religious educational institutions are the recipients of public funds, they should not be permitted to discriminate on the grounds of sex:

> It is unacceptable for educational institutions conducted by religious organisations (the preponderance of private schools) to discriminate on the ground of sex in respect of either employment or education when such institutions are the recipients of significant public funding. It is noted that there has been an increase in the number of educational institutions conducted by fundamentalist religious bodies, which may espouse views antipathetic to the spirit of the SDA and CEDAW about the position of women and girls in contemporary Australian society. As a matter of public policy, it is inappropriate that any educational institution that is the beneficiary of public funding be permitted to discriminate on any of the legislatively proscribed grounds.[38]

7.34 The Independent Education Union of Australia was particularly critical of the breadth of the exemption in section 38 and argued that:

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34 *Committee Hansard*, 9 September 2008, p. 35.

35 *Committee Hansard*, 10 September 2008, pp 4-5. See also Ms Caroline Lambert, YWCA Australia, *Committee Hansard*, 11 September 2008, p. 60.

36 *Submission 17*, p. 8. See also Mr Angelo Gavrielatos, Australian Education Union , *Committee Hansard*, 10 September 2008, p. 65; YWCA, *Submission* 58, p. 6; Anti-Discrimination Commission Queensland, *Submission* 63, p. 5.

37 *Submission 17*, p. 8.

38 *Submission 60*, p. 36. See also Mr Angelo Gavrielatos, Australian Education Union , *Committee Hansard*, 10 September 2008, p. 65.

> People should not be required to forgo their ordinary human rights when they commence employment in religious schools.[39]

7.35 On the other hand, Christian Schools Australia and the Association of Independent Schools of South Australia argued that maintaining the exemption in section 38 is necessary to protect religious freedom.[40] The Chief Executive Officer of Christian Schools Australia Mr Stephen O'Doherty told the committee that:

> International covenants place a high priority on children having the freedom to be able to be brought up within the belief structure of their family. Australia is a signatory to those international covenants. In our view it would be a very sad day if an Australian government tipped the balance against the right of children and their parents to live freely and to be educated freely within the teachings of a religion, whether it be Christianity, the Islamic faith, Judaism, or the other religions that flourish in Australia.[41]

7.36 In addition, Mr O'Doherty clarified the scope of the exemption under section 38:

> The exemption that is offered to religious schools, the Christians schools that we represent, is very limited. It applies only to employment and to dismissal, that is, the act of employing somebody or the act, if necessary, of dismissing somebody. The submissions before you that talk about the broad nature of exemption and allowing Christian schools to discriminate against individuals in the daily course of events or in their employment are not true.
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> ...[I]t is not lawful for a Christian school to discriminate in relation to conditions of employment, to deny employees access, or to limit their access to promotion, transfer, training or any of those sorts of things that go to making up how a community works. The exemption applies only to employment and dismissal.[42]

7.37 Mr O'Doherty also explained that the exemption in section 38 is not relied upon to discriminate on the basis of sex or pregnancy:

> [T]he area of contention for Christian schools in employment matters is not to do with a person's sex, whether he or she is male or female, and it is not to do with whether or not persons are pregnant or otherwise. The real issue we are talking about ...is in the area of moral behaviour as it relates to the genuine requirement of a Christian school to employ people who can truly

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39 *Submission 49*, p. 7; *Submission 75*, pp 6-7.

40 *Submission 27*, pp 3-6. See also Mr Colin Clifford, Jubilee Christian College, *Submission 35*; Mr Donald Leys, Condell Park Christian School, *Submission 37*; Mr Ronald Christie, Associate Pastor, Condell Park Bible Church, *Submission 38*.

41 *Committee Hansard*, 9 September 2008, p. 50.

42 *Committee Hansard*, 9 September 2008, pp 47-48. See also p. 55.

> act in a way that is consistent with the beliefs that they are required to teach.[43]

7.38 Rather, Mr O'Doherty explained that it is the marital status of employees and potential employees which is of concern to Christian schools because of the moral teachings of churches relating to marriage.[44]

7.39 Finally, Mr O'Doherty responded to queries as to why it is necessary for the exemption to encompass not only teaching staff but also ancillary staff such as gardeners and cleaners:

> The reason for that breadth—it relates to teachers, administrators, as well as ancillary staff and so on—is because of a belief within our style of education, our pedagogical approach, that the entire community is responsible for sharing the faith, living by the faith, and therefore transmitting what is known as the informal curriculum to students, not just the printed words or the moral teaching but the reality of living by that moral teaching in day-to-day life.[45]

Drafting issues

7.40 The Anti-Discrimination Commissioner of Tasmania raised specific concerns regarding the drafting of sections 37 and 38. The Commissioner drew attention to the phrasing in subsection 37(d) and section 38 which allow discrimination where it is necessary "to avoid injury to the religious susceptibilities of adherents of that religion". The Commissioner considered that this phrasing was too broad because it may permit discrimination on the basis that an act will injure the religious susceptibilities of *some* adherents of a religion.[46]

7.41 The Ordination of Catholic Women was similarly critical of the drafting of section 37 arguing that "the provision is far broader than is necessary to avoid injury to the religious susceptibilities of any rational adherents of the Catholic religion."[47] The Ordination of Catholic Women noted that the Sex Discrimination Bill 1983, as originally drafted, referred to "the religious susceptibilities of *the* adherents of that religion" and submitted that:

> [T]here is a great difference between 'the adherents' in the early versions and 'adherents' in the final version, namely, the difference between the great bulk of adherents and any number more than one.[48]

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43 *Committee Hansard*, 9 September 2008, p. 48. See also p. 56.

44 *Committee Hansard*, 9 September 2008, p. 56. See also Association of Independent Schools of South Australia, *Submission 75*, p. 3.

45 *Committee Hansard*, 9 September 2008, p. 51.

46 *Submission 13*, p. 5. See also Ordination of Catholic Women, *Submission 9*, part 2 and UNIFEM *Submission 19*, p. 8.

47 *Submission 9*, part 2, p. 2.

48 *Submission 9*, part 2, p. 2.

7.42 On the other hand, Australian Christian Schools expressed concern that the existing drafting of section 38 may not be broad enough.[49] These concerns arose out of a decision of the New South Wales Administrative Decisions Tribunal in a case that considered the exemption for religious bodies under section 56 of the *Anti-Discrimination Act 1977 (NSW).* The case involved a refusal by the Wesley Mission to accept an application from a gay couple to become foster carers. In that case, the tribunal interpreted the particular religion as meaning Christianity and not the particular denomination operating the foster care service.[50] The committee notes however that section 56 of the *Anti-Discrimination Act 1977 (NSW)* refers to acts or practices that are necessary "to avoid injury to the religious susceptibilities of *the* adherents of that religion" and thus is drafted more narrowly than the section 38 of the Act.

7.43 UNIFEM Australia also argued that the exemptions for religious organisations are far too broad.[51] Miss Nikibin of UNIFEM submitted that at the very least the drafting of the provisions should be limited, proportionate and clearer and, in particular, section 38 should not include discrimination on the grounds of pregnancy or sex.[52]

7.44 The Independent Education Union submitted that section 38 should require that the discrimination be not just 'in good faith' but that it be reasonable in the circumstances:

> The concept of "good faith" is subjective, too wide ranging, [and] is a major exception to the application of the prohibitions otherwise imposed by the legislation.
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> The IEUA believe that it is imperative that, if there must be exemptions relating to the area of employment, they be clearly and narrowly articulated, [and] they incorporate concepts of "reasonableness" (not merely "good faith")...
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> [W]here exemptions do exist in legislation, they should not be open to interpretation which is so broad that they undermine the human rights which the legislation is intending to protect.[53]

7.45 The Independent Education Union further argued that: "Employees' private lives should remain private" and thus the exemption should relate only to an

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49 Mr Mark Spencer, Christian Schools Australia, *Committee Hansard*, 9 September 2008, pp 53-54; *Submission 27*, pp 6-7. See also Mr Colin Clifford, Jubilee Christian College, *Submission 35*.

50 *OV and anor* v *QZ and anor (No.2)* [2008] NSWADT 115 at 119.

51 Mrs Rosalind Strong, UNIFEM Australia, *Committee Hansard*, 11 September 2008, p. 42.

52 *Committee Hansard*, 9 September 2008, p. 43.

53 *Submission 49*, p. 8.

employee's conduct during a selection process, in the course of their work or in doing something connected with their employment.[54]

7.46 ALRC recommended removal of the exemption in section 38 in *Equality Before the Law* report. However, if the exemption was to be retained ALRC recommended:

> At the very least the exemption should be removed in relation to discrimination on the ground of sex and pregnancy. The exemption for discrimination on the ground of marital status, if it is to be retained, should be amended to require a test of reasonableness.[55]

Combat duties exemption

7.47 Section 43 of the Act permits discrimination against women on the grounds of sex, in relation to employment in the Australian Defence Force (ADF), in positions which involve the performance of combat duties. The Department of Defence noted that the restriction on women serving in *combat-related* roles was removed in 1995 and that:

> Most of the barriers to women being employed across a range of ADF job categories have been removed over the past 15 to 20 years. Many women are now serving in command positions and on military operations overseas, and more are reaching senior star-rank levels. Women are now eligible to serve in approximately 90 per cent of employment categories, up from 73 per cent in 2003.[56]

7.48 The Department also advised that the Royal Australian Air Force is currently examining the restriction on women entering ground combat roles.[57] The Department nevertheless argued for the retention of the combat roles exemption:

> Whilst Defence has been progressively broadening women's roles in the ADF, current policy still restricts the employment of women in some employment categories that involve or have the potential to involve direct combat duties. The s43 exemption provides Defence with the manning flexibility to meet current and emerging operational and capability requirements. Accordingly, the exemption is still required.[58]

7.49 There was some support for retention of this exemption from other organisations. For example, Mr James Wallace of the Australian Christian Lobby argued that the combat effectiveness of units such as special forces relies upon the exclusion of women:

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54 *Submission 49*, p. 8.

55 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, recommendation 3.11.

56 *Submission 74*, p. 2.

57 *Submission 74*, p. 3.

58 *Submission 74*, p. 2.

> [T]he combat effectiveness of those groups relies on morale, and morale—I am sorry to say, for all the feminists—relies on the mateship bond between these fellows. They will die for each other, and they all know it. As the Israelis found out in 1973, if you inject into that scenario one female or, I have to say, even two homosexuals and you suddenly have a love relationship, that breaks down the morale or the compact, if you like, between the members of that group and it definitely affects the combat capability of that group.[59]

7.50 However, several submissions supported removal of the exemption in section 43.[60] Mr Jyonah Jericho argued that the existing ban against women accessing combat roles and other roles in the ADF is unjust, unethical and unnecessary.[61] He submitted that:

> It is a myth that all women are not suitable for combat, just as it is a myth that all men are suitable for combat. Arguments about men and women's suitability for frontline military service are grounded in stereotypical assumptions about the psychological and physiological makeup of women and men. It is naïve and ignorant to believe all women possess petite bodies and pacifist mindsets. It is equally absurd to believe all men are athletic warriors...[62]

7.51 Mr Jericho also noted that the argument that integrating women into frontline combat roles would undermine the morale and the efficiency of combat units is similar to the arguments which were used to exclude minority groups from the ADF including homosexuals and Indigenous Australians. He submitted that: "There is no evidence that integrating minorities into the ADF has ever undermined the institutions' morale or productivity."[63]

Exemptions for voluntary bodies and sport

7.52 The exemptions for voluntary bodies (section 39) and for sport (section 42) were the subject of specific criticism. ALRC recommended removal of both these exemptions in the *Equality Before the Law* report endorsing a previous recommendation of the Sex Discrimination Commissioner.[64]

7.53 Section 39 provides for an exemption for 'voluntary bodies' from the prohibitions on discrimination in Division 1 and 2 of Part II, in connection with:

- the admission of persons as members; or

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59 *Committee Hansard*, 11 September 2008, p. 56. See also Endeavour Forum, *Submission 36*, p. 2.

60 See Jyonah Jericho, *Submission 2*; Non-Custodial Parents Party, *Submission 21*, p. 5; Dads on the Air, *Submission 6*, pp 8-9.

61 *Submission 2*, p. 1.

62 *Submission 2*, p. 3.

63 *Submission 2*, pp 7-8.

64 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, recommendation 3.13.

- the provision of benefits, facilities and services to members. [65]

7.54 This exemption does not apply to 'clubs' which are defined in section 4 as an association of not less than 30 persons, associated for social, literary, cultural, political, sporting, athletic or other purposes, that:

- provides and maintains its facilities, in whole or in part, from the funds of the association; and
- sells or supplies liquor for consumption on its premises. [66]

7.55 However, subsection 25(3) creates a specific exception to allow single sex 'clubs' to discriminate on the basis of sex in relation to applications for membership.

7.56 Several submissions recommended the repeal of section 39. For example, the Anti-Discrimination Commission Queensland argued that voluntary organisations should not be prioritised over the human rights goals of anti-discrimination law and strongly supported removal of the exemption in section 39.[67]

7.57 Miss Nikibin of UNIFEM Australia expressed particular concern about how broadly the exemption in section 39 is cast:

> Section 38 specifically outlines that a religious institution can discriminate based on marital status, sex or pregnancy if it is in accordance with its religious creed or beliefs, whereas section 39 does not limit this discrimination provided it is in accordance with the constitution of the volunteer body or the membership requirements. It simply states that it is not unlawful for a volunteer body to discriminate against a person on the ground of a person's sex, marital status, or pregnancy in the admission of persons as a member or in the provision of benefits.
>
> That leaves it quite broad, in that it enables a voluntary body to choose to discriminate on the basis of a person's marital status, even if it is taking both married and unmarried people within its organisation, but it chooses to discriminate against one person on that basis.[68]

7.58 Section 42 of the Act currently provides competitive sporting activities with an exemption, with respect to discrimination on the basis of sex, whenever the strength, stamina or physique of competitors is relevant. The Human Rights Law Centre argued that:

> This exemption results in the exclusion of women from sports competitions even if they have the skill and merit to compete with men. This exemption is incompatible with Australia's obligations under CEDAW to provide

65 HREOC, *Submission 69*, p. 174.

66 HREOC, *Submission 69*, p. 174.

67 *Submission 63*, p. 3. See also Anti-Discrimination Commissioner of Tasmania, *Submission 13*, pp 5-6; Human Rights Law Centre, *Submission 20*, pp 40-41; NACLC, *Submission 52*, p. 36.

68 *Committee Hansard*, 9 September 2008, p. 43. See also p. 45.

> women with the same opportunities to participate actively in sports and physical education...[69]

7.59 The exemption under section 42 does not apply to sporting activities involving children under 12 years of age. NACLC noted that section 42 is relied upon by some sporting bodies to prevent females from participating with males once they are over a particular age. NACLC gave the example of Australian rules football competitions prohibiting females from participating in male competition once they are over the age of 14.[70] NACLC submitted that factors such as merit, capability and strength can be used to determine participation in sport and that there is thus no justification for retaining the permanent exemption based on gender in section 42.[71] Ms Shirley Southgate of NACLC expanded on this argument in her evidence to the committee:

> [P]eople should play on merit and capacity. That should not necessarily be determined by an arbitrary age cut-off. For example, already in New South Wales older boys are allowed to play in under-age rugby teams because of their size and weight. That is where their ability sits them, and vice versa. Some youngsters at nine who are bigger than me probably ought to be playing in the under twelves. ...How do we put people in the appropriate place to play? What are the appropriate questions to ask? Sex is not the only question that would be appropriate in that sort of circumstance. What are their physical attributes and what is their capacity?[72]

Other permanent exemptions

7.60 A number of submissions recommended the removal of other specific exemptions. The permanent exemptions for accommodation provided for employees or students (section 34), charities (section 36), acts done under statutory authority (section 40) and superannuation fund conditions (sections 41A and 41B) were all the subject of criticism.[73]

7.61 In addition, HREOC argued that the 'exemptions' in sections 31 and 32 would be more accurately characterised as provisions which clarify that certain differential treatment is not discriminatory. The Sex Discrimination Commissioner explained that:

> Some permanent exemptions promote substantial gender equality by allowing for differential treatment. If we look at section 31 in the Act, it allows the granting of privileges in connection with pregnancy or

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69 *Submission 20*, p. 42.

70 *Submission 52*, p. 33.

71 *Submission 52*, pp 35-36.

72 *Committee Hansard*, 9 September 2008, p. 36.

73 Anti-Discrimination Commissioner of Tasmania, *Submission 13*, pp 5-6; Human Rights Law Centre, *Submission 20*, pp 5-6; Associate Professor Beth Gaze, *Submission 50*, p. 5; Anti-Discrimination Commission Queensland, *Submission 63*, pp 4-6.

> childbirth. For example, organisations can roll out paid maternity leave schemes, and that is not seen to be discriminatory under the Act.[74]

7.62 Similarly, section 32 exempts services which by their nature can only be provided to members of one sex. HREOC explained that:

> This section enables, for example, specialist services for amnio centisis, or for vasectomies, to address health needs which are unique to women, or to men. This section is also consistent with CEDAW and is not an exemption to the obligation to promote gender equality.[75]

7.63 HREOC recommended that these provisions should be removed from Part II Division 4 of the Act which deals with exemptions and instead be consolidated with section 7D which provides that temporary special measures are not discriminatory.[76]

Exemptions granted by HREOC

7.64 Some submissions argued that the power of HREOC to grant temporary exemptions under section 44 of the Act should be more limited. For example, NACLC argued that these exemptions should only be granted for periods of up to 12 months where the applicant "demonstrates that no other practicable or reasonable step, other than the exemption can be taken."[77]

7.65 Professor Thornton supported circumscribing section 44 by requiring that any exemption granted under that provision must promote the objects of the Act.[78]

7.66 HREOC advised that it has developed guidelines for the granting of temporary exemptions under the Act. Under those guidelines, HREOC does consider the objects of the Act when determining whether to grant an exemption.[79] Nevertheless, HREOC also supported an amendment to the Act to confirm that the power to grant exemptions should be exercised in accordance with the objects of the Act.[80]

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74 *Committee Hansard*, 9 September 2008, p. 21. See also Ms Shirley Southgate, NACLC, *Committee Hansard*, 9 September 2008, p. 34.

75 *Submission 69*, p. 158.

76 *Submission 69*, p. 159. See also Human Rights Law Centre, *Submission 20*, p. 30.

77 *Submission 52*, p. 38.

78 *Submission 22*, p. 7. See also Collaborative submission, *Submission 60*, p. 36.

79 *Submission 69*, p. 156.

80 *Submission 69*, p. 157.