



ANTI DISCRIMINATION
COMMISSION QUEENSLAND

Youth Justice (Boot Camp
Orders) & Other Legislation
Amendment Bill 2012
Submission 041

Submission

to

Legal Affairs and Community Safety Committee

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

8 November 2012

Introduction

The Legal Affairs and Community Safety Committee (the Committee) has invited submissions on the *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012* introduced into the Parliament on 1 November 2012, by the Attorney-General and Minister for Justice, Hon Jarrod Bleijie MP.

This submission focuses on human rights and equality issues arising from the proposed amendments to the *Anti-Discrimination Act 1991* (the ADA) contained in the Bill

About the Anti-Discrimination Commission Queensland

The Anti-Discrimination Commission Queensland (Commission) is an independent statutory authority established under the Queensland *Anti-Discrimination Act 1991* (the AD Act).

The scheme of the AD Act is to prohibit discrimination, both direct and indirect, on certain grounds in certain areas of activity, unless an exemption under the Act applies, and to provide a mechanism for resolving contraventions of the Act. Other objectionable conduct is also prohibited, including sexual harassment, victimisation, vilification and unlawful requests for information.

The functions of the Commission include promoting an understanding, acceptance and public discussion of human rights in Queensland, as well as inquiring into, and where possible effecting conciliation of, complaints of contraventions of the AD Act. Complaints that are not resolved through conciliation can be referred to the Queensland Civil and Administrative Tribunal for hearing and determination.

Proposed exemption to the AD Act in relation to persons with a particular citizenship or visa status

The insertion of a new Section 106B into the AD Act allows the State of Queensland to exclude certain persons based upon their citizenship or visa status from being eligible for government assistance, services or support. The provision allows for more

favourable treatment of persons who have a particular citizenship or visa status in relation to eligibility.

The Attorney General in his introduction speech said:

The exemption will only apply to government policies for the provision of financial or other assistance, services or support and will only extend to citizenship or visa status criteria. It is not a blanket exemption for government policies in relation to other grounds covered by the Anti-Discrimination Act. Public resources are finite. Limits must often be placed on who is eligible for government funded assistance. The exemption will ensure that government entities can adopt and implement assistance policies based on citizenship or residency without being exposed to litigation which would further deplete scarce public resources.

The Commission appreciates that economic requirements may in some instances justify the restriction on the provision of expensive government services to Australian citizens or to persons with particular visa status. However, if the amendments are made as proposed, the Commission is concerned that any widespread denial of certain government services to long term residents of Queensland may create a permanent second class of people. The ADCQ considers this to be detrimental to Queensland's long term social cohesion and localised community harmony.

In particular, the Commission understands that there is an emergence of an economically disadvantaged group of New Zealand citizens living in Australia who do not have a clear pathway to either permanent residency or Australian citizenship.

This issue was clearly identified in a June 2012 report titled '*Access & Equity for a multicultural Australia*' which was delivered to the then Commonwealth Parliamentary Secretary for Immigration and Multicultural Affairs. An Access and Equity Inquiry Panel was established in 2011 to examine concerns relating to accessibility of Australian government programs and services for Australians of culturally and linguistically diverse (CALD) backgrounds.¹

¹ See <http://www.immi.gov.au/living-in-australia/a-multicultural-australia/government-approach/government-services/AandEreport.pdf>

Part of the Panel's report reads:²

The Panel received a number of detailed submissions and strong Queensland-based representations during the face-to-face consultation process in relation to access to services by New Zealand Non-Protected Special Category Visa (SCV) holders, who moved to Australia from New Zealand after February 2001.

Under policy introduced by the Australian Government in 2001, in the context of arrangements for a reciprocal social security agreement between Australia and New Zealand, SCV holders can enter and live in Australia indefinitely without meeting globally applied visa criteria, but do not have 'Permanent Resident' status. They cannot access a range of [federal] government services without first qualifying for permanent residence by meeting global migration criteria.

New Zealand citizens entering Australia on this temporary basis have an advantage over citizens of other countries in that they can freely enter and live in Australia, with access to the labour market, without meeting the long-term residence criteria applied to other nationals. However, the presence of many thousands of New Zealand citizen temporary residents with increasingly long-term periods of stay raises the potential for a variety of social consequences. A proportion of this group are from CALD backgrounds.

Submissions noted that many New Zealand citizens in this situation have limited access to employment, training and other programs, and were forced into low-paid or low-skilled jobs. These in turn result in long-term social impacts such as over-representation in juvenile justice, underperformance in numeracy and literacy, substance abuse, homelessness and suicide. The point was also made to the Panel that many people in this circumstance were unaware both before and after arrival of the very limited access to benefits within Australia.

The growing population of long-term temporary residents of New Zealand origin is occurring in the context of steadily increasing flows of people, frequently from CALD backgrounds, staying temporarily in Australia for periods longer than one year under a variety of immigration arrangements-.temporary skilled workers, students and working holidaymakers. A proportion of these temporary residents qualify under global criteria to remain in Australia as permanent residents, with a pathway to citizenship.

The Panel recommended:³

That the Australian Government ensure that agencies give clear and coordinated, whole-of-government advice to long-term temporary entrants to Australia, particularly New Zealand citizens contemplating long-term temporary residence in Australia, both before and after arrival, on their entitlements.

² From page 57

³ Recommendation 20, page 58

The Commission suggests the presence of many thousands of New Zealand citizen temporary residents with increasingly long-term periods of stay raises the potential for a variety of social consequences. A proportion of this group are from CALD backgrounds (Maori, Samoan, Tahitian or other Pacific Islander heritage). Denial of certain government services to this group may contribute to a sense of exclusion based on cultural identity. Potential long-term social impacts may lead to an over-representation in juvenile justice, underperformance in numeracy and literacy, substance abuse, homelessness and suicide - all of which ultimately cost the Queensland community.

A further possibility is that families of children with disabilities, who are not provided with support services, may relinquish their children into the care of the State, again increasing the social and economic costs to Queensland.

This is an issue that requires the attention of both the Commonwealth and State Governments to ensure that a permanent second class of people in Australia, that will ultimately impact on the well-being and social cohesion of broader Australian community, including Queensland, is not created.

Recommendation

- 1. If the amendment is passed, the Commission recommends the Queensland government issue clear policy guidelines to government entities to permit denial of services to long term residents, only in the most exceptional of circumstances.**
- 2. That the Queensland and Australian Governments work together to address and prevent the potential development of a permanent second class of people in Australia.**

Proposed amendments in accommodation for use in connection with work as sex worker

The Bill amends the AD Act to allow accommodation providers to discriminate against another person in relation to accommodation if the accommodation provider reasonably believes that the other person is using or intends to use the accommodation in connection with that person's or another person's work as a sex worker.

The definition of accommodation in the AD Act includes business premises, a house or flat, a hotel or motel, boarding house or hostel, a caravan or caravan site, manufactured homes, a camping site, and a building or construction site.

In his introduction speech on 1 November, the Attorney General said:

Recently, a motel operator was found to have contravened the Anti-Discrimination Act by refusing to provide accommodation to be used for prostitution purposes. The bill inserts a new exemption in the act to protect businesses from this sort of complaint and give them control over the use that is made of their premises. The exemption allows a person to lawfully discriminate against another person in relation to accommodation if they reasonably believe that the other person is using or intends to use it in connection with that person's work or another person's work as a sex worker. The exemption would justify a refusal of accommodation on the grounds that the person is a sex worker, a sex worker's procurer or a sex worker's customer if they are using or intend to use the accommodation to carry on prostitution. However, it will not allow a person to refuse to provide accommodation to someone merely because the other person is a sex worker.

Public Benefit of a well-managed legal sex industry in Queensland

The discrimination case that has led to this proposed amendment to the AD Act involved a sole operator sex worker working from a motel in the fly-in fly-out mining town of Moranbah. It would appear there is a demand for sex workers in Moranbah, and possibly in other mining towns in regional and remote Queensland.

A well regulated sex industry, where all stakeholders are protected by safe working practices and are able to work in areas of demand across Queensland in a discreet and unobtrusive manner, is a good policy outcome that most Queenslanders would prefer to a sex industry that operates in a manner that causes a nuisance to the broader community, or that operates in a manner that is unsafe to the stakeholders involved in the industry.

There is a strong possibility that if this proposed amendment is passed there will be a paucity of accommodation available for lawful sex workers to utilise for their business operations in remote and rural Queensland, which may result in a poorly managed sex industry with higher levels of unsociable conduct. Such an outcome is likely to lead to a poorly managed and potentially unlawful sex industry that will cause nuisance to the public and extra work for the law enforcement agencies.

Recommendation

- 3. If the amendment is passed as proposed, both the Queensland Police Service and the Prostitution Licencing Authority closely monitor any increase in unlawful sexual activity in the sex industry, and the numbers of nuisance complaints arising from the public in relation to the practice of unlawful sex work occurring in public places. The potential consequences of the amendments should be reviewed on a regular basis to avert any diminution in a well regulated lawful sex industry in Queensland.**

Rights of lawful Business Operators

The Attorney General in his press release about the proposed amendments referred to levelling the playing field so that the laws ‘suit the majority rather than the minority.’⁴

One of the most important functions of the AD Act is to protect minority groups from unfair discrimination. If a sex worker is working within the law, and is not causing a nuisance to others in the practice of their work, arguably they ought to be able to conduct their business without experiencing discrimination.

When introducing the Bill, the Attorney General stated the new exemption is to give businesses control over the use that is made of their premises. In order to work

⁴ Media Release of Attorney General and Minister for Justice 1 November 2012
<http://statements.qld.gov.au/Statement/2012/11/1/hotel-and-motel-owners-can-refuse-sex-workers-under-proposed-laws>

lawfully in Queensland, sole operator sex workers are required to work privately and independently. They too are business operators, as are accommodation providers.

The amendment has the effect of preferring one business type over the other. It might be argued that without the amendment, the law currently has the effect of preferring the sex worker business operator over the accommodation provider. However the sole sex worker is largely dependent on the accommodation provider to be able to operate the sole sex worker business in a lawful manner.

Accommodation providers have always had the right to deal with any person, guest or otherwise, who causes a nuisance at the accommodation, and most accommodation providers are likely to have standard policies and procedures for dealing with nuisance behaviours.

The nature of motels, hotels and similar accommodation is that what happens in the rooms is essentially private. People sleep, eat, drink, watch television and do other things, including having sex. Providing accommodation is providing a service for people to use in private. Controlling lawful activity that occurs in private is arguably going beyond the bounds of the service.

Discrepancy between the *Liquor Act* and *AD Act*

The Attorney-General's media release said that a discrepancy between the *Liquor Act* and *AD Act* would now be corrected.

The QCAT appeal panel said in the case of *GK v Dovedeen Pty Ltd and Anor* [2012] QCATA 128:

...it does not seem to us that section 152 of the *Liquor Act 1992* is inconsistent with any provision of the *AD Act* insofar as it concerns provision of accommodation to persons [who] may or will carry on lawful sexual activity therein.⁵

The decision is now on appeal to the Supreme Court of Queensland Court of Appeal.

⁵ At [51]

In its reasoning the QCAT appeal panel said:

[45] It may be readily seen that the provisions of the *Liquor Act 1992* are concerned, inter alia, with regulating what businesses are carried on by licensees on licensed premises. They are not concerned with regulating the activities of guests who utilise licensed premises. The *Liquor Act 1992* identifies in section 3 that its objects include regulating the liquor industry in a way compatible with minimising the harm caused by alcohol abuse and misuse. Section 3A of the Act identifies that in relation to the sale and supply of liquor, a person may obtain a licence to sell or supply liquor as part of conducting a business on the premises, and that liquor may only be sold or supplied as part of that business; that is the principal activity under the licence. Therefore, it may readily be seen that this principal is directed to ensuring that licensees conduct their businesses, or cause them to be conducted (insofar as they stand behind any other activity on the site), in ways that are regulated and compatible with the business of the sale or supply of liquor.

[46] It is an unremarkable and daily occurrence on licensed premises to be found across the length and breadth of Queensland, and probably the entirety of the Australian continent, that many guests who are travelling, are travelling for the purposes of conducting their business in the location where the licensed premises or motel is located. Many business people from all walks of life in some way or another conduct business in and from licensed premises every day. Some licensed premises actually offer as an incentive to business travellers specific ‘business centres’ upon the licensed premises. It may be readily inferred that the Legislature did not intend to impede the commonplace and ordinary lawful use of motel accommodation, whether with or without a liquor licence, by the enactment of section 152.

The Commission is of the view that the issue of any inconsistency between the AD Act and the Liquor Act can be resolved by the Court of Appeal. If, after the decision of the Court of Appeal, it is considered that there still a lack of clarity, that is the appropriate time for Parliament to legislate.

Potential for unscrupulous and potentially exploitative behaviour by accommodation providers

The provision in the Bill does much more than allow accommodation providers the ability control as to whether or not their premises or rooms are used for lawful sexual activity. Paragraph (c) gives the accommodation provider the ability to treat the sex worker ‘unfavourably in any way in connection with the accommodation.’

There is a potential for an accommodation provider to exploit the lawful sex worker by imposing terms and conditions to which other tenants or guests are not subjected.

These would not be limited to higher fees and charges, but could also include demands for ‘in kind’ payments and other exploitative and unscrupulous behaviour.

Such a provision allowing such conduct by accommodation providers is not in the public interest. It allows potential exploitation of both lawful sole operator sex workers as well as lawful brothel operators, and is not in the interest of a well regulated, non-exploitative sex industry in Queensland.

If Parliament is committed to giving accommodation providers a discretion as to whether they rent or let their rooms or premises to lawful sex workers, the Commission suggests adopting the Victorian approach. The Victorian legislation authorises a person to refuse to provide accommodation to another if the other intends to use the accommodation for or in connection with a lawful sexual activity on a commercial basis.

The Victorian legislation provides:⁶

Exception-accommodation for commercial sexual services

A person may refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis.

Recommendations

- 4. That the Queensland Government reconsider the proposed amendments in relation to sex workers and consult with the broader community and the Prostitution Licencing Authority in how best to manage the lawful sex industry’s operation, particularly in remote and rural Queensland.**
- 5. That the proposed section 106(c) be removed from the Bill.**

⁶ *Equal Opportunity Act 2010* (Victoria), section 62

6. That a better way to give accommodation providers the discretion whether to rent or let for the purpose of lawful sexual activity is to model the exemption in the Victorian *Equal Opportunity Act 2010*.

Fundamental legislative principles and Parliamentary democracy

The transitional provisions raise two issues: the retrospectivity and the removal of the right to take action.

The fundamental legislative principles as defined in the *Legislative Standards Act 1992* are the principles relating to legislation that underlie a parliamentary democracy. The principles include requiring that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament. *The Legislative Standards Act* sets out examples of whether the legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament.

As set out earlier herein, the removal of the protections from discrimination in the provision of services for lawful sex workers and certain migrants such as people from New Zealand, derogates the rights and liberties of these individuals.

The provisions further derogate rights and liberties by adversely affecting rights and liberties retrospectively. Not only would the provisions, if passed, take effect from the date of introduction (1 November 2012), the transitional provisions further derogate rights in removing the right to seek redress where a complaint had not yet been made before 1 November 2012.

Although laws change, rights of action for contraventions of the law that occurred before the change, continue to subsist, subject of course to any time limitation applicable to the type of action.

As noted in the Fundamental Legislative Principles Notebook of the Office of the Queensland Parliamentary Counsel, (OQPC) departure from the principles can only be justified on the basis of sound reasoning. The only explanation given for the retrospective effect of the changes and the removal of the right of action is to provide

clarity for accommodation providers and ensure that complainants do not exploit the window period between introduction of the Bill and assent.

The right of action is of itself a fundamental human right. The international agreements to which Australia is a party that provide for the protection of human rights, also provide that there must be a right to seek redress.

The transitional provisions effectively allow accommodation providers and government entities to discriminate in reliance on the proposed exemptions from 1 November 2012, even though the Bill has not yet been enacted. Though that in itself is unacceptable under fundamental legislative principles, it is enough to achieve the claimed objective of providing clarity for the relevant service providers. The removal of the right to make a complaint for alleged discrimination which occurred before 1 November 2012 is unacceptable, particularly as there was no notice to or consultation with the public on this issue.

The OQPC Notebook referred to above states that strong argument is required to justify an adverse affect on rights and liabilities retrospectively. The Commission is of the view that the reasons for the departures from the fundamental legislative principles have not been sufficiently explained and justified.

Recommendation

7. That if the proposed new exemptions are passed, that Parliament observe the fundamental legislative principles contained within the *Legislative Standards Act 1992* by amending clause 271 so it no longer has a retrospective effect and no longer limits the right to take action.

List of Recommendations

1. If the amendment is passed, the Commission recommends the Queensland Government issue clear policy guidelines to government entities to permit

denial of services to long term residents, only in the most exceptional of circumstances.

2. That the Queensland and Australian Governments work together to address and prevent the potential development of a permanent second class of people in Australia.
3. If the amendment is passed as proposed, both the Queensland Police Service and the Prostitution Licencing Authority closely monitor any increase in unlawful sexual activity in the sex industry, and the numbers of nuisance complaints arising from the public in relation to the practice of unlawful sex work occurring in public places. The potential consequences of the amendments should be reviewed on a regular basis to avert any diminution in a well regulated lawful sex industry in Queensland.
4. That the Queensland Government reconsider the proposed amendments in relation to sex workers and consult with the broader community and the Prostitution Licencing Authority in how best to manage the lawful sex industry's operation, particularly in remote and rural Queensland.
5. That the proposed section 106(c) be removed from the Bill.
6. That a better way to give accommodation providers the discretion whether to rent or let for the purpose of lawful sexual activity, is to model the exemption in the Victorian *Equal Opportunity Act 2010*.
7. That if the proposed new exemptions are passed, Parliament observe the fundamental legislative principles contained within the *Legislative Standards Act 1992* by amending clause 271 so it no longer has a retrospective effect and no longer limits the right to take action.