



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

Dear Madam/Sir,

Submission to the Australian Law Reform Commission Freedoms Inquiry

Kingsford Legal Centre ('KLC') welcomes the opportunity to provide a submission to the Australian Law Reform Commission's [Freedoms Inquiry](#) – [Enabling Attachments to Commonwealth Laws](#).

Kingsford Legal Centre

KLC is a community legal centre which provides free legal assistance to people in need of legal assistance in the New South Wales community 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) and 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 is also involved in law reform and policy work in order to ensure the practicality 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 inclusion of "any other similar legal right, freedom or privilege" 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 ethnic origin.³ 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 "prejudice and serious effects, not to be likened to the rights of a private citizen."

Section 18C of the RDA is not intended to impose a list of exemptions for anything. 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... and suggests that the section is more concerned with matters that extend to the public dimension. A mischief that is not merely injurious to the individual, but is injurious to the public interest in a social sense... Part IIA, a consequence which the interest sought to be protected by section 18C is the right to explain conduct which invades or diminishes the dignity of an individual, in the public context in which seeks to promote social cohesion."

Section 18C of the RDA (and related provisions) only necessary to protect community from 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 the need to protect racial vilification.

Freedom of Religion

Question 3-1 Whether a law which interferes with freedom of religion is justified under the Charter of Rights and Freedoms.

A law which interferes with freedom of religion is justified if it is necessary to protect important freedoms, such as the right to be free from unlawful discrimination on the basis of gender and sexual orientation.

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

⁴ *Australian Human Rights Commission v Commonwealth* [2011] HCA 12, 237 CLR 1.

⁵ *Creek v Cairns Post Pty Ltd* [2002] FCR 352, 16 ALJ 1001.

⁶ *Eatock v Bolt* [2011] FCA 1103, 203, 207.

The Sex Discrimination Act 1984 (Cth) ('SDA') currently exempts educational institutions "that are conducted in accordance with the religious precepts of a particular religion or creed" to discriminate against a person on the basis of their "sex, sexual orientation, gender identity or intersex status" if the institution can show "good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed".

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

As presently 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 if the institution were subject to the same 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 5,000 people in the Sydney diocese, while the Sydney Anglican School Corporation employs nearly 2,000 staff.⁹ The employment practices of these institutions have a significant impact on the ability of people, including women, gay and lesbian persons, to find and remain in work, and 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. The International Convention on the Elimination of All Forms of Racial Discrimination 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 with men, the same opportunities for advancement and women, the same opportunities for promotion.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. While the Freedom of Religion Act 2015 (Cth) provides for a prohibition on discrimination on the basis of religion, with the exception of religious organisations, racial vilification provisions do not extend to situations where a colour, skin tone or race 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 31.

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

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 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 11.

¹¹ *Fair Work Act 2009* (Cth) s 551.

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 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 lawful industrial activity. This includes both participation and non-participation.

Kingsford Legal Centre also supports the penalties which may be imposed under the Fair Work Act for employers who contravene the provisions, including the freedom of employees to associate in a lawful case. These include a grant of an injunction to prevent the effects of the contravention, a civil penalty of up to \$630,000 for the Director or a company, and any other civil penalty.

Burden of Proof

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

In the employment relationship, an unequal balance of power exists. This relationship requires a more equitable resolution of workplace disputes. In determining whether a law unjustifiably shifts the burden of proof, the resources and information available to the parties are relevant.

Which laws with unjustified reverse burdens of proof are these?

The reverse burden of proof is currently a feature of s361 of the Fair Work Act. 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 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 at the time of the action complained of will not easily be accessible to the employee.

We note that the reverse burden of proof does not pose an undue burden on employees to present their case for adverse action must be satisfied. The burden placed on employers is reasonable and may be discharged by showing that the reverse burden of proof is not a prohibited reason for the adverse action.

¹⁷ *Fox v Stowe Australia Pty Ltd* (2012) 271 FCR 277, 277.

¹⁸ See *Board of Bendigo Regional Institute of Technical and Further Education v Commonwealth* where the High Court considered the reverse burden of proof and removed the presumption that the employer should

The automatic cancellation of visas for individuals with a criminal record risks grossly unfair outcomes for individuals who have been sentenced to imprisonment for minor offences. The current measures had a substantial criminal record.

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

KLC has expressed concern that the automatic cancellation of visas for individuals with a criminal record are often complex. Additionally, the effects of visa cancellation are often complex. Additionally, the effects of visa cancellation on the family unit and reduced rehabilitation and employment prospects for individuals who are deported to countries with which they often have no link.

Please contact us on (02) 9383 9388 if you would like to discuss your submission further.

Yours faithfully,
KINGS COLLEGE LEGAL CENTRE



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