

Submission on

Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012

Part 3 - Amendment of Anti-Discrimination Act 1991 (the Amendment)

By David Faulkner

The Amendment will insert section 106B (see Addendum 1) into the *Anti-Discrimination Act 1991 (Qld)* (the AD Act). In essence, this section will make it lawful for the State of Queensland to perpetrate acts of race discrimination based on nationality in the provision of government services and assistance.

The Amendment is clearly in response to the recent settlement in the case of *Campbell vs State of Queensland QCAT 2012*. Ms Campbell, who is permanently residing in the State of Queensland, was denied disability services because she is a New Zealand citizen. The Tribunal stated that Ms Campbell had a strong case of direct discrimination based on nationality (which is classed as race discrimination under the AD Act). I have no doubts that she was indeed the victim of systemic race discrimination. In proposing the Amendment it seems apparent that the Queensland Government is in little doubt either.

The Amendment seems to be an ill-conceived knee-jerk reaction to the fear of widespread litigation. However, the legalisation of race discrimination by the State may well turn out to be a far costlier path than doing the right thing. The West Australian Government faced the same decision in 2011, and decided to quietly restore disability services to all New Zealanders. There was no flood of litigation as a result. In contrast, the Amendment runs the real risk of infuriating the New Zealand community to the point where we will launch sizeable class actions against the State.

If the Government thinks that the Amendment will enable it to racially discriminate against New Zealanders with impunity then it should think again. The State Attorney-General appears to have forgotten about the existence of federal legislation that prohibits race discrimination. The *Racial Discrimination Act 1975 (Cth)* (the RDA) prohibits, amongst other things, discrimination against migrants. Indirect discrimination based on national origin is also prohibited by the RDA. 2011 Census data reveals that a far greater proportion of New Zealand and Pacific Island born are being denied State services relative to those born elsewhere. In this regard I note that the Australian Human Rights Commission has previously accepted a complaint against the Queensland Government made by a New Zealander concerning discrimination based on immigration status.

Being Commonwealth legislation, the anti-discrimination provisions of the RDA override discriminatory state policies in any case. We will therefore simply switch to the Federal Courts in order to bypass the Amendment. Should we be successful under the RDA then the Amendment's only real effect will be to show the people of New Zealand that the State of Queensland is violating our human rights in an entirely calculated and deliberate way.

The legalisation of race discrimination by the State is also a clear breach of Queensland's binding obligations under the *International Covenant on Civil and Political Rights*, as nationality discrimination concerning economic rights is prohibited under the right to equality before the law (art. 26).

Nationality discrimination is similarly prohibited under article 2(2) of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR). I note that the Queensland Government is citing limited public funds as a rationale for the Amendment; however, ICESCR Article 2(3) only allows developing countries to determine to what extent they guarantee economic rights to non-nationals. As one of the richest countries in the world per capita, Australia cannot claim developing country status, and is required to treat all residents equally – particularly those lawfully residing on an open-ended basis.

The Convention on the Rights of the Child guarantees rights such as government-funded disability services to all children. The Amendment will allow the State to continue to deny such support to the disabled children of New Zealanders – including those actually born in Australia. The deliberate commission of human rights violations against disabled children is an unjustifiable disgrace.

In addition, in General Recommendation 30 (Discrimination against non-citizens), The UN Committee on the Elimination of Racial Discrimination stated inter alia:

3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.

New Zealand nationals are entitled to reside indefinitely in Australia by virtue of a bilateral arrangement between our 2 countries. We are required to pay the same taxes and contribute to society in the same manner as Australian nationals, yet we are being treated unfavourably based on an immigration status that uniquely pertains to our nationality.

Judge Rauf Soulio, Chair of the Australian Multicultural Council, made the following comments concerning the unequal treatment of New Zealanders as part of a submission to the Productivity Commission dated 25th of October 2012:

“...the emergence in Australia of an economically disadvantaged group, which also identifies as socially marginalised, appears not to have been considered or addressed. The fact that a number of these individuals are of Maori, Samoan, Tahitian or other Pacific Islander heritage can contribute to a sense of exclusion based on cultural identity.

As partners of Australia’s National Anti-Racism Strategy, the AMC considers such experiences to be detrimental to Australia’s long term social cohesion and localised community harmony. Australia’s commitment to positive relations with our trans-Tasman neighbours adds another dimension to this issue.

As alluded to by Judge Soulio, the savings that the State is making by committing human rights violations against New Zealanders comes at a cost to the social fabric and to continued good relations with New Zealand. I note that it has already been reported that the New Zealand Foreign Minister has asked his department to investigate the Amendment.

I also note that a sizeable proportion of tourists to Queensland are from New Zealand. They may not be so keen to come once they are aware that you are committing human rights violations against us – as detailed in the print and online versions of the NZ Herald:

“Queensland has introduced legislation that will allow it to discriminate against New Zealanders by blocking access to government aid.”¹

And on Radio NZ National News:

Queensland legislation would hit NZers

"One would hope that that signal, which of course, went to the very top of the Queensland Government, would have made them stop the discrimination but instead they're legislating to make the discrimination legal.

"This should be ringing alarm bells everywhere, particularly for New Zealanders resident in Queensland."

The New Zealand Labour Party's foreign affairs spokesperson Phil Goff says Australians permanently living in New Zealand are entitled to the same benefits as other permanent residents, and the same should apply for New Zealanders in Australia.

"If you're there, you're making a contribution to Australian society, you're paying your taxes, you're there long term, there's no legitimate grounds on which you as a Kiwi should be discriminated against and treated as a second-class citizen."²

In light of all of the above, I ask the Queensland Government to reconsider the wisdom of introducing such a blatantly racist amendment, and instead consider following the example set by the Western Australian Government as the most appropriate course of action.

¹ See http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10844810

² See <http://www.radionz.co.nz/news/national/119868/queensland-legislation-would-hit-nzers>

Addendum 1

106B Citizenship or visa requirements imposed under State government policies etc.

‘(1) This Act does not apply in relation to—

- (a) the inclusion of a prescribed eligibility provision in a relevant policy; or
- (b) the performance of a function by a person in connection with a prescribed eligibility provision.

‘(2) In this section, a reference to performing a function includes a reference to exercising a power or carrying out a responsibility.

‘(3) In this section—

government entity—

(a) means an entity mentioned in the *Public Service Act 2008*, section 24(1); but

(b) does not include—

(i) a GOC, other than to the extent the GOC is directed to perform an obligation under the *Government Owned Corporations Act 1993* or another Act; or

(ii) an entity mentioned in the *Public Service Act 2008*, section 24(2)(a), (b), (c), (d), (e), (f), (g), (i) or (j).

prescribed eligibility provision, of a relevant policy, means—

(a) a provision requiring that a person must have a particular citizenship or visa status to be eligible for financial or other assistance, services or support under the policy; or

(b) a provision under which persons who have a particular citizenship or visa status are treated more favourably than other persons in relation to their eligibility for financial or other assistance, services or support under the policy.

relevant policy means a policy of a government entity—

(a) that relates to any area of activity set out in part 4; and

(b) under which persons are provided with financial or other assistance, services or support.

visa see the *Migration Act 1958* (Cwlth), section 5.