# Submission to the Australian Law Reform Commission – Traditional Rights & Freedoms – Encroachments by Commonwealth Laws (Interim Report 127)

**Prepared by:** Ian Scott
With the assistance of JobWatch volunteers

Job Watch Inc
Level 10, 21 Victoria Street, Melbourne 3000
Ph (03) 9662 9458
Fax (03) 9663 2024
www.jobwatch.org.au
Email: admin@jobwatch.org.au

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# Table of Abbreviations

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| **ALRC** | Australian Law Reform Commission |
| **FW Act** | *Fair Work Act* 2009 (Cth) |
| **JobWatch** | Job Watch Inc |
| **RDA** | *Racial Discrimination Act* 1975 (Cth) |
| **Traditional Rights & Freedoms – Encroachments by Commonwealth Laws (Interim Report 127).** | Interim Report |

# 1 Introduction

Job Watch Inc (**JobWatch**) is pleased to make a submission to the Australian Law Reform Commission (**ALRC**) regarding the Interim Report encroachments by Commonwealth laws on traditional freedoms.

In this submission, JobWatch will reiterate our position in regards to the reverse burden of proof in the General Protections provisions of the Fair Work Act and address some of the arguments made by other contributors to the Freedoms Inquiry, as summarised in the Interim Report.

## 1.1 About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre receives State and Federal funding to do the following:

- Provide information and referrals to Victorian workers via a free and confidential telephone information service (TIS);
- Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;
- Represent and advise disadvantaged workers; and
- Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS and to date we have collected over 172,000 records. JobWatch starts a new record for each new caller or for callers who have called before but who subsequently call about a new matter. Our extensive database allows us to report on our callers' experiences, including on what particular workplace problems they face and what remedies, if any, they may have available to them at any given time. Currently, JobWatch's TIS takes approximately 10,000 calls per year.

The comments in this submission are made both from the perspectives of lawyers who routinely advise and represent clients in General Protections and discrimination matters and from callers to the JobWatch TIS. Case studies have been utilised to highlight particular issues where we have deemed it appropriate to do so. The case studies which we have used are those of actual but de-identified callers to JobWatch's TIS and/or legal practice clients.

# 2 The Reverse Burden of Proof in the *Fair Work Act 2009* (Cth)

The General Protections in the *Fair Work Act 2009* (Cth) (**FW Act**) prohibit an employer from taking adverse action against an employee because an employee has exercised a workplace right; has temporarily been absent from work due to illness or injury; has participated or not participated in industrial activity; or because of an employee's protected attribute.

Under s 361, adverse action taken against an employee will be presumed to be action taken for a prohibited reason unless the employer responsible for taking the adverse action proves otherwise. As stated in the interim report, this placement of the burden of proof on an employer is not novel: the first industrial relations statute, the *Commonwealth Conciliation and Arbitration Act 1904* (Cth), placed the onus on an employer to show that an employee was dismissed for some reason other than membership of a trade union or entitlement to the benefit of an industrial agreement or award.[1]

## 2.1 Why the reverse burden of proof in the FWA is justified

In our previous submission,[2] JobWatch argued that the reverse burden of proof in s 361 is both justified and necessary. This view was endorsed by other contributors to the inquiry, including the ACTU and the Law Society of NSW Young Lawyers. In the Interim Report, the ALRC canvassed arguments supporting and disapproving of the reverse burden. The latter argument, as espoused in submissions by the Institute of Public Affairs and the National Farmers' Federation, is centred on the view that the reverse burden of proof in the FW Act in an unnecessary and unjustified encroachment on the presumption of innocence.

JobWatch agrees that the principle of the reverse burden of proof and the presumption of innocence cannot be underestimated in their importance. Nevertheless, their importance does not mean that the reverse burden of proof must be applied absolutely. To reiterate our original submission, the reverse burden of proof is justified and does not unnecessarily encroach on fundamental freedoms, where:

(a) Given the legal context, it is particularly difficult for the prosecution to prove their case; and/or

(b) it is particularly difficult to prove a case due to an imbalance in resources that favours the defendant.

The following reasons show that s 361 is an example of a justified reverse burden:

(a) There is often a lack of evidence to support the employee's claim;

(b) Employees are uniquely vulnerable;

(c) Statistically, very few GPD claims succeed; and

[1] *Commonwealth Conciliation and Arbitration Act 1904* (Cth) ss 9(1), (3). See further Anna Chapman, Kathleen Love and Beth Gaze, 'The Reverse Onus of Proof Then and Now: The *Barclay* Case and the History of the *Fair Work Act*'s Union Victimisation and Freedom of Association Provisions' (2014) 37 *UNSW Law Journal* 471.

[2] JobWatch, Submission 46 to the ALRC, *Inquiry into Traditional Rights and Freedoms*, February 2015.

(d) The case law shows that the 'rebuttable presumption' of s 361 is easily rebutted.

The above points are summarised in the Commonwealth Productivity Commission's recent statement that 'Since employees cannot be in a position to acquire the information to prove intent, there is reasonable justification for such a reverse onus.'[3]

The reverse burden of proof has also been supported in a number of judicial decisions as summarised in paragraph 11.99 of the Interim Report.[4]

## 2.2 Arguments against the reverse burden of proof in the FW Act

Nevertheless, the Institute of Public Affairs argued that it is 'unsatisfactory to expect the employer to rely on their own records to defend themselves from a claim, while the plaintiff carries little of the burden'.[5] However, it is not clear why it is unsatisfactory to expect employers to rely on their own records when it is these records, rather than the employee's, which are significantly more likely to contain the true reasons for the adverse action.

The Institute of Public Affairs also argued that 'shifting the burden of proof is an example of a logical fallacy that assumes the truth of a particular claim without the need for supporting evidence. The person making a negative claim cannot logically prove non-existence because to do so would require perfect knowledge.'[6] JobWatch concedes that the reverse burden *does* assume the truth of a particular claim without evidence. Nevertheless, the second part of this argument (that it is impossible to prove non-existence) is plainly untrue as employers have repeatedly proved the non-existence of the basis of a claim of unlawful adverse action. They have done this by simply establishing a legitimate, i.e. non-unlawful, substantial and operative reason for the adverse action. Further, as clarified by *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (*Barclay*)[7], the *subjective belief* of the employer in regards to their reason for action is accepted by the court, if they can adduce sufficient evidence of said subjective intent. As stated in JobWatch's previous submission, this makes the 'rebuttable presumption' of the prohibited reason for adverse action relatively easily to rebut.

The Interim Report stated that it would 'generally be unjust'[8] if a defendant is placed in a position in which he or she would find it difficult to produce the information needed to avoid conviction. JobWatch agrees with this statement, but submits that s 361 does not place employers in this position, as illustrated by the rate at which employers are successful in defeating General Protections matters.[9]

The Interim Report concluded that reversals of the burden of proof in civil laws that 'may be criminal in nature' merit careful scrutiny. It is not clear whether the ALRC

[3] Productivity Commission, *Workplace Relations Framework Inquiry*, Draft Report, (August 2015), 29.
[4] ALRC, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws*, Interim Report no 127 (August 2015), 331.
[5] The Institute of Public Affairs, Submission 49 to the ALRC, *Inquiry into Traditional Rights and Freedoms*, February 2015, 9.
[6] Ibid, 5.
7 [2012] HCA 32 .
[8] ALRC, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws*, Interim Report no 127 (August 2015), 337 at paragraph 11.124.
[9] Based on a snapshot of 25 General Protections decisions from the Federal Circuit Court of Australia in 2014/2015 put together by JobWatch for our previous submission, in approx 70% of cases the employee applicant's General Protections claim was unsuccessful.

views the General Protections to be civil laws that are criminal in nature. According to the Interim Report, whether a civil law is criminal in nature may depend on whether the proceedings are instituted by a public authority with statutory powers of enforcement.[10] It is therefore arguable that the FW Act is criminal in nature because it allows the Fair Work Ombudsman to prosecute (it prosecutes approximately 50 cases a year). However, it only ever seems to prosecute when the evidence is so overwhelming that the reverse onus is in effect irrelevant and therefore not required. This includes cases not only against employers but also employees and unions, and incarceration is not a possible penalty. Regardless, JobWatch submits that the reverse onus in the General Protections is still necessary and justified for the reasons mentioned above.

To understand where the burden of proof may justifiably be reversed, it is necessary to understand that the presumption of innocence goes to broader concerns about the liberties of the individual. JobWatch submits that it is in fact the rights of the individual that are protected by the reverse burden of proof in the FW Act. This is because, realistically, altering the burden would be make it substantially more difficult for an individual employee to be successful in a General Protections claim against an invariably more powerful employer. For this reason, JobWatch supports s 361 and recommends that it remain unchanged.

## 2.3 Anti-discrimination law

JobWatch endorses the ACTU's submissions regarding the reverse onus of proof in anti-discrimination law.[11] Indeed, the reasons given by the ACTU (listed below) in support of the reverse burden in this context are equally applicable to the General Protections context. These reasons are:

- *Power imbalance*—There is a significant imbalance in resources and expertise between complainants and respondents;
- *Information asymmetry*—The respondent has access to information and evidence that the complainant does not e.g. statistics;
- *Practicality*—The respondent is in the best position to explain the reason for the requirement. The complainant may not know the reason behind it;
- *Reality*—Use of the reverse onus reflects the realities of the situation because in practice the burden usually falls on the respondent anyway; and
- *Access to justice*—It is 'notoriously difficult' for complainants to prove indirect discrimination has occurred.[12]

# 3 Freedom of Speech

The Interim Report concluded that anti-discrimination laws and, in particular, s 18C of the RDA were an area of particular concern regarding freedom of speech.[13]

[10] ALRC, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws,* Interim Report no 127 (August 2015), 328 at paragraph.11.83
[11] ACTU, Submission 44 to the ALRC, *Inquiry into Traditional Rights and Freedoms,* February 2015, 29.
[12] Ibid, 29.
[13] ALRC, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws,* Interim Report no 127 (August 2015), 95.

JobWatch confirms its previous submission that the current provisions under section 18C of the *RDA* should remain unchanged. They do not unnecessarily restrict free speech, restrict fair comment or reporting of matters that are in the public interest. It is a defence to s 18C if the conduct is a fair and accurate report of any event or matter of public interest,[14] or the conduct is is a fair comment on any event or matter of public interest and is an expression of a genuine belief held by the preson making the comment.[15]

Indeed, in JobWatch's opinion, provisions similar to section 18C should be *extended*, as far as constitutionally possible, to include protections for persons on the basis of other protected attributes, such as gender identity and sexual orientation, through amendments to the relevant legislation (i.e. the *Sex Discrimination Act* 1984).[16]

# 4 Freedom of Religion

As stated in the Interim Report,[17] insofar as the General Protections provisions prohibit employers from discriminating against an employee on the basis of a protected characteristic, they may be characterised as interfering with freedom of religion. This is because these provisions may affect the employment practices of religious organisations that wish to select staff who conform to the beliefs of that organisation. The Interim Report noted that these provisions were not raised as an issue by stakeholders to the Inquiry. JobWatch submits that this is most likely due to the fact that any impact these provisions have on freedom of religion is assuaged by s 351 of the FW Act. This provision provides that the General Protections do not apply to action that is not unlawful under any anti-discrimination law in force in the place where the action is taken. As State anti-discrimination legislation provides exceptions for religious bodies (e.g. ss 82-84 of the Victorian Equal Opportunity Act 2010) thereby making it lawful to discriminate in certain religious contexts, the General Protections will not apply to this type of scenario. Whilst JobWatch's position has always been that there should not be any blanket exceptions to anti-discrimination laws, including for religious bodies, so long as a worker can perform the inherent requirements of a particular job, JobWatch notes that States are able to effectively amend these provisions and therefore recommends that the FW Act be amended to incorporate reasonable exceptions so that State governments are prevented from effectively nullifying the General Protections should they ever intend to do so.

## 4.1 Case studies

The following case studies are of actual but de-identified callers to JobWatch's Telephone Information Service (TIS):

14 Racial Discrimination Act 1975 (Cth) s 18D(c)(i).
15 Ibid s 18D(c)(ii).
16 Marianna Papadakis, 'Charlie Hebdo Enters a Legal Divide', The Australian Financial Review (Sydney), 14 January 2015, 7.
17 ALRC, *Traditional Rights and Freedoms- Encroachments by Commonwealth Laws,* Interim Report no 127 (August 2015), 57 at paragraph 4.44.

### 4.1.1 Case Study 1

Anna worked for a recruitment agency that placed her in childcare roles. She was recently placed in a Jewish pre-school. Anna was not allowed to wear her head covering in the school and so was ‘returned’ to the agency.

### 4.1.2 Case Study 2

James used to be a musician before working at a school as teacher. Some students found a Youtube clip of him from when he was a musician which contained adult themes. James’ employer asked him to resign and when he didn't he was terminated. It was stated that by the school that he did not fit into their 'religious ethos'.

### 4.1.3 Case Study 3

Jane, a hairdresser, felt she was forced to resign because her employers were Christian and disapproved of her single parental status. After resigning, the employer withheld some of her pay, and made defamatory comments to clients and other hairdressers.

### 4.1.4 Case Study 4

Michael’s employment was terminated after his mother died and in conversation with his employer he mentioned that he has very strong religious beliefs. The employer reacted by saying she didn't believe and that it was a 'load of shit'. Two days later his employment was terminated. He states there were no performance issues raised with him.

### 4.1.5 Case study 5

Sarah works on a 457 visa for a biotechnology company. About a month ago her manage started bringing his dogs with him to work. She immediately complained that she did not feel comfortable around the dogs as her religion does not allow her to touch dogs. The manager continued to bring his dogs to work, and allowed them to roam the office off their leash. Sarah has been the subject of jokes and laughter as a result of her aversion to the dogs. So far meetings have been unable to solve the dispute.

### 4.1.6 Case study 6

David was dismissed and believes that one of the reasons for his dismissal was that all of the managers in the company are of a particular religion and, although they do hire people of a different religion, do not eat or associate with them.

# 5 Conclusion

As a result of the above, any encroachment on traditional freedoms by the ‘reverse onus of proof’ in the General Protections and anti-discrimination law and the restrictions on freedom of speech in section 18C of the RDA are entirely justified and so the status quo should, as a minimum, remain.

JobWatch would welcome the opportunity to discuss any aspect of this submission further.

If you have any queries please contact Ian Scott on (03) 9662 9458.

Yours sincerely,

Per:
Job Watch Inc