



21 September 2015

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

KINGSFORD
LEGAL CENTRE

By email: freedoms@alrc.gov.au

Dear Ms Wynn,

ALRC Interim Report 127: Traditional Rights and Freedoms—Encroachments by Commonwealth Laws

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

This submission builds on our earlier submission on the Inquiry's discussion paper (dated 19 February 2015). It refers to laws identified in the Interim Report and expresses our view as to whether these laws deserve further review.

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: Scope of the Inquiry

As noted in our previous submission, we are concerned that the framework of 'traditional rights and freedoms' in the Inquiry Terms of Reference excludes other significant rights and freedoms, including the right to freedom from discrimination. This 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. Further, 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

Racial Discrimination Act (Interim Report pp 80-84)

The Interim Report identifies section 18C of the *Racial Discrimination Act 1975* as a law that potentially interferes with freedom of speech.

As noted in the Report, KLC believes that section 18C strikes an appropriate balance between freedom of speech and other interests. In addition, this section has already been subject to considerable scrutiny and review through the Exposure Draft Legislation released in March 2014, and we do not think that further review is necessary.

Section 18C finely balances fair and accurate reporting and fair comment with discrimination protections. The 'reasonably likely' test 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'.¹

Section 18D 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 Act 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

¹ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 16.

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.²

Section 18C (and related provisions) only limits 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.

- No further review of section 18C of the *Racial Discrimination Act* is necessary as it strikes an appropriate balance between freedom of speech and freedom from racial hatred and has recently been reviewed through the Exposure Draft Legislation released in March 2014.

Freedom of Religion

Non-discrimination (Interim Report pp 106-111, 115-119)

Exemptions

As noted in the Interim Report, KLC believes that the existing anti-discrimination law exemptions for religious organisations are an unjustifiable encroachment on the principle of non-discrimination and they undermine the effectiveness of anti-discrimination legislation.

This exemption in the *Sex Discrimination Act 1984* permits discrimination in connection with employment, contract work and the provision of education and training. This exemption undermines the rights of people already subject to discrimination, such as women, gay people and lesbians, 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,³ while the Sydney Anglican School Corporation employs nearly 2,000 staff.⁴ 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.

² *Eatock v Bolt* [2011] FCA 1103, 263, 267.

³ Catholic Education Office, Employment (2015)
<<http://www.ceosyd.catholic.edu.au/Employment/Pages/Home.aspx>> accessed 29 January 2015.

⁴ Sydney Anglican School Corporation, *Annual Report 2014*, p 8.

Further, many religious organisations, including schools, are in receipt of public funding or performing a service on behalf of government. These services include aged-care, education, adoption, employment assistance and child welfare services. Religious organisations in receipt of public funding or performing a service on behalf of government should not be exempt from anti-discrimination laws. Exempting them sends a message that discrimination is acceptable in our community, which goes further to entrenching systemic discrimination against vulnerable groups of people.

- Existing exemptions for religious organisations should be removed from anti-discrimination laws as they are an unjustifiable encroachment on the principle of non-discrimination.

Protections for freedom of religion

As noted in our previous submission, 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 employment.⁵ Further, 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 ethno-religious 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.

Case study: 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 he would not be able to successfully make a discrimination complaint, as the law does not protect a person from discrimination on the basis of their religion.

- To adequately protect the right to freedom of religion, federal anti-discrimination law should include religion as a protected attribute in all areas of public life, and religious vilification be made unlawful.

Freedom of Association

Workplace relations law (Interim Report pp 131-138)

As noted in our previous submission, 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. Any repeal of current legislative protections or the introduction of laws that interfere with freedom of association in the workplace would not be justified.

⁵ *Fair Work Act 2009* (Cth) s 351.

KLC supports the provisions of the *Fair Work Act 2009*⁶ that protect the right of individual employees to organise, and importantly, also to refuse to do so if they choose. In addition, we support the concerns raised by the ILO Committee of Experts, the Australian Council of Trade Unions and the Australian Institute of Employment Rights about limits to protected industrial action, collective bargaining and right of entry for union officials. Specifically, we are concerned about the encroachment on freedom of association by:

- provisions that prohibit sympathy strikes and general secondary boycotts (ss 408-411), and remove protections for industrial action in support of multiple business arrangements (s 413(2)) and pattern bargaining (ss 409(4) and 412);
- industrial action only being protected during the process of bargaining for an agreement;
- the requirements for industrial action to be authorised by protected action ballot;
- the breadth of the powers of the Fair Work Commission to suspend or terminate industrial action; and
- the limitations on union officials' rights of entry to workplaces.

KLC also supports the *Fair Work (Registered Organisations) Act* as it enables industrial organisations to apply to the Fair Work Commission for registration under that Act.

Anti-discrimination laws and freedom of association (Interim Report pp 140-141)

The Interim Report discusses the impact of anti-discrimination laws on associations, including the restrictions placed on associations to discriminate against people with disability and the exemptions that permit discrimination under the *Sex Discrimination Act*.

As set out above, KLC submits that the existing anti-discrimination law exemptions for religious organisations are an unjustifiable encroachment on the principle of non-discrimination. Freedom of religion would be better protected under anti-discrimination law by including the right to freedom of religion as a protected attribute.

Under Article 22 of the International Covenant on Civil and Political Rights, freedom of association can be restricted where it is 'necessary in a democratic society in the interests of the protection of the rights and freedoms of others'. Limits on freedom of association in anti-discrimination law are justifiable as they protect the right of individuals to live free from discrimination.

We disagree with Patrick Parkinson's view that the religious exemptions are necessary to protect the freedom of association for religious organisations to discriminate in their staff recruitment practices. Our understanding of the freedom is that it protects the right of individuals to associate in political and religious organisations, and trade unions. It protects the right of the individual to join with others to stand up against institutionalised forces. This is consistent with the ALRC's summary on pages 121-123. It does not apply to organisations in their recruitment practices in order to permit them to discriminate unfairly.

⁶ *Fair Work Act 2009* (Cth) s 336.

Burden of Proof

Fair Work Act 2009: adverse action (Interim Report pp 330-331)

The reverse burden of proof for adverse action in section 361 is justifiable because the evidence of the state of mind of the employer is not easily accessible to an 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 particularised.⁷ 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 alleged.⁸

KLC 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.

➤ The reverse burden of proof in section 361 of the *Fair Work Act* is justifiable and further review is not necessary.

Discrimination laws (Interim Report pages 331-332)

We note the concerns raised about the burden of proof for establishing 'indirect discrimination'. First, it is inaccurate to describe this as a reverse burden of proof. It is more accurately described as a shifting or shared burden. The complainant must first establish that the respondent's imposition of a condition, requirement or practice was indirectly discriminatory. The burden then shifts to the respondent to prove that the condition, requirement or practice was reasonable in the circumstances.

We support the Australian Council of Trade Unions' explanation of why this shift is appropriate. That is, it is justified because of the power imbalance in resources and expertise between the complainants and respondents, and the respondent has access to the necessary information and evidence putting them in the best position to explain a reason behind a requirement. We also agree with the ACTU's assessment that it is very difficult for complainants to prove indirect discrimination has occurred.

Anti-discrimination laws have been subject to considerable scrutiny through the Australian Government's Consolidation of Commonwealth Anti-Discrimination Laws project, and the subsequent draft Human Rights and Anti-Discrimination Bill 2012. Any further review of anti-discrimination laws should include consideration of this work and, amongst other

⁷ *Fox v Stowe Australia Pty Ltd* (2012) 271 FLR 372, 27.

⁸ 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 acted for a prohibited reason, it was sufficient for the employer to provide evidence of an alternative reason for the adverse action alleged.

things, introduce a unified definition of discrimination that addresses the difficulties in proving direct and indirect discrimination law.

- Any further review of anti-discrimination laws should build on the Consolidation of Commonwealth Anti-Discrimination Laws project and introduce a unified definition of discrimination that addresses the difficulties in proving direct and indirect discrimination law.

Procedural Fairness

Mandatory cancellation of visas (Interim Report pages 423-425)

As noted in our previous submission, the *Migration Amendment (Character and General Visa Cancellation) Act 2014* unjustifiably denies procedural fairness to visa holders with a substantial criminal record.

Prior to the amendments, the decision to cancel a visa on character grounds was discretionary and reviewable. Ministerial Direction No 55 (now revoked) 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. If a person's visa was cancelled on character grounds, the Minister's decision was reviewable on application to the Administrative Appeals Tribunal.

The amendments 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. 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. The Minister has the power to set aside a decision made by the Administrative Appeals Tribunal or a delegate to revoke a decision to cancel a visa. The Minister is also 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, there is no merits review available.

The amendments 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 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 to 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.

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.

Further, 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.

- Ministerial discretion and the right to apply for a review of Ministerial decisions should be reintroduced for visa cancellation to ensure that these laws do not unjustifiably deny procedural fairness.

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

Yours sincerely,
KINGSFORD LEGAL CENTRE



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