



19 February 2015

KINGSFORD  
LEGAL CENTRE

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

By email: [freedoms@alrc.gov.au](mailto: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 the protection of individual freedoms – Encroachments by Commonwealth Laws.

**Kingsford Legal Centre**

KLC is a community legal centre which has provided free legal advice and advocacy to people in need of legal assistance in the Canterbury and Petersham areas of inner-city 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 (NSV), and a specialist law reform unit. The NSV provides advice on the protection of individual freedoms and policy work in areas where the protection of individual freedoms 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 inclusion of "similar" rights creates a false hierarchy of rights, which significantly undervalues 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



number of inquiries. Section 18C makes it unlawful for a person to publicly “offend, insult, humiliate or intimidate” another person on the basis of their race, colour or national extraction or ethnic origin.<sup>3</sup> Under the Racial Discrimination Act 1975 (Cth), a person can make a complaint to the Australian Human Rights Commission if they believe they have been discriminated against in this way.

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 belittle the dignity of the individual”<sup>4</sup>

Section 18D of the RDA provides for exemptions from racial discrimination laws by imposing a list of exemptions for anything that is “public interest related”.<sup>5</sup> The Australian Courts have consistently interpreted the exemptions 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...[and] suggests that the section is concerned with more serious than mere personal insults...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 in a society which respects equality, conformity with, regard as the intent [of] Part IIA, a consequence which the section is designed to explain, conduct which invades or threatens the dignity of an individual, carries it up, involves a public matter in the context of which the conduct seeks to promote social cohesion.”*

Section 18C of the RDA (and related provisions) only applies where there is a real and necessary to protect community safety and welfare. It does not apply to racial vilification, and therefore does not need to be breached. Section strikes the appropriate balance between Australia’s international obligations to protect freedom of speech and its obligations to protect the public interest.

## **Freedom of Religion**

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**Question 3–1** Why is freedom of religion important? Is it important whether law interferes with this right?

A law which interferes with freedom of religion is justified if it is necessary to protect other important freedoms, such as the right to be free from unlawful discrimination.<sup>6</sup> Religion is NOT absolute – it must be balanced against freedom of speech on the basis of gender and sexual orientation.

<sup>3</sup> Racial Discrimination Act 1975 (Cth) s 18C.

<sup>4</sup> Australia v Creek

<sup>5</sup> Creek v Cairns Post Pty Ltd [2009] FCA 112 ECR 352, 16

<sup>6</sup> 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 principles of a religious institution or a body of persons of religion or creed" to discriminate against a person on the basis of their "sex, sexual orientation, gender identity or intersex status" if it is done "in good faith in order to avoid injury to the religious sentiments, religious freedoms or abilities of adherents of the religion or creed".<sup>7</sup>

This exemption from sex discrimination law permits discrimination in connection with employment, contract work, and provision of education and training.<sup>8</sup>

As it currently stands, this exemption violates and permits the rights of people already subject to discrimination, such as women, gay and lesbian persons, and sanctions discriminatory behaviour which would not be tolerated in other contexts. It also permits religious bodies to provide less than the rights and freedoms afforded to those individuals by international human rights law, such as the right to live free from discrimination.<sup>9</sup>

Religious education institutions are a significant employer in Australia. For example, the Catholic Education Office employs more than 9,000 people in the Diocese,<sup>10</sup> while the Sydney Anglican School Corporation employs nearly 2,000 staff.<sup>9</sup> The employment practices of organisations such as these have a significant immediacy of people, including women, gay and lesbian persons, to find and remain in work, so 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 law. Article 27(1) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), states that:

States Parties shall take all appropriate measures to ensure equal opportunities for men and women in the field of employment in order to ensure, on a basis of equality of opportunity and rights, the same opportunities for men and women, the same conditions of work and pay.

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 treatment on the basis of religion is currently insufficiently protected at the federal level. The SDA only protects against discrimination on the basis of religion, with the exception of race, colour, national extraction or ethnic origin. Religious protection does not extend to situations where a complainant is victimised on the basis of their religion, but this cannot be linked to their race. For example, recognised

<sup>7</sup> Sex Discrimination Act 1984 (Cth).

<sup>8</sup> Catholic Education Office, Employment (2015) <<http://www.ceosydney.catholic.edu.au>>.

<sup>9</sup> Sydney Anglican School Corporation, *Annual Report 2014*, p 8.

<sup>10</sup> Convention on the Elimination of All Forms of Discrimination Against Women, United Nations, 1980, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>11</sup> Fair Work Act 2009 (Cth) s 351.

etc., more religious groups will be able to bring claims under anti-vilification laws, but could also make it easier for religious groups to have difficulty succeeding in a racial vilification claim. In addition, to protect the right to freedom of religion, federal legislation should prohibit religious vilification in all areas of public life, and make religious vilification be made to be unlawful.

## Freedom of Association

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

The workplace right to freedom of association protects the right to form, and join associations, and to pursue industrial disputes through collective bargaining, power imbalance between workers and employers, and the right to strike. Standing and being part of a trade union is important for workers' rights. 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 International Covenant on Civil and Political Rights<sup>12</sup> and the International Freedom of Association and Protection of the Right to Organise Convention<sup>13</sup>. The International Freedom of Association and Protection of the Right to Organise and Collective Bargaining Convention<sup>14</sup> that protects 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 right to freedom of association is integral and that any repeal of the Fair Work Act legislative protections or the introduction of new laws that interfere with the right to association must be done so with the greatest care.

**What Commonwealth Laws unjustifiably interfere with the right to association? Are these laws discriminatory?**

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

The Fair Work Act protects workers, and persons who are free to do so, from discrimination on the basis of sex, race, ethnicity, age, disability, marital status, pregnancy, gender reassignment, or sexual orientation. It also protects persons who are free to do so, from discrimination on the basis of political belief, religious belief, or trade union membership. Persons are free to be represented, or not to be represented, by industrial associations, and are free to participate, or not participate, in lawfully constituted associations.

<sup>12</sup> International Covenant on Civil and Political Rights (entered into force 23 March 1976) art.22.

<sup>13</sup> Freedom of Association and Protection of the Right to Organise Convention 1949, G.A. Res. 1012, 68 UNTS 17 (entered into force generally 18 July 1951; entered into force for Australia 28 February 1975) art.2.

<sup>14</sup> Right to Organise and Collective Bargaining Convention 1949, G.A. Res. 1012, 68 UNTS 257 (entered into force generally 18 July 1951; entered into force for Australia 28 February 1975) art.1.

<sup>15</sup> Fair Work Act 2009 (Cth) s.350.

The Fair Work (Registered Organisations) Act is also important as it enables industrial organisations to register with the Fair Work Commission for registration under the Fair Work Act.<sup>17</sup>

Furthermore, the Fair Work Act protects employees from adverse action taken in response to their exercising or proposing to exercise a workplace right or engaging or proposing to engage in a protected industrial action. This includes both participation and non-participation.

Kingsford Legal Centre supports the penalties which may be imposed under the Fair Work Act for employers making general declarations, including the freedom of employees to associate with others for the purpose of advancing their interests. These range from \$1,000 to \$10,000. Directors or officers of companies may be liable for up to \$10,000 and any other officer, employee and any other person up to \$1,000.

## Burden of Proof

**What general principles or criteria should be applied to determine whether a law unjustifiably shifts the burden of proof?** A law that reverses or shifts the burden of proof is justified if:

In the employee-employer relationship, an unequal balance of power exists between the parties. This relationship requires that the employer has the power to take adverse action and the responsibility 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 each party must be considered.

**Which Commonwealth health laws unjustifiably shift the burden of proof?** These laws are identified below:

The reverse burden of proof is currently a feature of s361 of the Fair Work Act.<sup>18</sup> Once an employee or prospective employee alleges that they were subjected to adverse action, it is presumed that the adverse action was taken for a prohibited ground unless the employer proves otherwise. The burden is on the employer to rebut this presumption 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 is often difficult to obtain and may not easily be accessible to the employee.

We note that the reverse burden of proof does not pose a significant problem for employees as it still requires them to present their case – the burden placed on employers must be clear and reasonable. The burden placed on employers is reasonable and may be discharged by providing a simple alternative (*i.e.* the primary reason for the adverse action).

<sup>17</sup> Fox v Stowe Australia Pty Ltd [2012] FCA 1717, 27 FCR 227, 27.

<sup>18</sup> See Board of Bendigo Regional Institute of Technical and Further Education v. Goss, where the High Court of Australia has recommended that the court should remove the presumption in favour of the employer.

The King's Law Legal Centre believes that any changes to the law that place an unfair burden on employee applicants will result in unfair outcomes. In some cases the information relating to the reason why the employee was subject to the action alleged is “peculiar” with little or no evidence of the reason. Under these provisions, it is difficult for employees to gather sufficient evidence to establish that an employer acted for ~~good~~<sup>bad</sup> reasons. This creates an unfair advantage for employers in workplace disputes.

## Procedural Fairness

### 14.2 Why do commonwealth laws unjustifiably deny procedural fairness, and why are these laws unjustified?

New laws passed by the Australian Government in 2014 have denied procedural fairness to holders of visas. In 2014, the Australian Government passed the Migration Amendment (Character and General Visa Cancellation) Act 2014.

The changes introduce mandatory cancellation of visas without notice or opportunity to be heard to persons who do not pass the character test or do not satisfy the Minister that the person is not a threat to Australia.<sup>19</sup>

#### Visa Cancellation provisions prior to the amendments

Prior to the amendments, the decision to cancel a visa on character grounds was discriminatory and reviewable. Section 501(3) of the Migration Act 1958 provided that:

The Minister may cancel a visa held by a person if the Minister reasonably expects that the person does not pass the character test and the person does not satisfy the Minister that the person is not a threat to Australia.<sup>20</sup> [emphasis added]

The section stated that a person does not pass the character test if he or she has a “substantial criminal record,” which was defined in subsection (3).<sup>20</sup>

The previous Ministerial Direction No. 53 (2001), revoked, made under section 455, specified that in exercising its discretion to cancel a person’s visa, the decision must take into account a variety of factors. These factors included the strength, duration and nature of the person’s ties to Australia, the best interests of the person, and the promotion of the welfare of the Australian community.

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<sup>19</sup> Migrant Action 1958 (Cth) s 501(3), later amended by Migration Amendment (Character and General Visa Cancellation) Act 2014.

<sup>20</sup> 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 by the Administrative Appeals Tribunal.<sup>21</sup>

### Changes to the Act

The amendments to the Migration Act 1958 (Cth) have removed both the power and discretion to cancel a visa on character grounds where there is a substantial criminal record (it is now mandatory).<sup>22</sup> A decision to cancel a visa on character grounds must be made by the Minister under section 501(3A).

The Minister *must* cancel a visa if the Minister is satisfied that the person does not pass the character test because of the operation of ...substantial criminal record which has been committed within the last 12 months.<sup>23</sup> [emphasis added]

The changes expand the power of the Minister to cancel a visa on character grounds from a threshold of a substantial criminal record which was previously 2 years or more of imprisonment to only 12 months or more.

Section 501BA of the Act gives the Minister the power to set aside a decision made by the Administrative Appeals Tribunal or to delegate to revoke a decision made 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 principles of natural justice do not apply. Unless the Minister delegates the power to cancel, the Minister will always have merits review available.

These amendments to the Migration Act 1958 (Cth) remove the Minister's power to cancel a visa on character grounds if the Minister is satisfied that the person does not pass the character test because of the operation of a substantial criminal record which has been committed within the last 12 months. The Minister's power to cancel a visa on character grounds is now mandatory. Previously, the Minister's discretion to order procedural fairness up to the visa cancellation, including that the decision was made in the light of the relevant process is discretionary and applies to all regardless of the circumstances of their particular situation. In removing of the Minister's discretion to consider the circumstances of the person whose visa is being cancelled, the provision precludes the circumstances of the person whose visa is being cancelled from being considered. This expansion of the Minister's power to cancel a visa on character grounds creates a lack of transparency and accountability in the decision-making process.

It is acknowledged that the Minister's power to cancel a visa on character grounds is 'urgent action' is needed to prevent serious harm to the community.<sup>24</sup> The Bill offers no compelling reason that justifies the denial of procedural fairness in this circumstance. Additionally, unlike the previous legislation, the Minister has the power to prevent a greater harm by denying to cancel a person's visa. Where the Minister is mandated to act and there is no scope to review those decisions, this encroaching on procedural fairness creates broad territory for justice.

<sup>21</sup> Migration Act 1958 (Cth) s 500, later amended by Migration Amendment (Procedural Fairness in Visa Cancellations) Act 2013.

<sup>22</sup> Migration Act 1958 (Cth) s 501(3A).

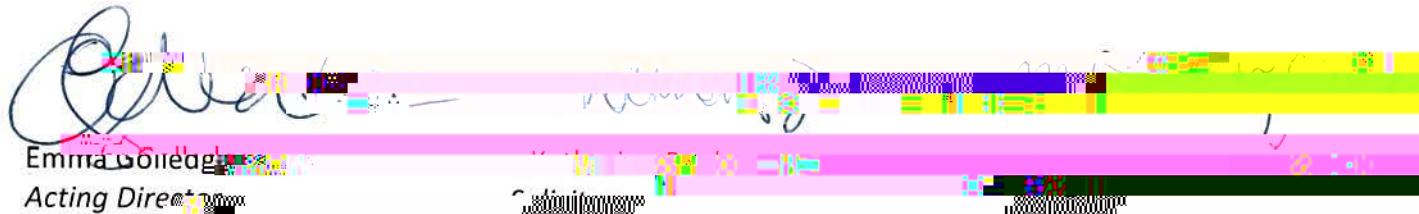
The automatic cancellation of visas for foreign offenders risks grossly unfair outcomes. It is discriminatory to re-impose criminal penalties on people whose measures had been taken into account when their substantial criminal record was assessed.

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

KLC has expressed concerns about the impact of visa cancellation on foreign offenders. Following their release, many of these people are vulnerable and their circumstances are often complex. Additionally, the effects of visa cancellation can affect the separation of the family, the right and reduced rehabilitation and employment prospects for offenders who are deported to countries with which they often have no links.

Please contact us on (02) 9503 9900 if you would like to discuss your submission further.

Yours faithfully,  
KINGS CROSS LEGAL CENTRE



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