



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

G P O B o x 2 2 8 1 B r i s b a n e 4 0 0 1

The Committee Secretary visit us at www.qccl.org.au
Senate Legal & Constitutional Affairs Committee

By Email: legcon.sen@aph.gov.au

Human Rights and Anti-Discrimination Bill 2012 ("The Bill")

Please accept this submission on behalf of the QCCL in relation to the exposure draft of the Human Rights and Anti-Discrimination Bill 2012. We note the submission is somewhat late but ask the committee to accept it in any event.

About the Council

The QCCL is a purely voluntary organisation established in 1967 which has, as its principle purpose, the implementation in Queensland and Australia of the Universal Declaration of Human Rights. The following articles of Universal Declaration require consideration in the context of this submission:

Article 2.

- Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 7.

- All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 23.

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.

Article 8.

- Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

The QCCL fully supports equal opportunity for all in our society. However, whilst pursuing that aim among other important values to our society need to be considered namely: freedom of speech, and procedural fairness. This submission seeks to balance those interests.

Freedom of speech and association

It is the Council's position that the Commonwealth should uphold free speech in Australia, as a liberal society with Constitutional protections. More specifically, the right to freedom of political communication has been implied into the Constitution by the High Court.¹ As Brennan J astutely noted in *Nationwide News v Wills*:

To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential: it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgements.²

The Council shares the sentiment expressed by His Honour and notes further the test prescribed in *Lange v Australian Broadcasting Corporation* which protects certain communication on government or political matters.³ This test was found to also apply to less overtly political communications than that which were the subjects of *Nationwide* and *Lange*, including insults.⁴ There are also strong suggestions that the freedom extends to freedom of association.⁵ Therefore, it is clear that the High Court has found for free speech a significant and indisputable place in Australian law.

Further, the Universal Declaration of Human Rights affords persons a similar right in Article 19:

'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.'⁶

¹ See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

² *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47.

³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

⁴ *Coleman v Power* (2004) 220 CLR 1.

⁵ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 139, 212, 277.

⁶ *Universal Declaration of Human Rights*, UNGA Res 217 A (III) (UDHR) (adopted 10 December 1948) art 19.

It is the Council's position that the Commonwealth should develop legislation whilst attaching to free speech the equally high importance as is given by Australian constitutional interpretation and international law. In this context, the Council has noted that the Bill repeatedly and unjustifiably encroaches on free speech.⁷

Firstly, section 19, which deals with when a person discriminates by unfavourable treatment, is a gross overreach. We believe that the conduct which enlivens subsection 2, in particular conduct that 'offends' or 'insults', creates far too low a threshold for what is considered unlawful. Liberties may be curbed if there are worthy justifications, such as if they encroach on other liberties or there is some important reason of policy or common sense. However, section 19 has the potential to reduce democratic discourse to innocuous, sterilised conversation, given the subjectivity of what may cause offence or insult. The law should not intervene to merely prevent feelings being hurt, especially when the trade-off is such a significant portion of free speech. Therefore, we hold that in the case of conduct that offends or insults, there is not worthy justification for their outlaw.

Section 51 is a further violation of free speech and we reject it on the same basis as section 19. The Council is not a racist organisation but we defend a person's right to express racist sentiments. In a liberal democracy, it should be the contest of individual expression that fights for what may be considered socially acceptable. The government has but a very limited place in regulating such contests. Being democratically elected does not give a government a mandate to stifle voices with which it does not agree and this in fact undermines that democratic process. In this vein, we also reject subsection 4 which outlines circumstances in which racism is lawful. It is the hallmark of a censorship state that regulates its media on the basis of how 'genuine' its academic, artistic or scientific purpose is. Whilst the Council can see value in preventing people from falsely representing their academic or scientific credentials, this is separate from censoring the expression of individuals on the basis of what the government considers a valuable contribution to public discussion. The latter is an unacceptable interference, especially given that the threshold for illegality is so low, encompassing conduct that offends insults or humiliates. If a person is physically or emotionally abused, the issue is not racist expression, but instead a problem with violence or aggression which should not be tolerated.

⁷ See also our previous submissions on this topic at http://www.qccl.org.au/documents/Sub_MC_5April95_Racial_Hatred_Bill_1994.pdf

Section 23 Exemption

The Council also takes issue with section 23 pertaining to when discrimination is lawful. We find that this exemption is not present in say the Victorian or Queensland legislation. We question whether if it is necessary and in particular whether it is too vague and broad.

Women in defence

With regard to section 40 subsection 4, the Council considers it sexist that women should be excluded from combat roles until 2016. Where women are capable of fulfilling the same requirements for combat that are currently required by men, they should be afforded the same responsibilities and duties as men. Showing preference to men in a situation where women may be equally capable is unacceptable in modern Australia. Such discrimination is akin to paying women less for the same occupation or excluding them from management in private enterprise. We note further that the date from which women may be given combat roles coincides roughly with when Australia ceases its duties in Afghanistan. This otherwise arbitrary date can only be seen as a direct attempt to exclude women from that war.

Junior rates of pay

Section 42 is problematic for several reasons. Firstly, there is no reason why an employer may discriminate merely on the basis of age, as that person may be just as qualified as someone older than 21 years of age. More practically, such a restriction is likely to dissuade young people from engaging in work as early as possible. Secondly, even if there was justification for discriminating against younger workers, the age of 21 holds no significance in modern Australia – 18 years of age is when a person is legally considered an adult.

Defendant in a proceeding

We note that this is a civil proceeding so the same strictures in relation to the burden of proof do not apply as in relation to a criminal proceeding. In a criminal proceeding the burden of proof is part of a system of principled asymmetry which exists between the prosecution and the defence as a safeguard to liberty.

In civil proceedings, it is not at all unusual for there to be a burden shifting. For example, in a personal injuries claim where the defendant claims that the plaintiff has suffered from a pre-existing condition the plaintiff has the burden of making out a *prima facie* case that they have suffered incapacity as a result of the defendant's negligence. Once that has been done the onus shifts to the defendant to prove the pre-existing condition and its effect. However, the

onus remains upon the plaintiff to convince the court on the whole of the evidence that his or her alleged disability is caused by the defendant's negligence⁸.

We do accept that there is a legitimate concern that in discrimination cases most of the relevant evidence is in the hands of the respondent. However, we consider that Section 124 goes too far in that it shifts the ultimate burden of persuasion to the respondent. In our view, the correct approach is that of the United States Supreme Court as exemplified in cases such as *United States Postal Service v Aikens* 460 US 711, in which the Court held the correct approach is that where the plaintiff establishes a *prima facie* case, a rebuttable presumption is created against the employer. However, the plaintiff retains the ultimate burden of persuasion.

We also condemn section 133 which deals with costs. In our view the ordinary rules as to costs should apply.

This submission is substantially the work of executive member Will Kuhnemann. We trust this is of assistance to you in your deliberations.

Yours Faithfully

Michael Cope
Executive Member
For and on behalf the
Queensland Council for Civil Liberties
10 January 2013

⁸ *Cross On Evidence* 8th Australian Ed paragraph 7205