



KINGSFORD
LEGAL CENTRE

19 February 2015

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: freedoms@alrc.gov.au

Dear Madam/Sir,

Submission to the Australian Reform Commission Freedoms Inquiry

Kingsford Legal Centre ('KLC') welcomes the opportunity to provide a submission to the Australian Law Reform Commission's Inquiry into Traditional Rights and Freedoms – Encroachments by Commonwealth Laws.

Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas in Sydney since 1981. KLC provides general advice on a wide range of legal issues, and undertakes casework for clients, many of whom without our assistance would be unable to afford a lawyer. In 2014, KLC provided 1725 advices and opened 271 new cases.

KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

General comments

Although the Terms of Reference list important rights and freedoms, it is not an exhaustive list, as recognised by the inclusion of "any other similar legal right, freedom or privilege". KLC is concerned that the framework of "traditional rights and freedoms" excludes other significant rights and freedoms, including the right to freedom from discrimination, and imposes a false hierarchy of rights by implying that rights and freedoms which are

considered to be traditional take precedence over other recognised rights, such as social and economic rights.

Despite Australia's long engagement with the United Nations and the ratification of key international instruments protecting rights and freedoms, Australia falls short in the domestic enactment of these protections. Any consideration of rights and freedoms in Australia is complicated by the existing patchwork protection of rights and freedoms through a myriad of federal, state and territory laws, policies and practice, and the common law. Furthermore, Australia's protection of rights and freedoms will remain limited without adequate Constitutional protection and domestic enactment of the international obligations Australia has recognised through ratification of international instruments. We note that current constitutional protection of rights and freedoms is limited, and has been narrowly interpreted by the High Court.

KLC supports the enactment of a national Human Rights Act, to address the insufficient protection of rights and freedoms at the Commonwealth level. A national Human Rights Act would allow for clear articulation of rights and freedoms, and would better protect these rights and freedoms from being encroached by other Commonwealth legislation. Additionally, we note that there is broad support for a Human Rights Act. The National Human Rights Consultation found that the majority of those attending community roundtables favoured a Human Rights Act, and 87% of those who presented submissions to the Committee and expressed a view on the question supported such an Act.

Freedom of Speech

Question 2-1: What general principles or criteria should be applied to help determine whether a law that interferes with freedom of speech is justified?

Laws which interfere with freedom of speech are justified if they protect other important rights and freedoms, such as the right to be free from racial discrimination. KLC notes that the right to freedom of speech is not absolute, and may be subject to restrictions where necessary to protect the rights of others¹.

Australia is obliged under the *Universal Declaration of Human Rights (UDHR)*, the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* to ensure that no one is subjected to racial hatred.²

A cornerstone in Australia's commitment to the right to freedom from racial discrimination was the introduction of the *Racial Discrimination Act 1975 (Cth) ('RDA')*, and the subsequent amendment in 1995 which introduced section 18C following the recommendations of a

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3).

² *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 7; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signatures 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 1 & 4.

number of inquiries. Section 18C makes it unlawful for a person to publicly “offend, insult, humiliate or intimidate another person or a group of people” on the basis of their “race, colour or national or ethnic origin”.³ Under the *Australian Human Rights Commission Act 1986* (Cth), a person can make a complaint to the Australian Human Rights Commission if they believe they have been discriminated against in this way⁴.

Section 18C finely balances fair and accurate reporting and fair comment with discrimination protections. The ‘reasonably likely’ test provided for in 18C allows for an objective assessment to be made, and ensures that the threshold for racial vilification is appropriate. Courts have found that to be unlawful, the conduct complained of must have “profound and serious effects, not to be likened to mere slights”⁵.

Section 18D of the RDA provides adequate safeguards to protect freedom of speech by imposing a list of exemptions for ‘anything said or done reasonably and in good faith’. Australian Courts have consistently interpreted the provisions in the RDA in a fair and reasonable manner, and from a broader public interest perspective:

“section [18C(1)] is at least primarily directed to serve public and not private purposes... That suggests that the section is concerned with consequences it regards as more serious than mere personal hurt, harm or fear. It seems to me that s 18C is concerned with mischief that extends to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest and relevantly, the public’s interest in a socially cohesive society... Conformably with what I regard as the intent of Part IIA, a consequence which threatens the protection of the public interest sought to be protected by Part IIA, is a necessary element of the conduct s 18C is directed against. For the reasons that I have sought to explain, conduct which invades or harms the dignity of an individual or group, involves a public mischief in the context of an Act which seeks to promote social cohesion.”⁶

Section 18C of the RDA (and related provisions) only limit freedom of speech to the extent necessary to protect communities and individuals from the detrimental impact of racial vilification and therefore does not need to be amended. Section 18C strikes the appropriate balance between Australia’s international human rights obligations to protect freedom of speech and freedom from racial hatred.

Freedom of Religion

Question 3–1 What general principles or criteria should be applied to help determine whether a law that interferes with freedom of religion is justified?

A law which interferes with freedom of religion is justified if that law protects other important freedoms, such as the right to be free from unlawful discrimination. Freedom of religion is not absolute. It needs to be balanced against freedom from discrimination on the basis of gender and sexual orientation.

³ Racial Discrimination Act 1975 (Cth) s 18C.

⁴ *Australian Human Rights Commission Act 1986* (Cth) s 11.

⁵ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 16.

⁶ *Eatock v Bolt* [2011] FCA 1103, 263, 267.

The *Sex Discrimination Act 1984* (Cth) ('SDA') currently permits educational institutions "that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed" to discriminate against a person on the basis of their "sex, sexual orientation, gender identity, marital or relationship status or pregnancy", if this is done "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed".⁷

This exemption from sex discrimination law permits discrimination in connection with employment, contract work and the provision of education and training.

As it currently stands, this exemption undermines the rights of people already subject to discrimination, such as women, gay and lesbian persons, and sanctions discriminatory behaviour which would not be tolerated elsewhere. It allows for the right of freedom of religion to prevail over other rights afforded to those individuals by international human rights law, such as the right to live free from discrimination.

Religious education institutions are a significant employer in Australia. For example, the Catholic Education Office employs more than 9,000 people in the Sydney Archdiocese,⁸ while the Sydney Anglican School Corporation employs nearly 2,000 staff.⁹ The employment practices of organisations such as these have a significant impact on the ability of people, including women, gay and lesbian persons, to find and remain in work and it is unacceptable that they not be subject to the same laws as other significant employers.

The right to live free from discrimination is provided for in international human rights law. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) states that:

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights [...].¹⁰

It is unacceptable that the Australian Government, a Party to CEDAW, provides significant public funding to institutions which are permitted by law to discriminate against its employees on the basis of sex.

On the other hand, KLC notes that freedom of religion is currently insufficiently protected at the federal level in anti-discrimination law. There is currently no protection against discrimination on the basis of religion, with the exception of employment¹¹. Furthermore, racial vilification protections do not extend to situations where a complainant is vilified on the basis of their religion, but this cannot be linked to their race. For example, recognised

⁷ *Sex Discrimination Act 1984* (Cth) s 38.

⁸ Catholic Education Office, *Employment* (2015) <<http://www.ceosyd.catholic.edu.au/Employment/Pages/Home.aspx>> accessed 29 January 2015.

⁹ Sydney Anglican School Corporation, *Annual Report 2014*, p 8.

¹⁰ *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 11.

¹¹ *Fair Work Act 2009* (Cth) s 351.

ethnoreligious groups would be protected against vilification under the current racial vilification laws, but complainants not from recognised ethno-religious groups would have difficulty succeeding in a racial vilification complaint. KLC recommends that to adequately protect the right to freedom of religion, federal legislation be enacted to make religion a protected attribute in all areas of public life, and religious vilification be made unlawful.

Freedom of Association

What general principles or criteria should be applied to help determine whether a law that interferes with freedom of association is justified?

The workplace right to freedom of association protects the right to form and join associations to pursue common goals in the workplace, helping to correct the significant power imbalance between employees and employers. This principle has been a long-standing and beneficial feature of Australian labour law. Without such protections, the ability of employees to bargain with their employer in their collective interest is greatly reduced.

Australia is a signatory to a number of international conventions, including the ICCPR¹², Freedom of Association and Protection of the Right to Organise Convention¹³ and the Right to Organisation and Collective Bargaining Convention¹⁴ that protect the right to freedom of association in the workplace, and legislators should endeavour to ensure this is reflected in domestic law.

We submit that the current protections for freedom of association in the workplace are integral and that any repeal of these legislative protections or the introduction of laws that interfere with these protections would not be justified.

What Commonwealth Laws unjustifiably interfere with freedom of association, and why are these laws unjustified?

The Kingsford Legal Centre supports the provisions of the *Fair Work Act 2009* (Cth)¹⁵ that protect the right of individual employees to organise, and importantly, also to refuse to do so if they choose.

The *Fair Work Act* protects freedom of association in the workplace by ensuring that persons are free to become, or not become members of industrial associations, and are free to be represented, or not be represented, by industrial associations, and are free to participate, or not participate, in lawful industrial activities.

¹² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 22.

¹³ *Freedom of Association and Protection of the Right to Organise Convention 1948*, opened for signature 1948, 68 UNTS 17 (entered into force generally 4 July 1950; entered into force for Australia 28 February 1973) art 2.

¹⁴ *Right to Organisation and Collective Bargaining Convention 1949*, opened for signature 1 July 1949, 96 UNTS 257 (entered into force generally 18 July 1951; entered into force for Australia 28 February 1973) art 1.

¹⁵ *Fair Work Act 2009* (Cth) s 336.

The *Fair Work (Registered Organisations) Act* is also important as it enables industrial organisations to apply to the Fair Work Commission for registration under the *Fair Work Act*.

Furthermore, the *Fair Work Act* also contains a number of General Protections which protect employees from adverse action taken in response to them exercising or proposing to exercise a workplace right or engaging or proposing to engage in lawful industrial activity. This includes both participation and non-participation in industrial activity¹⁶.

Kingsford Legal Centre also supports the penalties which may be imposed under the *Fair Work Act* for employers breaching general protections, including the freedom of employees to associate in the workplace. These are granting a final injunction to stop or remedy the effects of the contravention, payment of a pecuniary penalty (in the amount of \$10,200 for Directors or \$51,000 for companies), awarding compensation, an order for reinstatement and any other order the court considers appropriate.

Burden of Proof

What general principles or criteria should be applied to help determine whether a law that reverses or shifts the burden of proof is justified?

In the employee-employer relationship, an unequal balance of power exists. The nature of this relationship requires the burden of proof to be shifted in employment law onto the respondent party to ensure a more equitable resolution of workplace disputes. When determining whether a law unjustifiably shifts the burden of proof, the resources and information available to both parties in the dispute should be considered.

Which Commonwealth laws unjustifiably reverse or shift the burden of proof, and why are these laws unjustified?

The reverse burden of proof is currently a feature of s361 of the *Fair Work Act 2009* (Cth). Once an employee or prospective employee alleges that they were subject to adverse action, it is presumed that the adverse action was taken for a prohibited reason unless the employer proves otherwise. The burden is on the employer to rebut this assumption by submitting evidence that the operative reason behind the adverse action is not one of the prohibited grounds. This strikes a fair balance as evidence as to the state of mind of the employer when they engaged in the action complained of will not easily be accessible to the employee.

We note that the reverse burden does not pose an unfair advantage for employees as employees are still required to present their case with sufficient clarity, as the motivation for adverse action must be clearly alleged and particularised¹⁷. Additionally, the evidentiary burden placed on employers is reasonable, and may be discharged by providing evidence of an alternative (not prohibited) reason for the adverse action alleged¹⁸.

¹⁷ *Fox v Stowe Australia Pty Ltd* (2012) 271 FLR 372, 27.

¹⁸ See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, where the High Court held that to discharge the reverse onus and remove the presumption the employer had

The Kingsford Legal Centre believes that any changes to this area of law will create an unfair burden on employee applicants, who are often out-resourced by the employers. In many cases the information relating to the reason why the employee was subject to the adverse action alleged is “peculiarly” within the knowledge of the employers. In the absence of these provisions, it is difficult for employees to gather sufficient evidence to establish that an employer acted for unlawful reasons. The reverse burden of proof does not pose an unfair advantage for employees in workplace disputes, but rather addresses this imbalance.

Procedural Fairness

14.2 Which commonwealth laws unjustifiably deny procedural fairness, and why are these laws unjustified?

New laws passed by the Australian Parliament unjustifiably deny procedural fairness to visa holders with a substantial criminal record. On 24 November 2014 the Australian Parliament passed the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

The changes introduce mandatory cancellation of visas and limit administrative review of decisions to cancel visas.

Visa Cancellation provisions prior to the amendments

Prior to the amendments, the decision to cancel a visa on character grounds was discretionary and reviewable. Section 501 of the *Migration Act 1958* provided that:

The Minister **may** cancel a visa that has been granted to a person if the Minister reasonably suspects that the person does not pass the character test and the person does not satisfy the Minister that the person passes the character test.¹⁹ [emphasis added]

The section stated that a person does not pass the character test if the person has *inter alia* a “substantial criminal record”, which was defined in subsection (7).²⁰

The previous Ministerial Direction No. 55 (now revoked) made under section 499, specified that in exercising discretion to cancel a person’s visa, the decision maker must consider a variety of factors. These factors included the strength, duration and nature of the person’s ties to Australia, the best interests of minor children in Australia and the protection of the Australian community.

acted for a prohibited reason, it was sufficient for the employer to provide evidence of an alternative reason for the adverse action alleged.

¹⁹ *Migration Act 1958* (Cth) s 501(3), later amended by *Migration Amendment (Character and General Visa Cancellation) Act 2014*.

²⁰ *Migration Act 1958* (Cth) s 501(6)(a), later amended by *Migration Amendment (Character and General Visa Cancellation) Act 2014*.

If a person's visa was cancelled on character grounds, section 500 provided that the decision of the Minister to cancel a visa on character grounds may be reviewed on application to the Administrative Appeals Tribunal.²¹

Changes to the Act

The amendments to the *Migration Act 1958* (Cth) have removed both the Minister's discretion to cancel a visa on character grounds where there is a substantial criminal record (it is now mandatory for the Minister to cancel the visa), and the right to apply for review of a decision if a visa is cancelled personally by the Minister. Section 501 has a new subsection (3A), which reads:

The Minister **must** cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test because of the operation of ...substantial criminal record or...sexually based offences involving a child.²²
[emphasis added]

The amendments expand the power of the Minister to cancel a visa by lowering the threshold for a substantial criminal record which was previously 2 years or more of imprisonment to only 12 months or more imprisonment.

Section 501BA of the Act gives the Minister the power to set aside a decision made by the Administrative Appeals Tribunal or a delegate to revoke a decision to cancel a visa under section 501(3A). The Minister is empowered to substitute a decision to cancel the visa. These powers are not subject to merits review and the rules of national justice do not apply. Unless the Minister delegates the power under subsections 501(1) and (2), there is no merits review available.

These amendments to the *Migration Act 1958* (Cth) unjustifiably interfere with the right to procedural fairness. Previously, the Minister's discretion afforded procedural fairness to the visa holder by ensuring that the decision was made in light of the relevant factors. The process is now automatic and applies to all regardless of the circumstances of their particular situation. In removing of the Minister's discretion to consider these factors, the person's whose visa is to be cancelled is denied due process. The provision precludes the circumstances of the individual from being taken into account. This, coupled with an expansion of the Minister's personal, non-merits reviewable powers under the Act result in a lack of transparency and accountability in decision making.

It is acknowledged that encroachments upon procedural fairness may be justified where 'urgent action' is needed to prevent 'greater harm.' The explanatory memorandum for the Bill offers no compelling reason that justifies the denial of procedural fairness in this circumstance. Additionally, under the previous legislation, the Minister had the power to prevent a greater harm by deciding to cancel a person's visa. Where cancellation is mandatory and there is no scope to review those decisions, this encroachment upon procedural fairness creates broad territory for injustice.

²¹ *Migration Act 1958* (Cth) s 500, later amended by *Migration Amendment (Character and General Visa Cancellation) Act 2014*.

²² *Migration Act 1958* (Cth) s 501(3A).

The automatic cancellation of a person's visa on the grounds of a substantial criminal record risks grossly unfair outcomes for an individual – and their families – who have no recourse to review. There is no justification for these measures, especially where the previous measures had already empowered the Minister to cancel a person's visa on the grounds of substantial criminal record.

Furthermore, these amendments effectively impose an additional punishment upon persons who have already been sentenced by the Courts, by providing for their deportation when their sentences have been served.

KLC has experience in providing advice to people who have had, or are at risk of having, their visa cancelled. Many of these people are vulnerable and the causes of their offending are often complex. Additionally, the effects of visa cancellation can result in separation of the family unit and reduced rehabilitation and employment prospects for individuals who are deported to countries which they often have no links to.

Please contact us on (02) 9385 9566 if you would like to discuss our submission further.

Yours faithfully,
KINGSFORD LEGAL CENTRE



Emma Colledge
Acting Director



Katherine Boyle
Solicitor



Maria Nawaz
Solicitor

Vern Lim
Anneliese Oldcastle
Student Law Clerks