

**Consolidation of Commonwealth  
Anti-Discrimination Laws**

Submission of  
The Boys' Brigade Queensland Limited

January 2012

**To:**

Assistant Secretary  
Human Rights Policy Branch  
Attorney-General's Department  
Robert Garran Offices  
3-5 National Circuit  
Barton ACT 2600

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This submission was prepared and authorised by the Board of Directors of *The Boys' Brigade Queensland Ltd*:

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in consultation with Christopher Mills, member.

## **SUMMARY**

As a general principle, and in line with its Christian foundations, *The Boys' Brigade Queensland Ltd* supports the concept that all Australians have a fundamental right to not be discriminated against based on any particular attribute and seeks to, within its various programs, ensure that members are not actively discriminated against.

Further, it holds that within the process of enshrining such non-discriminatory principles in legislation, such legislation should ensure that while properly and rightly trying to protect a part, or parts, of our society from unjustifiable discrimination, it does not actively discriminate against other parts of society (i.e. engage in reverse discrimination).

This submission makes the following observations:

1. The Commonwealth is bound by the Constitution not to interfere with the free exercise of religion;
2. Organisations such as The Boys' Brigade provide services which meet the religious needs, and cater for the fundamental civil rights, of certain persons who wish to practise religion;
3. The Boys' Brigade provides services for people of a particular gender and believes that this is a valid criteria for the provision of services and should be protected from claims of unlawful discrimination;
4. It is desirable for organisations to provide services on the basis of gender as this provides greater liberty overall;
5. A person's choices can be formed and influenced by their religious conscience, thus placing it beyond the power of the Commonwealth to enact principles to regulate the tensions between religious conscience and the law.

## INTRODUCTION

The directors of *The Boys' Brigade Queensland Ltd* (a company limited by guarantee operating in a non-profit capacity) ('BBQld') wishes to bring to the Attorney General's attention the particular and unique needs of BBQld, which, it submits, warrant protection.

It seems prudent to commence the body of this submission by outlining the international purpose of The Boys' Brigade, since its inception in 1883:

**“The Advancement of Christ's Kingdom among Boys and the promotion of habits of obedience, reverence, discipline, self respect and all that tends towards a true Christian manliness.”**

The Boys' Brigade movement has always considered that its core elements are expressed dually therein, in short The Boys' Brigade Queensland as part of the international movement exists:

1. For the advancement of Christ's Kingdom and the development of Christian men (the Christian religion); and
2. For the training and provision of developmental services to boys and young men.

It is further noteworthy that in Queensland, BBQld is complemented by its sister organisation, *The Girls' Brigade Queensland Inc.* ('GBQld'). Whilst BBQld does not propose to make submission on the behalf of GBQld, the Directors of BBQld have sufficient knowledge of GBQld's function to make the proposition that, in general terms, GBQld would experience similar effects to those discussed below. It is further noteworthy that GBQld provides equivalent services to girls that are similar to those that are provided by BBQld to boys.

On this basis, this submission shall be divided into two parts. The first part shall discuss the need for provisions in the proposed legislation that protect the rights of BBQld to act according to its religious conscience and the religious consciences of its members and component groups. The second submission made by BBQld is that, even in general terms and aside from the educational and religious context, the right of an organisation to define its association in terms of gender identity is valid.

## **BBQld and RELIGIOUS CONSCIENCE**

Prior to commencing a review of the needs of BBQld in respect of this field, it is important that the reader has a brief understanding of BBQld's structure. Aside from being a *company limited by guarantee*, BBQld is an umbrella organisation for individual BB groups operating within Queensland. These groups are operated by individual churches and are thus subject to the policies and procedures of each church and denomination. BBQld provides a structure and support in terms of overall policy, training and resourcing.

To further expand upon this, BBQld is a multi-denominational organisation that operates in most mainstream Christian denominations. BBQld accepts that its various member groups will act in accordance with their individual religious conscience.

### ***Religious Freedom***

BBQld refers to the Constitutional guarantee of free exercise of religion in accordance with s116 of the Constitution, notably:

“The Commonwealth shall not make any law... for prohibiting the free exercise of any religion...”

BBQld notes that there is a significant jurisprudential background as to the definition of s116, but notices principally that the courts have interpreted this section in such a way as to promote broad freedom of religious practices and beliefs.<sup>1</sup>

The key feature of BBQld is the provision of a program, which is grounded in religion. BBQld and its affiliated member groups find that one of the key reasons that parents wish to enrol their children in The Boys' Brigade is that it provides services which will promote the Christian religion to its members. Such service provision is impliedly protected by the *International Covenant on Civil and Political Rights* ('ICCPR'):

“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to 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.”

**“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.”<sup>2</sup>**

This provision applies equally to the other aspect of this submission, the provision of services, as such services flow from the religious convictions of parents and their children. The services which BBQld provides are services which fulfil a basic civil right - the right of a parent to decide in which way it is best to instil in their child whichever religious convictions that those parents decide is most appropriate. Importantly, such right is consistent with the approach taken by the court in child custody matters.<sup>3</sup>

*If BBQld is not entitled to act in accordance with its religious conscience by the provision of services, which promote the Christian religion generally, and ‘true Christian manliness’ specifically, the civil right which is enunciated by the ICCPR is effectively being denied to those to whom BBQld provides its services.*

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<sup>1</sup> Ratnapala, S. (2007) *Australian Constitutional Law*. Melbourne: Oxford University Press. At p 309

<sup>2</sup> Article 18

<sup>3</sup> *Evers v Evers* (1972) 19 FLR 296

## **BBQld and GENDER SPECIFIC SERVICES**

One of the fundamental premises of The Boys' Brigade is that boys learn and develop in a different manner to girls. The services provided by BBQld are for the benefit of individuals and families who hold a specific view of gender - that is, there is benefit to Boys in providing a single gender service. Whilst the position of BBQld is informed by a theological understanding that gender is a divine rather than a social construct, it is also submitted that there is considerable benefit to specifying the provision of service to boys. The reasoning behind this proposition is laid out as follows.

### ***BBQld's Method***

BBQld relies upon the foundational tenets of The Boys' Brigade as developed by the movement's founder, Sir William Alexander Smith. The primary tenet of this approach is that boys are given an environment where the 'distraction' and inhibiting nature of being in a dual-gender group is removed so that boys and young men are free to explore, discuss and engage in topics and activities that are of natural interest to them. The Girls' Brigade operates in the same way – in fact, if their program structure is examined, it covers all of the same developmental areas, but contains content and learning activities specific to the natural and societal needs of young women in Australian society.

BBQld does not operate for the unequal treatment of women - equal treatment of women is a fundamental principle which BBQld promotes to its members. Accordingly, it is submitted that by causing gender segregation to be unlawful, some boys and parents may suffer detriment.

It is argued that the *Yogyakarta Principles* operate in the same fashion:

“Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.”<sup>4</sup>

Though the Principles are not binding in any legal sense, and do not give rise to any power of the Commonwealth to legislate thereto, it must be noted that a just approach requires that persons who adopt a traditional view of masculinity must not suffer unequal treatment on the basis of that characteristic. Any prohibition on an organisation which services the needs of those who accept a traditional masculine identity is unjust and a denial of the rights of such people who wish to patronise BBQld.

Accordingly, it is submitted that a class of exemption or the like should be extended to associations, organisations or bodies corporate who extend or provide services to persons on the basis of their gender. It is acknowledged that a number of organisations are already available to provide services to peoples of diverse backgrounds. BBQld wishes to ensure that, while ensuring non-discrimination against traditionally disadvantaged groups, the reverse situation is not created whereby other groups become discriminated against through the operation of the legislation. International instruments and principles equally apply to any such 'reverse discrimination'.

Given the Constitutional immunity under s116 with respect to free exercise of religion, BBQld submits that the Commonwealth is not empowered to interfere with religious conscience, or to establish what it considers must be religious doctrine. A principled approach to equality is in order, but not at the expense of the fundamental human right and pre-eminent Constitutional immunity, which is freedom of religion.

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<sup>4</sup> Principle 2

### ***Anecdotal Evidence***

BBQld receives consistent feedback from leaders based within groups. Some such leaders have been involved with The Boys' Brigade for in excess of 40 years and are convinced as to the effectiveness of The Boys' Brigade method. Some receive direct feedback from parents and guardians of the children within groups. The most consistent feedback received from leaders and parents is such that the subject boy has displayed significant development in maturity and confidence, and has developed leadership skills. Such direct feedback received from parents and guardians of boys praises BBQld's approach, indicating that where boys have the opportunity to develop amongst other boys and with male leadership, their boys learn to become more confident in their masculinity and grow as leaders.

Likewise, direct feedback from boys includes that, in some of their most significant developmental experiences, they would not have been free to express themselves or take risks in a mixed gender group.

### ***Academic Support***

There is academic support from the field of education that suggests that, when boys are encouraged to engage in a diverse understanding of masculinity, boys develop a stronger sense of social justice. Studies done by Martin Mills and Amanda Keddie suggest that a hegemonic and unfairly discriminant construction of gender can be broken down and replaced by more socially just constructions by taking positive social constructs of masculinity, fostering the same in boys and establishing such confidence in those aspects as makes for socially equitable outcomes.<sup>5</sup>

For Mills and Keddie, the acceptance, recognition and appropriate encouragement of gender difference is the only path by which discriminatory and prejudicial treatment on grounds of sexual orientation or gender identity will be broken down. By encouraging confidence, and challenging boys on what masculinity is, equality and social justice comes to the fore. It must be acknowledged that the provision of such services to persons of a particular gender, rather than being constructed by discriminatory practices, is a positive step in breaking traditional prejudices.

An increasing number of schools have responded to concerns for gender equality through the provision of gender specific classes for some *Key Learning Areas*.

*The Boys' Brigade, as an organisation, must be entitled to provide services to those persons who desire a single gender program. Freedom of association is already a civil/political right as recognised at international level, and the right of persons of a particular identity to freedom of association is becoming recognised as such. The denial to allow an organisation to provide such services is a denial of civil and political rights of people to form associations or to access support or services. This civil/political right finds support in terms of the effect it has in reducing a polarised view on the grounds of gender-based service choices and must be protected by the Commonwealth.*

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<sup>5</sup> Mills, M. and A. Keddie. 'Teaching Boys & Gender Justice'. (2007) *International Journal of Inclusive Education* 11:3, 335-354 at page 349.

## **CONCLUSION**

The services provided by BBQld are significant on the two grounds outlined above. Such organisations are worthy of the protection of the Commonwealth on the grounds that the services provided are in pursuance of basic and fundamental human rights as well as internationally recognised civil and political rights and broader principles thereto. Furthermore, organisations such as BBQld provide much needed diversity and breadth with regard to societal engagement.

The 'power' and 'voice' provided by BBQld and similar organisations are a valid and valuable contribution to a federal society. An organisation that seeks to best understand and promote the needs and values of what could be termed as a 'traditional masculine gender identity' is a site of 'minority rule', leading to a more diverse society which fundamentally understands and values equality and freedom.

BBQld asks the Minister to appreciate the importance of the services it provides to boys and their families whilst considering the proper approach to constructing unlawful discrimination. It is submitted that limiting the freedom of BBQld, in this respect, will restrict diversity within society, and rather than resolve the current social problems relating to equality, serve to perpetuate them.

BBQld continues to support, through its close working relationship with GBQld, access to a similar wide range of opportunities and experiences for girls and young women.

It is submitted that a certain level of acceptable discrimination be preserved - not for the mandate of upholding social prejudices, but for the purpose of promoting a diversity and multiplicity of viewpoints and basis of 'minority rule' which will lead to a fairer, more tolerant society as well as the availability of services to which people ought to be entitled.