THE UNIVERSITY OF NEW SOUTH WALES

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 [illegible] 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 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 framing of the Terms of Reference implies that some 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 [illegible] makes it unlawful for a person to publicly "offend, insult, humiliate [illegible] because of the race, colour or national 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 must have "profound and serious effects, not to be likened to mere slights".[4]

Section 18D of the RDA provides exemptions for anything done reasonably and in good faith to protect freedom of speech by imposing a list of exemptions for anything 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 directed to conduct which is regarded as more serious than mere personal hurt. The section 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 in the existence of a cohesive society. Conformably with what I regard as the intent of Part IIA, a consequence which the prohibition of conduct to which the section is directed is to protect the interest sought to be protected by the section. Section 18C is directed to conduct which has the right to explain conduct which invades or undermines the dignity of an individual or group, invests it as a public matter in the context of a law which seeks to promote social cohesion.*[5]

Section 18C of the RDA (and related provisions) only limits freedom of speech to the extent necessary to protect communities 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 [illegible].[6]

Freedom of Religion

Question 3–1 Whether [illegible] should be applied when determining whether [illegible]

A law which interferes with freedom of religion is justified if [illegible] important freedoms, such as the right to be free from unlawful discrimination. 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 [illegible]*

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

[6] *Eatock v Bolt* [2011] FCA 1103, 265, 267.

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

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

As it currently stands, this exemption limits 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 secular society. It allows those of religion to prioritise 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 9,500 people in the Sydney diocese, while the Sydney Anglican School Corporation employs nearly 2,000 staff.[8] 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.[9] It is such as these have a significant impact on the ability of people, 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 no protection against discrimination on the basis of religion, with the exception of the *Fair Work Act 2009* (Cth).[11] Therefore, 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 37(1)(d).

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

[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 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 11.

[11] *Fair Work Act 2009* (Cth) s 351.

ethno-religious groups with [illegible] vilification laws, but co[illegible] difficulty succeeding in a racial v[illegible] protect the right to freedom of religion, federal legi[illegible] protected attribute in all areas of public life [illegible]

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 [illegible] power imbalance betwe[illegible] st[illegible] 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, includ[illegible] Freedom of Association and Protection of the Right to [illegible] to Organisation and Collective Bargaining Convention[12] that pr[illegible] association in the workplace, and legislators should endeavour to ensure this is reflected in domest[illegible]

We submit that [illegible] protections for fr[illegible] integral and that any repeal of [illegible] legislative protections or the introductio[illegible] laws that int[illegible]

What Commonwealth Laws unjustifiably interfere with t[illegible] are these?

The Kingsford Legal Centre supports the provisions of the *Fair Work Act 20[illegible]* (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* prote[illegible] persons [illegible] free to b[illegible] not become members of indus[illegible] to be represented, or [illegible] be represented, by industrial associations, and are free to participate, or not participate, in lawful industrial

---

[12] *International Covenant on Civ[illegible]* (entered into force 23 March 1976) art 22.

[13] *Freedom of Association and Protection of the Right to O[illegible]* 68 UNTS 17 (enter[illegible] force generally 4 July 1950; entered into force for Australia 28 February 1973) art 2.

[14] *Right to Organis[illegible]n and Collective Bargaining Convention 1949*, opened for sig[illegible] 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* [illegible] protect employees from adverse action taken in response to their [illegible] 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 breaching general protections, including the freedom of employees to associate in the workplace. These [illegible] granting injunctions to stop or delay the effects of the [illegible] penalties (in the amount of $10,200 for Directors or $54,000 for companies), [illegible] reinstatement and any other [illegible].

Burden of Proof

What general principles or criteria should be applied to [illegible] that reverses or shifts the burden of proof is justified?

In the employee-employer relationship, an unequal balance of power exists. this relationship requires [illegible] response [illegible] to ensure a more equitable resolution of workplace [illegible]. 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 [illegible] health laws unjustifia[illegible] these laws justified?

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 subjected 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 [illegible] engaged in the action complained of will not easily be accessible to the employee.

We note that the reverse burden of proof [illegible] employees are [illegible] still required to present their case sufficiently for adverse action must be [illegible]. Additionally, the burden placed on employers is reasonable, and may be discharged by providing evidence of an alternative (non-prohibited) reason for the adverse action.[18]

---

[17] *Fox v Stowe Australia Pty Ltd* (2012) 211 IR 272, 27[illegible]

[18] See *Board of Bendigo Regional Institute of Technical and Further Education* [illegible] where the High Court [illegible] the reverse onus and remove the presumption the employer had

The [illegible] Legal Centre believes that any ch[illegible] will create an unfair burden on employee applic[illegible] cases the information relating to the reason why the employ[illegible] was subject to th[illegible] action alleged is "peculiarly" within the knowledge of the employer. Under these provisions, it is difficult for employees to gather sufficient evidence to establish that an employer acted for [illegible] unfair advantage for employees in workplace disputes,

Procedural Fairness

14.2 [illegible] commonwealth laws unjustifiably deny procedural fairness, and why are such laws unjustified?

New laws passed by [illegible] hold[illegible] passed the Migration Am[illegible]

The changes introduce mandatory cancellation of visas and limit the scope of decisions to cancel visas.

Visa Cancellation provisions prior to the amend[illegible]

Prior to the amendments, the decision to cancel a visa on character grounds was discretionary and reviewable. Section [illegible] 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 [illegible] [emphasis added][19]

The section stated that a person does not pass the character test if the person has a "substantial criminal record", which was defined in subsection (7).[20]

The previous Ministerial Direction No. 55 (and revoked) made under section 499, specified that in exercising the discretion to cancel a person's visa, the decision maker must take a variety of factors into consideration. 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 [illegible] stated reason, it was sufficient [illegible] 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 revie[illegible] Administrative appeals Tribunal.[21]

Changes to the Act

The amendments to the *Migration Act 1958* (Cth) have re[illegible] both the [illegible] discretion to cancel a visa on character grounds where there is a substantial criminal record (it is now m[illegible] a decis[illegible] (3A), [illegible]

> The Minister ***mu***[illegible] satisfied that the person does not pass the character test because of the operation of ...substantial criminal record [illegible].[22] [emphasis added]

The amendments expand the power of the Minister to canc[illegible] threshold [illegible] 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 [illegible] delegate to revoke a decision to cancel a visa under section 501(3A). The Minister is empowered to substitute a d[illegible] cancel [illegible] These powers are no[illegible] merits review and th[illegible] rules [illegible] natural justice do not apply. Unless the Minister dele[illegible] there is no merits review available.

These amendments to the *Migration Act 1958* (Cth) [illegible] procedural fairn[illegible] Previously, the Minister's discretion afforded procedural fairness to the v[illegible] by ensuring that the decision was made in light of the relev[illegible] process [illegible] automatic and applies to all regardless of the circumstances of their particular situation. In removing of the Minster's discretion to consi[illegible] person's whose visa is [illegible] process. The provision precludes the circumst[illegible] into account. This, coupled with an expansi[illegible] powers under [illegible] a lack of transpare[illegible]

It is acknowledged that [illegible] 'urgent action' is needed to pr[illegible] The expl[illegible] Bill offers no compelling reason that justifies the den[illegible] circumstance. Additionally, under the previous legislation, the Minister had the power to prevent a greater harm by dec[illegible] cancel a person's visa. Where [illegible] mandatory and there is no scope to review those decisio[illegible] this encroachm[illegible] procedural fairness creates broad territory for injustice.

---

[21] *Migration Act 1958* (Cth) s 500, later amended by *Mi*[illegible] *al Visa Can*[illegible]

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

The automatic ca[illegible] risks grossly unfair o[illegible] to re[illegible] measures had [illegible] substantial criminal record.

Furthermore, these amendments effectively impose an additional punishmen[illegible] who have already been [illegible] their sente[illegible]

KLC has ex[illegible] their visas cancelled. Many of these people are vulnerab[illegible] are often complex. Additionally, the effects of visa can[illegible] the fa[illegible] are deported [illegible] countries, which they often have no links [illegible]

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

Yours faithfully,
KINGSFORD LEGAL CENTRE

Emma Golledge
Acting Director

Vern Lim
[illegible]
Student Law Clerks