

Queensland Independent Education Union

Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Exposure draft of the Human Rights and Anti-discrimination Bill 2012

1. Introduction

Queensland Independent Education Union of Employees (QIEU) is an industrial association of employees registered as an industrial organisation under the *Industrial Relations Act 1909* (Qld).

QIEU is a union of in excess of 16,000 members with a growing membership. Members are drawn from the non-government education sector which includes members from the Catholic systemic and Non-systemic schools, Anglican systemic and Non-systemic schools, the Lutheran school system and Presbyterian and Methodist Schools Association, the various Grammar schools, Christian Community schools, stand-alone independent schools, the Early Childhood sector (Kindergartens and Preschools) and members from private educational institutions such as English Language Colleges and Business Colleges.

QIEU is an industry union and has coverage of the non-government educational sector generally. As an industry union we cover not only teachers but also those who are ancillary to the educational activity in schools and these school officer members include clerical support staff, teachers' aides, laboratory assistants and the like. Principals of non-government schools who do not have the autonomous right to hire and dismiss employees are eligible for membership of our union. Services staff may also join QIEU.

QIEU has a very substantial interest in and concern for the provisions of anti-discrimination legislation throughout Queensland applicable as a result of both Federal and State legislation. This arises from both its industrial and professional concerns and addresses the interests both of its members as employees and of students as the beneficiaries of the work carried out by its members.

This submission by QIEU is limited to a small number of significant matters where QIEU believes it can be of assistance to the Committee given both the interests of its members and its experience in representing its members.

QIEU is aware of submissions being made by peak employee industrial bodies such as the Australian Council of Trade Unions and the Queensland Council of Unions in relation to matters not addressed in this submission and by the relevant nationally-registered union, the Independent Education Union of Australia.

2. Content of this submission

This submission will address briefly the issues of Attributes and shifting of the onus of proof.

It will then deal with clause 33 entitled 'Exceptions for Religious Bodies and Educational Institutions', a matter of both principle and practical importance from the perspective of QIEU.

It will conclude with a submission expressing concern in relation to the inclusion in the definition of discrimination and in certain other sections of the words 'offends' and 'insults'.

3. Attributes

QIEU is supportive of the expanded list of 'protected attributes' in clause 17.

In particular, QIEU is particularly supportive of the inclusion of 'social origin' in relation to the work area. As an education sector union, facilitation of equality of opportunity is a matter close to the interests of QIEU and its members and accordingly, QIEU in principle is most supportive of the inclusion of this ground. Given that it is undefined however, there may be a need to review it in the light of experience once some cases and practical examples are available for study.

QIEU does have a concern that unlike, for example, the provisions in the *Anti-discrimination Act 1991* (Qld), in respect of a number of protected attributes the word 'activity' does not appear. QIEU is concerned that the absence of this word could lead to an unintended narrowing in interpretation.

In particular, it is submitted that 'political opinion', should read 'political opinion or activity' and that 'religion' should read 'religious belief or activity'.

QIEU also submits that in the absence of a definition of religion there should be explicit provision to the term including non-belief or non-involvement in religious activity and thus submits that the appropriate terminology would be 'religious belief (or non-belief) or religious activity (or abstention from such activity)'.

4. The 'shifting' burden of proof

QIEU has examined carefully the provisions of clause 124 in the light of the public discussion.

QIEU notes that the rationale is to place upon the person having the capacity to produce evidence (in particular about a state of mind) and that it is in this context and that for this reason that the burden of proof is shifted in clause 124(1).

QIEU also supports as uncontroversial orthodox and correct in principle that the burden of proof or exceptions should be placed on the respondent asserting that the exception is applicable.

5. Clause 33 – exceptions for religion bodies and educational institutions

QIEU has over a lengthy period of time and in a number of contexts given close consideration to the terminology and rationale for such religious bodies' exemptions particularly in the educational institutions area.

QIEU notes that in clause 143 of the discussion paper, dated 20 September 2011, under the heading 'Exceptions and Exemptions', the following appears in lines 2 and 3. 'These exceptions reflect situations in which a person's attributes are relevant to the action taken'.

The essence of the concern of QIEU is that the expression of exceptions in terms such as those in clause 33 is much wider than is required by that principle, particularly in the employment situation which is the principal concern in this context of QIEU.

QIEU acknowledges that there is a tension between good principles. The first principle, reflected in the sentence quoted from paragraph 143, is that the rights of persons not to be discriminated against should be upheld except where the circumstances justify the discrimination. The other principle is that the values of adherents of religions should be respected, at least to an extent consistent with anti-discrimination law principles and rationale.

QIEU submits that the appropriate principle in relation to discrimination in the work area is that of loyalty to the employer's legitimate interests in the workplace and conduct in the workplace or closely associated with the workplace reflecting the employer's ethos.

QIEU submits that formulations such as those in clause 33 are much wider than this. In particular, they do not contain an element limiting the scope of the exception to circumstances in which demonstrated interests in relation to the workplace must be identified before the exception can apply.

QIEU submits that provisions such as Section 25 of the *Anti-discrimination Act 1991* (Qld) much more appropriately reflect the correct principle to be applied.

Section 25 is headed 'Genuine Occupational Requirements', and a copy is Appendix A to this submission.

That provision commences with the proposition 'A person may impose genuine occupational requirements for a position'.

In the context of educational institutions or other bodies established for religious purposes, Subsection 3 sets out requirements which are reflective of this principle, and reads:

- (3) It is not unlawful for an employer to discriminate with respect to a matter that is otherwise prohibited under section 14 or 15, in a way that is not unreasonable, against a person if—
 - (a) the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs—
 - (i) during a selection process; or
 - (ii) in the course of the person's work; or
 - (iii) in doing something connected with the person's work; and

Example for paragraph (a)—

A staff member openly acts in a way contrary to a requirement imposed by the staff member's employer in his or her contract of employment, that the staff member abstain from acting in a way openly contrary to the employer's religious beliefs in the course of, or in connection with the staff member's employment.

- (b) it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person's work, act in a way consistent with the employer's religious beliefs.

This is reinforced by Subsection 5, which reads:

- (5) For subsection (3), whether the discrimination is not unreasonable depends on all the circumstances of the case, including, for example, the following—
 - (a) whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate to the person's actions;
 - (b) the consequences for both the person and the employer should the discrimination happen or not happen.

QIEU submits that this is a most appropriate outcome as that formulation appropriately reflects the correct resolution given the two conflicting principles.

It follows from such terminology that the employer is entitled to have its 'doctrines, tenets or beliefs of that religion' respected by the employee in all appropriate circumstances.

However, that formulation would not create an exemption so as to permit discrimination in relation to conduct that lacked the appropriate connection with the workplace.

That, it is submitted by QIEU, is the correct balance.

Section 25 was the result of very wide community consultation with a broad range of stakeholders and much public debate in the Queensland community early in the last decade and it is submitted is appropriate both in principle and in terminology as a resolution of this issue which it is submitted should be adopted in lieu of clause 33.

QIEU notes that in the *Equal Opportunity Bill 2010* in Victoria, an alternative (but based on similar principle) approach was taken by explicitly exempting employment from the exception and also imposing an inherent requirement element.

In conclusion, QIEU respectfully urges that serious consideration be given to the Queensland provision being examined carefully as an appropriate basis in contemporary Australia for the resolution of the conflict between the respecting of the doctrines, tenets and beliefs of the religion and the objectives of an anti-discrimination law which are to prevent discrimination where there is no justification for it. Justification, QIEU submits, is limited to loyalty in the workplace and respect in the workplace for the doctrines, tenets, beliefs of the employees religion. The exception should not permit discrimination based on beliefs or conduct elsewhere.

6. Offensive or insulting behaviour

QIEU refers particularly to Clauses 19, 49 and 51. As an education sector union QIEU and its members are strongly supportive of freedom of speech. QIEU acknowledges that there are already various statutory and other legal constraints on freedom of speech. QIEU submits, however, that it should always be a case of examining very carefully whether there is a justification for any new constraint and that the number of constraints should not become a justification for adding more. Each proposed constraint should be examined very carefully before adoption.

Whilst QIEU supports civilised conduct between citizens, the question here is not whether one approves or disapproves of the conduct but whether legal intervention is an appropriate response.

QIEU is supportive of the proposition that behaviour which is harassing or intimidating (clause 19) is rightly to be dealt with as proposed in the exposure draft but respectfully submits that to include offends and insults in these categories is undesirable as a matter of public policy and that offensive and insulting conduct should be dealt with by the

existing criminal law and/or by public discourse itself rather than by inclusion in the proposed Human Rights and Anti-discrimination legislation. QIEU submits that the (marginal) benefits available from including those concepts will be offset by the dangers to freedom of public discourse, particularly the inhibition of public discussions by persons fearful (even if wrongly) of being brought into substantial proceedings as a result of complaints based on concepts which are so vague and inherently subjective.

QIEU respectfully endorses the very thoughtful speech on this issue by the Hon James Spigelman AC.

7. Conclusion

If QIEU can assist further on any of these matters, please do not hesitate to contact us.

Terence P Burke
General Secretary
Queensland Independent Education Union
20th December, 2012.