

30 October 2014

Human Rights Commissioner  
Mr Tim Wilson  
Australian Human Rights Commission  
Level 3, 175 Pitt Street  
SYDNEY NSW 2000

Via email: [rights2014@humanrights.gov.au](mailto:rights2014@humanrights.gov.au)

Dear Human Rights Commissioner,

I write to make a submission to the Rights & Responsibilities 2014 national consultation *on behalf of* Community Legal Centres NSW (CLCNSW), which is the peak representative body for 39 Community Legal Centres (CLCs) in NSW.

CLCs are independent community organisations providing equitable and accessible legal services. NSW CLCs work for the public interest, particularly for disadvantaged and marginalised people and communities. CLCs not only provide legal advice and assistance, but also encourage and enable people to develop skills to be their own advocates. We promote human rights, social justice and a better environment by advocating for access to justice and equitable laws and legal systems. CLCs work towards achieving systemic change through community legal education, and through law and policy reform. The 39 CLCs throughout NSW employ qualified staff including solicitors, social workers and community legal educators. We also have volunteer solicitors, barristers, law students and others working with us to extend our legal services. The members of CLCNSW are both generalist and specialist centres.

I have read the Human Rights Commissioner's Rights & Responsibilities 2014 Discussion Paper and rate my understanding of human rights and freedoms as a high level understanding.

## **General comments**

CLCNSW recommends that the focus of Rights & Responsibilities 2014 needs to be broader than those four 'rights' or 'freedoms' identified. For example, it should also include: 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 including voting and a range of other issues.

CLCNSW recommends that the most appropriate way to protect rights and freedoms is to enact a National Human Rights Act.

Over 87 per cent of the 35,000 public submissions to the Australian Government commissioned National Human Rights Consultation in 2009-10 supported the adoption of a Human Rights Act. A Human Rights Act was a key recommendation of the National Human Rights Consultation Committee.<sup>1</sup>

The Australian Government adopted the Australian Human Rights Framework in April 2010, rather than enacting a Human Rights Act.<sup>2</sup>

'Since then, most of the key elements of the Framework have been terminated or suspended. For example, the Australian Government has cut funding to the Human Rights Education Grants Scheme, backed away from its commitment to simplify and strengthen Commonwealth anti-discrimination laws, and stalled on implementation of Australia's National Action Plan on Human Rights. The proposed 2014 review of the Australian Human Rights Framework has not been conducted and the Australian Government has not announced plans to conduct such a review in the future.'<sup>3</sup>

CLCNSW recommend that the Australian Government fully incorporate its international human rights obligations into domestic law by introducing a comprehensive, judicially-enforceable Human Rights Act.

## **RIGHT TO FREEDOM OF EXPRESSION**

### **1. Criticising authority**

An important aspect of freedom of expression is the freedom of civil society to criticise government. Recent changes to funding agreements which prevent Community Legal Centres from using Commonwealth funding to undertake law reform and advocacy are concerning. They deny government the useful insights of Community Legal Centres, who see on a daily basis, the impact of government legislation and policies on the most vulnerable members of our community.

CLCNSW recognises the importance of organisations and individuals, such as asylum seekers or prisoners, being able to speak freely without repercussions for their freedoms.

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<sup>1</sup> National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009), xxiv.

<sup>2</sup> Commonwealth of Australia, *Australia's Human Rights Framework* (April 2010), 1.

<sup>3</sup> Joint NGO report Joint NGO report to the United Nations Committee Against Torture, *Torture and Cruel Treatment in Australia*, October 2014.

## **2. Voting rights**

Determinations about the legal capacity for people with disability impact on the freedom of expression for people with disability. CLCNSW supports the position of the People with Disability Australia, The Australian Centre for Disability Law and The Australian Human Rights Centre in their July 2014 submission to the Australian Law Reform Commission: Equality, Capacity and Disability in Commonwealth Laws Discussion Paper.

The Commonwealth Electoral Act (CEA) 1918 should be amended to remove the ‘unsound mind’ provisions in Section 93(8)(a). All Australian citizens of voting age are required to vote and must be permitted to exercise that right with support where required. Supports in this context may require the provision of information and ballot papers in alternative formats, accessible voting procedures, or support to mark, fold and deposit a ballot paper for example.

A person who does not vote is liable for a fine by virtue of section 245 of the CEA. A lack of support to vote should be considered a “valid and sufficient reason for failing to vote” as provided by section 245(4). This would cover instances where a person was too ill to vote, their intended support service failed them, or where supports were not able to facilitate an expression of will and preference. None of these options necessitate a person’s removal from the electoral role, and all retain the recognition of the person’s legal capacity to make a decision about electoral matters.

CLCNSW recognises the need to ensure that effective processes are in place to ensure that prisoners and mental health patients can enrol and vote in elections. CLCNSW understands from our work with Justice Action that there does not appear to be consistency across jurisdictions for enrolling prisoners and mental health patients. CLCNSW is also aware that there have been instances where prisoners were prevented from receiving information that relates to their voting rights such as how to vote information. CLCNSW recommends that the Human Rights Commissioner investigate this matter and ensure that effective processes are in place for prisoners and mental health patients to enrol, receive information and vote in elections.

## **3. Privacy**

CLCNSW agree with the Law Institute of Victoria that ‘the protection of an individual’s privacy is fundamental to their human dignity and is central to many other human rights such as the right of freedom of association, movement and expression’.<sup>4</sup>

## **4. Safety**

CLCNSW supports the right to have safe access to health services. People have the right to access women’s health services without patients and staff being physically and psychologically harassed and intimidated by anti-choice groups. Sensible measures need to be put in place that allow people to express their opinions whilst women can safely access health services without being harassed and intimidated

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<sup>4</sup> Law Institute of Victoria, *Submission to Australian Law Reform Commission: Serious Invasions of Privacy in the Digital Era Issues Paper*, November 2013.

## 1. Discrimination

CLCNSW opposed the proposed changes to s 18C of the Racial Discrimination Act 1975 (Cth) (RDA) and expressed the view that the RDA appropriately strikes the balance between freedom of speech and freedom from racial vilification/racial hatred.

## RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE OR RELIGIOUS WORSHIP

## 2. Discrimination

CLCNSW opposes existing exemptions and exceptions under anti-discrimination legislation for religious organisations that undermine the effectiveness of anti-discrimination legislation. (For example, in relation to sexual orientation, gender identity and intersex status under the Sex Discrimination Act 1984 (Cth)).

The information below has been provided by CLCNSW member, Kingsford Legal Centre, and outlines the CLCNSW position regarding religious discrimination and exemptions.

### 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 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.<sup>5</sup>

CLCNSW 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, aged care, health services, adoption services, and child welfare and employment assistance. The exemptions are particularly concerning for organisations that 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.<sup>6</sup> In 2009, approximately \$6.3 billion in government funding was allocated to non-government schools.<sup>7</sup> 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.

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<sup>5</sup> Age Discrimination Act 2004 (Cth) s 35; Sex Discrimination Act 1984 (Cth) ss 37, 38.

<sup>6</sup> 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>.

<sup>7</sup> 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>.

CLCNSW 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.

CLCNSW 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. CLCNSW'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.

#### 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.<sup>8</sup> Moreover, there are no enforceable remedies for this.

CLCNSW 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. Kingsford Legal Centre advised Ali that they 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. Kingsford Legal Centre advised Jake that a discrimination complaint would be unlikely to succeed, as religion is not a protected attribute in discrimination law.*

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<sup>8</sup> Australian Human Rights Commission Act 1986 (Cth) s 3(1).

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.

### **3. Religion**

CLCNSW is concerned that Christian prayers at the beginning of parliament and other public forums send the wrong message regarding freedom of religious worship. CLCNSW recommends that parliament and government adopts a moment of reflection, as is done in the ACT Legislative Assembly, as an alternative to Christian prayers at the beginning of events such as parliament.

## **RIGHT TO FREEDOM OF ASSOCIATION OR PEACEFUL ASSEMBLY**

### **8. Fair Work Act**

CLCNSW member, Kingsford Legal Centre, outlines below the CLCNSW position regarding the Fair Work Act.

CLCNSW 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'.<sup>9</sup>

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)

CLCNSW is supportive of the role that both the Fair Work Act 2009 (Cth) and the Fair Work

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<sup>9</sup> 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>

(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.

CLCNSW 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’.<sup>10</sup> 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,<sup>11</sup> 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 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*.<sup>12</sup> It was held that it is necessary to look to the ‘true motivations’ of the employer in taking the adverse action.

CLCNSW supports the penalties that 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.

## **9. Consorting laws**

CLCNSW is concerned about consorting provisions in NSW. CLCNSW agrees with our member, the Public Interest Advocacy Centre, that:

‘Fundamentally, any consorting law, by its very nature, impinges on a person’s right to freedom of association and principles enshrined in international human rights law. Most significantly, the International Convention on Civil and Political

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<sup>10</sup> Fair Work Act 2009 (Cth) s336

<sup>11</sup> Particularly Fair Work Act 2009 (Cth) s346

<sup>12</sup> *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2013] FCAFC 132

Rights, to which Australia is a party, specifically protects an individual's right to freedom of association. Moreover, the right to freedom of association serves as a vehicle for the exercise of many other civil, cultural, economic, political and social rights – to meet for common purpose, to socialise, to assemble peacefully – and is therefore an essential component of any democratic society.

In this context, regardless of legislative drafting, there remains a serious risk that the law could result in criminalising otherwise legitimate interactions and dismantling key social units. .... Since NSW consorting provisions impinge so significantly on international human rights law, no legislative amendment or policy change could ever fully cure the law's deficiencies.<sup>13</sup>

CLCNSW strongly recommends repeal of consorting provisions in NSW.

## **10. Peaceful assembly**

CLCNSW opposes state based laws that unreasonably restrict the right to peaceful assembly, such the NSW consorting provisions.

## **11. Industry support**

CLCNSW is concerned about the financial penalties that exist through our tax system if people do not join private health funds. CLCNSW is not aware of other industry that has such a level of support from the federal government, that the tax system is used to penalise people who do not take up the services of a particular industry. CLCNSW questions whether this measure impinges on the right to freedom of association and the desire of some individuals not to associate with the private health insurance industry.

## **RIGHT TO PROPERTY**

### **12. Native title**

CLCNSW believes that 'Australia should reform the onerous standards and burdens of recognition for native title that deny Aboriginal peoples the right to access and control their traditional lands and take part in cultural life. The strict requirement of the Native Title Act 1993 (Cth) of continuous connection since colonisation is incompatible with the UN Declaration on the Rights of Indigenous Peoples.'<sup>14</sup>

### **13. Housing**

CLCNSW believes that everyone has the right to have access to adequate housing. We believe that the government must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. We believe no one should be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances and that no legislation should permit arbitrary eviction.

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<sup>13</sup> Public Interest Advocacy Centre, *Targeting criminality: Submission in response to the NSW Ombudsman's Issues Paper: Review of the use of the consorting provisions by the New South Wales Police Force*, 27 February 2014.

<sup>14</sup> Joint NGO submission to Universal Periodic Review of Australia, July 2010.



If you would like to discuss this further please contact Kerry Nettle from CLCNSW on (02) 9212 7333.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Alastair McEwin'.

Alastair McEwin  
Director  
Community Legal Centres NSW