



31 October 2014

Tim Wilson
Human Rights Commissioner
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2000

By email: rights2014@humanrights.gov.au

**KINGSFORD
LEGAL CENTRE**

Dear Human Rights Commissioner,

Consultation into people's human rights and freedoms in Australia

Kingsford Legal Centre (KLC) welcomes the opportunity to provide a submission on the consultation about how effectively we protect people's human rights and freedoms in Australia.

This submission addresses:

- the need for a national Human Rights Act;
- our support for stronger and consolidated discrimination laws;
- our concerns about the freedom of speech implications of the recent changes to Community Legal Centre funding agreements to prevent using Commonwealth funding to undertake law reform and advocacy;
- our support for the current s 18C of the *Racial Discrimination Act 1975* (Cth);
- the need for protection from religious discrimination;
- our view that existing exemptions and exceptions under anti-discrimination legislation for religious organisations undermine the effectiveness of anti-discrimination legislation;
- our support for the role of the *Fair Work Act 2009* (Cth) and the *Fair Work (Registered Organisations) Act 2009* (Cth) in protecting the right to freedom of association in the Australian workplace; and
- our concern about the implications of NSW consorting provisions for the right to freedom of association.

All case studies used have been de-identified to protect our clients' confidentiality.

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 since 1981. KLC provides general advice on a wide range of legal issues, including matters regarding human rights and freedom, and undertakes casework for clients, many of whom were discriminated against, or unfairly dismissed.

KLC 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.

An overview of rights protection in Australia

Broader focus on other rights and freedoms

The consultation paper recognises that human rights are universal, and affect ‘everyone, everywhere, everyday’ but only focuses on four particular freedoms, namely:

1. Freedom of opinion or expression
2. Freedom of thought, conscience or religious worship
3. Freedom of Association or peaceful assembly
4. Freedom from arbitrary detention

These freedoms are only a subset of the fundamental human rights that are identified in international documents such as the 1948 *Universal Declaration of Human Rights*. We are of the opinion that inherent dignity and the equal and inalienable rights of all members of the human family can only be preserved by upholding human rights as a whole. Therefore, we are disappointed that the focus of Rights and Responsibilities 2014 is not broader, and does not include other freedoms such as the right to equality and non-discrimination, right to self-determination, right to freedom from arbitrary detention, fair trial and fair hearing rights, right to marry, right to take part in public affairs such as voting.

Promoting freedoms in a national Human Rights Act

KLC believes that the culture of respect for rights and responsibilities would be fostered by enacting a national Human Rights Act. Currently, human rights in Australia are protected through a myriad of federal, state and territory laws, policies and practice, and the common law. We are concerned that the current structure of the law makes it difficult for ordinary Australians to identify their rights and freedoms, and the extent to which their freedoms are recognised at law. The complex interactions of the various sources of law also make it difficult to articulate the law concisely. This hinders the promotion of respect for these rights and responsibilities. KLC believes that it would assist ordinary Australians’ understanding of their rights and responsibilities to set these out in one single document. By allowing all Australians to understand their freedoms, they would be more active in discussing their rights and responsibilities.

Moreover, the current approach of the Australian law is a bottom-up approach to address the protection of each right individually. We believe that this creates too many grey areas and gaps. Enacting a national Human Rights Act would allow a more concise classification of human rights and freedoms that would better protect rights and freedoms.

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.

Parliamentary Joint Committee on Scrutiny of Human Rights is not sufficient

We appreciate the efforts of the Joint Parliamentary Committee on Human Rights in examining legislative instruments for compatibility with human rights. However, in spite of their efforts, we observe that Joint Committee’s concerns are rarely addressed in Parliamentary debates, and their recommendations are seldom followed in the enacted legislation. We believe that the Parliament should be more attentive to the human rights implications of legislations. In addition, we believe the problems identified with the impact of the Joint Committee highlight the need for a national Human Rights Act to improve legislative protection of human rights in Australia.

Consolidating and strengthening discrimination laws

We also believe that there is a need to consolidate and strengthen the Commonwealth discrimination laws. We believe that anti-discrimination laws need to be enhanced to fully enshrine Australia's international human rights obligations into domestic law and to promote substantive equality. We are disappointed that the substantial work of government and non-government organisations on this area of law did not result in broader discrimination law reform. The work already undertaken provides a significant opportunity to modernise, improve and simplify the anti-discrimination regime, and to address gaps in the current system.

Freedom of speech and expression

Funding restrictions on community legal centres' involvement in law reform and policy advocacy restrain the freedom of speech and expression

Due to recent changes to funding agreements, community legal centres and other legal assistance providers are prevented from using Commonwealth funding to undertake law reform and policy advocacy work. We believe that the changes are short-sighted and curtail more broadly, the freedom of civil society to express their views on government policies. We believe that it affects people's capacity to speak freely of laws and policies that impact on access to justice and other matters impacting disadvantaged Australians.

Policy and law reform activities respond to an identified need in the community by being grounded in case work.¹ The ability of community legal centres to openly communicate their views on policies and law reform matters creates an increase in 'efficiency of service delivery and access to justice through addressing systemic issues affecting large numbers of people'.² This shows the crucial nature of law reform work. By being able to submit law reform issues, community legal centres will be able to reduce the number of people requiring frontline legal services. Such work can simultaneously 'reduce pressure on casework that remains chronically underfunded at State and Federal level'.³

Generally, the work performed in frontline legal services does not address underlying problems in society or legal system itself.⁴ A report commissioned by the Financial Rights Legal Centre and CLCNSW gave an example that 'better access to the courts because of free legal representation does not help a client whose legal problem is not recognised by the law. If CLCs do not advocate for systemic changes, it has been argued that they are "simply assist[ing] an unjust system to process the cases which are put before it".⁵

Community legal centres are in a position to identify systemic issues that affects many of the more disadvantaged Australians, due to the makeup of their client base.⁶ KLC considers this role of amplifying the experiences and voices of disadvantaged groups, including Aboriginal and Torres Strait Islander and Australians with disability, to be of the utmost importance.

¹ Judith Stubbs, 'Adding Public Value, The Integration of Frontline Services and Law Reform in the NSW Community Legal Sector' (Report for Financial Rights Legal Centre and Community Legal Centres NSW, Judith Stubbs, 4 August 2014), 5.

² Ibid 6.

³ Carolyn Bond, *Community legal centres challenged to weather the storm of funding cuts and advocacy restrictions* (29 September 2014) Power to Persuade <<http://powertopersuade.org.au/2014/09/29/community-legal-centres-challenged-to-weather-the-storm-of-funding-cuts-and-advocacy-restrictions/>>.

⁴ Nicole Rich, 'Reclaiming CLCS: Maximising our potential so we can help our clients realize theirs' (Consumer Action Law Centre and Victoria Law Foundation, 2009) 13.

⁵ Ibid; Stubbs, above n 1, 8.

⁶ Stubbs, above n 1, 6.

Stopping support for law reform and advocacy will only seek to entrench the inequities suffered by many pockets in the Australian community. In some cases, community legal centres' work also captures the view of a very wide cross section of the Australian community, such as the Mortgage Fee Exit Ban and Retirement Village consumer reforms.⁷ Therefore, the ability to perform law reform work has a significant importance since it can create long lasting and widespread impacts.

Support for existing section 18C of *Racial Discrimination Act*

KLC believes that the *Racial Discrimination Act* strikes an appropriate balance between the right to freedom of speech and right to freedom from racial vilification, and should not be amended. We support the government's decision to not progress its previously proposed amendment to section 18C.

Article 19 of the *International Covenant on Civil and Political Rights* (ICCPR) requires Australia to protect freedom of speech however it also recognises that the right to freedom of speech is subject to limitations:

2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - a. *For respect of the rights or reputations of others...*

Australia is obliged under the *Universal Declaration of Human Rights* (UDHR), the 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.⁸ Section 18C 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. Furthermore, the use of section 18C is extremely limited, and there is no evidence that section 18C, as it currently stands, operates as any real limit of free speech. This is significant as the *Racial Discrimination Act* has been Australian law for over three decades.

In KLC's experience as a discrimination practice that undertakes significant work in the area of racial discrimination, section 18C is rarely used by people who have experienced vilification or discrimination. This is because section 18C already places significant limits on the type of speech that is actionable.

Peter

Peter is an elderly Aboriginal man. He was photographed without his consent while going for his daily walk down to the shops. This photo appeared in a magazine article that attributed high crime rates to Aboriginal people. We advised Louis that he could make a racial vilification complaint to the Australian Human Rights Commission, however he ultimately chose to pursue a defamation complaint because the burden of proving racial vilification was too high.

⁷ Ibid.

⁸ UDHR Article 7, ICCPR Article 26, ICERD Articles 1 and 4.

In addition to section 18C, there is a long history through the law of balancing the right to free speech with other rights. For example, in defamation law the right to free speech is balanced with the right to reputation; and criminal laws also limit freedom of speech by prohibiting the use of offensive language in or near a public place or school.⁹ This is always a balancing act of rights and responsibilities, one which is subject to community debate. While we welcome debate about Australia's protection of human rights, we believe that the debate around section 18C was not been balanced in articulating the impact of the Act on free speech, and ignored the ways in which free speech protections can be enhanced while retaining the current provisions.

Freedom of thought, conscience or religious worship

Need for protection from religious discrimination, vilification and harassment

Federal legislation does not effectively prohibit discrimination on the ground of religion. The *Australian Human Rights Commission Act 1986* (Cth) only protects against religious discrimination if it has the effect of impairing equality of opportunity or treatment in employment or occupation.¹⁰ Moreover, there are no enforceable remedies for this.

KLC believes that religious belief and activity should be a fully protected attribute in Commonwealth discrimination law. This would ensure that the right to freedom of religion is adequately protected.

Ali

Ali is a young Muslim man in prison. He was given external leave to undertake studies at an educational institution. At the educational institution, Ali regularly prayed in outdoor areas. He was told that he was not allowed to pray there. When he continued to pray, Ali's education leave was cancelled and he was not allowed to continue his studies. This caused significant distress to Ali and his family. We advised Ali that we did not feel that he would be able to successfully make a discrimination complaint, as the law does not protect a person from discrimination on the basis of their religion.

Jake

Jake is a student at a Catholic high school. He believes that he is being treated unfairly because he is not Catholic. Jake was not allowed to attend overseas trips with school, and his nomination for the Student Representative Council was removed by the school. We advised Jake that a discrimination complaint would be unlikely to succeed, as religion is not a protected attribute in discrimination law.

The law should also be amended to prohibit vilification and harassment on the ground of religion, in order to protect people from harm and distress caused by religious hatred. In particular, Muslims in Australia have suffered significant vilification and harassment in recent times, with little legal remedy available.

Need to remove exemptions for religious organisations in discrimination law

Permanent exemptions from Commonwealth discrimination law currently exist for religious organisations with regards to the protected attributes of age, sex, sexual orientation, gender

¹⁰ *Australian Human Rights Commission Act 1986* (Cth) s 3(1).

identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities. The exemptions permit religious organisations to discriminate against individuals where it is necessary to avoid injury to the sensitivities or susceptibilities of the adherents of a religion.¹¹

KLC believes that the existing exemptions for religious organisations should be removed. The exemptions compromise the rights of vulnerable groups who already suffer discrimination. The current law allows the right to freedom of religion to prevail over other rights which people have under international human rights law, including the right to live free from discrimination.

A vast range of social and welfare services are managed by faith-based organisations. These services include education, health services, adoption services, and child welfare and employment assistance. The exemptions are particularly concerning for organisations which receive government funding for the provision of essential goods and services.

1,127,014 students attended non-government schools in 2009, and 90% of these students were in religious schools.¹² In 2009, approximately \$6.3 billion in government funding was allocated to non-government schools.¹³ By allowing publically funded organisations to discriminate against certain groups, the Government sends a message that discrimination is acceptable in our community. This has the effect of entrenching systemic discrimination against vulnerable groups in our society.

KLC believes that one fundamental right should not be automatically privileged above others by the granting of a permanent blanket exception. Removing religious exemptions and introducing religion as a protected attribute ensures that freedom of religion is not privileged over and above the other rights but is still adequately protected.

KLC also supports removing all permanent exemptions and instead introducing a general limitation clause that deems discriminatory actions or conduct to be lawful when they are a reasonable, necessary and proportionate means of achieving a legitimate aim. Such a clause would allow a more thorough examination of human rights in conflict and consideration of how they might be balanced. KLC's support for a general limitations clause is subject to the following conditions:

- the general limitations clause must replace all current exemptions;
- the general limitations clause should not apply to the protected attribute of race;
- the judiciary must be required to consider the relevant Act's objectives when determining the application of the general limitations clause;
- the judiciary determining discrimination complaints must have specialist training and knowledge of beneficial nature of discrimination law;
- AHRC have the power to initiate discrimination complaints;
- organisations must be able to initiate representative complaints; and
- the defence of unjustifiable hardship must be a separate provision, distinct from a general limitations clause.

¹¹ *Age Discrimination Act 2004* (Cth) s 35; *Sex Discrimination Act 1984* (Cth) ss 37, 38.

¹² Centre for Independent Studies, Jennifer Buckingham, *The Rise of Religious Schools*, 2010 at page 3 (<http://www.cis.org.au/images/stories/policy-monographs/pm-111.pdf>).

¹³ Department of Education, Employment and Workplace Relations, *Financial Assistance Provided to Each State in respect of 2009, 2010* <<http://www.deewr.gov.au/Schooling/RecurrentGrants/NonGovSchools/Documents/GreenReport09.pdf>>.

Freedom of Association

KLC supports the provisions under the *Fair Work Act 2009* (Cth) and the *Fair Work (Registered Organisations) Act 2009* (Cth) that protect the right of individual employees to freedom of association in the workplace. The workplace right to freedom of association protects the right to form and join associations to pursue common goals in the workplace.

International Labour Organisation obligations

Australia was a founding member of the International Labour Organisation (ILO). The principle of freedom of association is at the core of the ILO's values. It is based on the belief that 'the right to organise and form employers' and workers' organisations is the prerequisite for sound collective bargaining and social dialogue'.¹⁴

A number of international conventions are particularly significant to Australian law in relation to the freedom of association. As a signatory of the *Freedom of Association and Protection of the Right to Organise Convention* 1948, Australia has an obligation to ensure that workers' and employers' organisations are able to organize freely and not be liable to be dissolved or suspended by an administrative authority. Furthermore, under the *Right to Organisation and Collective Bargaining Convention* 1949, employees are protected from acts of anti-union discrimination, including requirements that a worker not join a union or relinquish trade union membership for employment, or dismissal of a worker because of union membership or participation in union activities.

Fair Work Act 2009 (Cth) and *Fair Work (Registered Organisations) Act 2009* (Cth)

KLC is supportive of the role that both the *Fair Work Act 2009* (Cth) and the *Fair Work (Registered Organisations) Act 2009* (Cth) play in protecting the right to freedom of association in the Australian workplace. The entrenchment of this workplace right is also integral to Australia continuing to uphold our international obligations in regards to freedom of association, especially Article 22 of the *International Covenant on Civil and Political Rights*, which provides that everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of their interests.

KLC acknowledges the importance of the *Fair Work Act 2009*, which 'protects freedom of association in the workplace by ensuring that persons are free to become, or not become, members of industrial associations, are free to be represented, or not represented, by industrial associations, and are free to participate, or not participate, in lawful industrial activities'.¹⁵ We submit that the Australian Human Rights Commission should continue to work to ensure that freedom of association in the workplace is protected under Australian law.

The *Fair Work (Registered Organisations) Act 2009* is important as it enables industrial organisations to apply to the FWC for registration under the Act.

The *Fair Work Act* also contains a number of General Protections,¹⁶ which protect employees from adverse action based on actions they may take in 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 activity. These General

¹⁴ International Labour Standards on Freedom of Association, *International Labour Organization*, retrieved from <http://ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/lang--en/index.htm>

¹⁵ *Fair Work Act 2009* (Cth) s336

¹⁶ Particularly *Fair Work Act 2009* (Cth) s346

Protections have a reverse onus of proof, which means that the employer's conduct is assumed to have occurred for a prohibited reason unless they can prove to the court on the balance of probabilities that their reason for taking the action did not include any prohibited reason. The law in regards to industrial associations was interpreted in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd*.¹⁷ It was held that it is necessary to look to the 'true motivations' of the employer in taking the adverse action.

KLC supports the penalties which may be imposed under the *Fair Work Act* for employers breaching general protections. 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 and \$51,000 for companies), awarding compensation, an order for reinstatement and any other order the court considers appropriate. The courts are also empowered to issue interlocutory injunctions.

Consorting Offences

The right to freedom of association in Australia has been challenged recently by the introduction of new consorting offences into a number of Australian jurisdictions. KLC believes that consorting provisions place an unnecessary restraint on individual civil liberties, and entrench discrimination against those who are already vulnerable to the criminal justice system. As a tool which is used to combat organised crime, the usefulness of consorting offences is outweighed by the detrimental impact they have when used against vulnerable and disadvantaged people who are not necessarily involved in organised crime.

Consorting provisions were introduced in NSW on 9 April 2012 as part of a package of reforms designed to 'combat organised crime in further support of police in their war on drive-by shootings'¹⁸. KLC believes that the new consorting provisions contained in Division 7, Part 3A of the *Crimes Act 1900* (NSW) are too broad. The breadth of the provisions allows police to issue warnings and charge people using public spaces with consorting, with little or no evidence that they are involved in organised criminal activity, subverting the original intention of the provisions.

Targeting 'convicted offenders' for consorting, without needing to demonstrate that they are involved in organised crime, has the effect of entrenching discrimination against people who are already marginalised in our communities due to their interaction with the criminal justice system, as well as criminalising people who have not had any prior interaction with the criminal justice system. This can have a disproportionate impact on Aboriginal and Torres Strait Islander people, as roughly 30% of Aboriginal and Torres Strait Islander people have been convicted of an indictable offence over the past 10 years, compared to roughly 3.5% of the wider population.¹⁹ Additionally, social and kinship relations make Aboriginal and Torres Strait Islander people more likely to be in contact with other members of their community, and to make avoidance of members of their community more difficult.²⁰

¹⁷ *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2013] FCAFC 132

¹⁸ The Hon. Barry O'Farrell MP (Premier of NSW), *New Laws to Tackle Drive-by Shootings*, media release, NSW Government, Ministry for Police and Emergency Services, Sydney, 13 February 2012, in NSW Ombudsman, "Consorting Issues paper: Review of the use of the consorting provisions by the NSW Police Force" November 2013, 1.

¹⁹ New South Wales Ombudsman, *Consorting Issues Paper*, November 2013

²⁰ The Law Society of New South Wales, *NSW Ombudsman Consorting Issues Paper – Review of the use of the consorting provisions by the NSW Police Force*, 26 March 2014

Please call us on (02) 9385 9566 if you would like to discuss our submission further. We look forward to attending a Sydney consultation forum.

Yours faithfully,
KINGSFORD LEGAL CENTRE

A handwritten signature in cursive script, appearing to read 'Edwina MacDonald'.

Edwina MacDonald
Solicitor

Maria Nawaz
Employment Solicitor

Jesse Hanna
Kevin Lam
Mark Susanto
Rebecca Sutton
Student Law Clerks