Aboriginal & Torres Strait Islander
Legal Service (Qld) Ltd

www.atsils.org.au

Level 5, 183 North Quay Brisbane Qld 4000
PO Box 13035, George Street Brisbane Qld 4003
T: 07 3025 3888 | F: 07 3025 3800
Freecall: 1800 012 255
ABN: 116 314 562

Mr Scott McDougall
Commissioner
Queensland Human Rights Commission
Level 20, 53 Albert Street
Brisbane Q4000

Email: adareview@qhrc.qld.gov.au

By email: adareview@qhrc.qld.gov.au

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Dear Scott,

RE: Review of the Anti-Discrimination Act 1991

We welcome and appreciate the opportunity to provide feedback on the question of special measures in the anti-discrimination legislation.

As part of the review being conducted by the Queensland Human Rights Commission of the Anti-Discrimination Act 1991, the Commission is considering whether there is a need for any reform to enhance and update the legislation to best protect and promote equality and non-discrimination and the realisation of human rights.

One of the purposes of the Anti-Discrimination Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation. This purpose is to be achieved by prohibiting discrimination, and providing for enforcement through a complaints process.

The effects of discrimination are harmful and have a corrosive effect on communities. As noted in the discussion paper, unfair discrimination impacts people's health, wellbeing, and their sense of belonging in all areas of life. It can also have visible and invisible social and economic

impacts on our families, communities, and society. We note the impact of what is called 'intersectional discrimination' when multiple forms of intersecting discrimination occur, for example on the basis of gender, race, disability or sexuality, and which can be particularly harmful. Strong communities and social cohesion are always important but has proved especially important in times of crisis as the last two years has shown.

The Anti-Discrimination Act reflects international human rights standards which have been adopted by the Commonwealth of Australia as part of its international obligations. These standards have been implemented by the Commonwealth and states and territories in legislation and policies. Human Rights standards also influence the development of the common law in Australia.

Australia is a party to seven core international human rights treaties. With respect to protection from racial discrimination under international human rights standards, The United Nations International Convention on the Elimination of All Forms of Racial Discrimination1965, (CERD) was one of the first human rights treaties to be adopted by the United Nations. More than 156 countries including Australia have ratified the Convention. Such represents about 80% of the membership of the United Nations who have all agreed to implement the standards contained in the Convention as law.

Australia ratified the Convention on 30 September 1975 and has passed legislation to introduce the provisions of the Convention into Australian law. Similar jurisdictions to Australia, including Canada, South Africa, the United States of America, and New Zealand, have similarly enacted the standards in their legislation.

Under CERD, an international committee has been established to monitor each State's compliance with the articles of the Convention. This committee is the Committee on the Elimination of Racial Discrimination (CERD Committee), As well as commenting on compliance the CERD Committee has issued guidelines to member states on the appropriate interpretation and implementation of the provisions.

Apart from the Commonwealth, Queensland, New South Wales, the Australian Capital Territory, Victoria, Tasmania, South Australia, Western Australia, and the Northern Territory have all implemented the standards in their anti-discrimination or equality legislation, albeit with variations in their approaches.

We thank you for your ongoing inclusion in the consultation process. Specifically we have been asked to comment on Discussion question 20:

* Should welfare measures and equal opportunity measures be retained or changed? Is there any benefit to collapsing these provisions into a single special measures provision?
* Should special measures provisions continue to be an exemption to discrimination, or incorporated into the meaning of discrimination?

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submissions are informed by nearly five decades of legal practice at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

COMMENT

The Australian equality jurisdictions have provisions that allow for special measures by permitting actions to be taken for the benefit of people with protected attributes. Past reviews of equality legislation have considered these special measures to be essential to achieving substantive equality.

Presently, the Anti-Discrimination Act 1991 (Qld), has two exemptions for discrimination that fall into the category of 'special measures': the welfare measures under s 104 of the Act, where an act is done for the welfare of the members of a group of people with a protected attribute, and s 105 where an act is done to promote equal opportunity for a group of people with a protected attribute.

Equality, Special measures, and International Norms

The United Nations International Convention on the Elimination of All Forms of Racial Discrimination, [1975] ATS 40, (the Convention) is based on the principles of the dignity and equality of all human beings.

However there is also recognition that there is disparate enjoyment of human rights by persons and there is an ensuing need to correct such imbalances. Thus special measures are one

component in the ensemble of provisions in the Convention dedicated to the objective of eliminating racial discrimination,

As explained by the CERD Committee special measures are not an exception to the principle of non-discrimination but are integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality.

Thus advancement and protection of communities through special measures is recognised as a legitimate objective to be pursued in tandem with respect for the rights and interests of individuals.

Having said that, the starting point is always the principle of non-discrimination, which in article 1, paragraph 1, of the Convention protects the enjoyment on an equal footing of human rights and fundamental freedoms "in the political, economic, social, cultural or any other field of public life".

The CERD Committee distinguishes special measures from a range of other measures and the recommendation states that it is important that States parties distinguish "special measures" from:

* Unjustifiable preferences;
* Affirmative action, positive action or affirmative measures;
* Differentiation that is not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim;
* Measures that lead to the maintenance of separate rights for different racial groups.

The CERD Recommendation therefore encourages State parties to employ terminology that clearly demonstrates the relationship of their laws and practice to these concepts in the Convention.

Special Measures as an Exemption or Positive Measure in the Australian Equality Jurisdictions:

Both Victoria and the ACT have looked at whether special measures should not be seen as exemptions to discriminatory conduct but rather as a positive measure to promote equality.

Here in Queensland, the still relatively new Human Rights Act 2019 which recognises the right to recognition and equality before the law also contains the qualification in s 15(5) that:

Measures taken for the purpose of assisting or advancing person or groups of persons disadvantaged because of discrimination do not constitute discrimination.

We would approach a change to define special measures as a positive measure with extreme caution. Unless worded appropriately, the concern is that definitional changes could open themselves up to misapplication or misuse or end up entrenching inappropriate or outdated

measures.

Special measures should not lead to the maintenance of separate rights for different racial groups or entrenched and outdated measures.

As a consequence of the experience of impermissible measures being justified as special measures, CERD has consolidated its guidelines on permissible and impermissible measures into General Recommendation no. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination (2009)

As noted by the CERD Committee there are two major limitations on special measures set out in the Convention:

The first limitation is that the measures 'should not lead to the maintenance of separate rights for different racial groups' and the CERD Committee while noting the specific historical context also recognised the need to avoid doing so for other groups namely: minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognized within the framework of universal human rights.

The second limitation is that special measures are temporary. The length of time permitted for the duration of the measures will vary in light of their objectives, the means utilized to achieve them, and the results of their application.

The persistence of special measures past the point when the motivating conditions no longer exist or the anticipated benefits do not eventuate are a concern.

For example, challenges were raised in Moloney v The Queen [2013] HCA 28 (19 June 2013) on the characterisation of restrictive and discriminatory legislation. In Maloney the challenge was raised on the basis that the special measure failed to conform to four key guidelines contained in the Recommendation.32

Two observations flow from Maloney, As noted in the earlier appeal in the Queensland Court of Appeal in R v Maloney [2012] QCA 105, the then President of the Court noted that it was four years on from when the restrictive measure had been introduced:

The Queensland executive presently reports quarterly to the Queensland Parliament on key indicators in those Indigenous communities affected by the relevant provisions, including Palm Island. The report for the period July 2010 to June 2011 (published December 2011) recorded that the Alcohol Management Plan commenced on Palm Island on 19 June 2006. As to hospital admissions, there was no overall trend in admission rates. As for reported offences against the person, there was no overall trend but, in the period from 2006/07 onwards, rates of reported offences against the person trended up. As to substantiated child protection notifications and admissions to child protection orders, the 2010/11 rate was similar to that in 2009/10 but there

was a decrease in the rate at which children were admitted to child protection orders. As to student attendance rate at the Bwgcolman Community School (Palm Island) 2010 to 2011, the student rate increased but remained less than the rate recorded in 2007/08

The President of the Court of Appeal went on to comment:

These figures do not suggest the relevant provisions insofar as they affect the Palm Island community are yet producing the results hoped for by the legislature. The legislature may reasonably consider that more time is required to assess the impact of the relevant provisions on achieving the desired special measure.

The appeal judgments of McMurdo P in R v Maloney [2012] QCA 105, Morton v Queensland Police Service (2010) 240 FLR 269; [2010] QCA 160, and Aurukun Shire Council v CEO Office of Liquor Gaming & Racing (2010) 265 ALR 536; [2010] QCA 37 outline the historic context of the reliance by Councils on liquor sales to be able to fund services and the additional measures such as alternative sources of funding for services to remove the dependence on alcohol sales to fund services in the community.

Special measures are intended to change the context which led to their implementation in the first place. As the context changes around those special measures, the need for or the appropriateness of the special measures changes too. Questions of other less restrictive ways then become a live issue and need to be raised and addressed.

As noted by the President in the Court of Appeal in R v Maloney:

It is clear from the international instruments and statements to which I have referred [listed in paras [34]–[39] of the reasons] that special measures must be temporary and not maintained after the objectives for which they were enacted have been achieved. See also Brennan J's observations in [Gerhardy v Brown (1985) 159 CLR 70, 140].

After discussing the statistics that were meant to justify and support the imposition of special measures and the question, four years later, of what an appropriate length of time would be (as quoted in the the passages above, the President then went on to observe:

Conversely, if it becomes clear after a reasonable period that legislation enacting a special measure is ineffective in achieving the intended results, in accordance with the spirit of Racial Discrimination Act and the international instruments and statements relating to special measures to which I have referred, it would cease to be a special measure and must be repealed.

If special measures are left as a defence, then the ability to challenge outdated or inappropriate measures remains. However if made part of the definition of discrimination, its non temporary nature would entrench the existing special measure and block other more reasonable measures from being implemented.

Timing and Early Loss of Equal Opportunity Measures:

The other branch of the question in Discussion Question 20 impacts upon equal opportunity measures undertaken by private and not for profit groups.

As the Human Rights Act addresses actions and decision making by government and public entities, the special measures reference contained in it is directed towards government and public entities. In contrast, the Anti-Discrimination Act also addresses actions and decision making by private and not for profit groups and the special measures provisions also refers to special measures undertaken by those groups.

Ironically, the question of when a special measure, especially special measures created by legislative regimes has been in place too long and has reached its expiry date is only one of the questions of timing associated with special measures. The other major question of timing, whether a special measure has had enough time to be effective, arises more in the context of special measures undertaken by private and not for profit groups.

These special measures are likely to be discrete small initiatives and represent significant investment of time and resources for the relatively small organisations.

In our submission, any tests for the appropriateness of special measures by these groups should not be overly complex or create overly expensive and time consuming processes to establish or be too constrained in time.

Two useful illustrations arise from Victoria and South Australia. They arise respectively from The Ian Potter Museum of Art (Anti-Discrimination Exemption) [2011] VCAT 2236 (28 November 2011) and the application decided on the papers in Wallman's Lawyers [2020] SACAT 1(2 January 2020).

In Wallman's Lawyers [2020] SACAT 1 the applicants submitted that they had identified a significant lack of lawyers, law clerks and law students of Aboriginal and Torres Strait Islander descent, particularly in the area of corporate and commercial law. They brought an application under s92 of the Equal Opportunity Act 1984 for an exemption for their proposed internship and scholarship for an Aboriginal or Torres Strait Islander applicant.
In Wallmans, The South Australian Civil and Administrative Tribunal cut through the Gordian knot of the exemption test in s92 and applied the simpler general exception under s 65 of the Equal Opportunity Act 1984.

Had Wallman's lawyers been forced to rely upon the exemption granting power under s 92 of the Equal Opportunity Act 1984 then their initiative would have been subjected to time limits within which their aspirations would have likely been left unfulfilled.

(2) An exemption under this section—
(a) may be granted unconditionally or on conditions; and
(b) may be revoked by the Tribunal on breach of a condition; and
(c) subject to revocation, remains in force for a period, not exceeding three years, determined by the Tribunal, but may be renewed from time to time for a further period, not exceeding three years, determined by the Tribunal.

Consequently, although the Tribunal was empowered to grant exemptions under s 92 of the Act, the exemption granted by the Tribunal could only remain in force for three years, and possibly renewed for up to another three years.

Given that a law degree takes four years and the road to obtaining a principal's certificate takes a few more years and the internship was for one student, the most incorrigibly optimistic of law educators and law partners would not anticipate a significant increase of lawyers, law clerks and law students of Aboriginal and Torres Strait Islander descent from the maximum 6 years that this exemption could be granted for.

Even if the internship helped redress that balance should it cease to be accepted as a special measure while the percentage of law firm partners or judges who identified was so low? Given the number of current and past Chief Justices of the Australian states and territories had now exceeded 100, how long before an Australian jurisdiction could claim its first Chief Justice who identifies as being of Aboriginal or Torres Strait Islander descent? The test under s92 would constitute an impediment to such being achieved.

In The Ian Potter Museum of Art (Anti-Discrimination Exemption) [2011] VCAT 2236 the Ian Potter Museum of Art applied for an exemption under the Victorian Equal Opportunity Act 2010 to allow them to employ only an Indigenous person for the role of an Assistant Curator. Had that exemption been granted it would have only be granted for five years.

instead the tribunal was prepared to find that the proposed conduct is a special measure under section 12(1) of the Equal Opportunity Act and made a declaration to that effect under section 124 of the Victorian Civil & Administrative Tribunal Act 1998 (VCAT Act). Therefore, having satisfied s 12(1), under section 12(2) of the EO Act the applicant will not discriminate against another person contrary to the EO Act by taking that special measure.

The provision in section 12(1) of the Victorian Equal Opportunity Act takes a simpler approach.

Special measures
(1) A person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute.

Examples

1 A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.

2 A swimming pool that is located in an area with a significant Muslim population holds women-only swimming sessions to enable Muslim women who cannot swim in mixed company to use the pool.

3 A person establishes a counselling service to provide counselling for gay men and lesbians who are victims of family violence, and whose needs are not met by general family violence counselling services.

(7) On achieving the purpose set out in subsection (1), the measure ceases to be a special measure

As noted above, the special measures undertaken by private and not for profit groups are likely to represent significant investment of time and resources for the relatively small organisations and are at risk of being allowed exemption status for too short a time, considering both the positive effect it is designed to achieve and f the investment of time and resource required from the private or not for profit entity in establishing it.

Any special measures provision should not be too cumbersome for private or not for profit organisations to fulfil or terminate too quickly before the intended changes can take effect.

CONCLUSION.

Our primary contention is that changes to the legislation should be facilitative of obligations under international human rights law with respect to special measures and provisions for special measures should be in conformity with international human rights norms. Our submissions look further at the temporary nature of special measures and how ideally prospective changes to the law should respond to that. Thank you for this opportunity to provide input.

Yours faithfully,

Shane Duffy

Chief Executive Officer