

Part B:
Does the law need to change?

Overview

During the initial phase of the Review, we asked stakeholders if the Anti-Discrimination Act is effective in eliminating discrimination in Queensland, or whether the legislation needs to change.⁵

The consistent theme that emerged through our initial consultations, research, and submissions is that the current system lacks a preventative focus.

The legislation is geared toward addressing discrimination by resolving individual complaints made about conduct that has already occurred. Given the barriers to accessing the complaints process, particularly for marginalised or disadvantaged groups, stakeholders have told us that there is a need for change.

We heard that:

- People and communities continue to experience discrimination in Queensland, even though it is unlawful.
- Discrimination is harmful, and has wide-reaching impacts on people, their communities, and our society.
- The current legislative approach relies on a complaint-based model. While this can be effective for some people in resolving individual complaints, many people do not want to make a complaint, or experience barriers to accessing the process. This makes enforcement of protections less accessible than they should be.
- While the Anti-Discrimination Act has played an important role in responding to discrimination over the last 30 years, there is room to build on what we have learned about eliminating, and responding to, all forms of discrimination.
- Discrimination and sexual harassment cannot be addressed only through legislation. Awareness, education, and support are critical measures to ensure the law is meaningful in practice.

These issues and themes are explored below.

⁵ The Terms of Reference ask us to consider whether there is a need for any reform to enhance and update the *Anti-Discrimination Act 1991* (Qld) to best protect and promote equality and non-discrimination and the realisation of human rights.

Experiences of discrimination

The Anti-Discrimination Act has been fundamental in shaping community expectations. Since the legislation was introduced, there has been increased recognition that overt discrimination is unacceptable and unlawful.

However, we have identified that a substantial amount of discrimination still occurs, particularly more complex forms of discrimination that is endured by people who experience social disadvantage. Rather than being contained to isolated incidents involving individuals, their experiences were linked to broader systems and culture.

We also heard that the Anti-Discrimination Act may not be having a real impact on the daily lives of people the legislation seeks to protect, because it has limited capacity to create meaningful systemic change.

Organisations that provide services to people at risk of discrimination because of their attributes such as race, age, sexuality, religion, or social status, told us discrimination is often normalised and can therefore become invisible. This means that some people may not identify as having experienced discrimination, even though they experience its adverse impacts.

The Review also heard anecdotal information that while blatant forms of discrimination have declined since the introduction of the Anti-Discrimination Act, more subtle and less visible forms of discrimination are commonly experienced by some groups, and these are often linked to attitudes, biases, and stigma.

We also heard that discrimination law has limited capacity to fully recognise the experiences of people who have more than one protected attribute – for example, a First Nations woman with disability who is pregnant, or a gay man from a culturally and linguistically diverse background. These experiences are often compounded and can have an impact on how a person is treated across their lifetime. Intersectional disadvantage also affects a person's sense of belonging, which can have deleterious impacts.

What is systemic discrimination?

The Review was told that discrimination can be deeper, wider, and more structurally embedded than what is currently unlawful. This is often referred to as ‘systemic discrimination’. This term can mean different things in different contexts, and is also referred to as ‘structural discrimination’ or ‘institutional discrimination’.⁶

Drawing on common components of relevant definitions,⁷ systemic discrimination can include:

- a) legal rules, policies, practices, attitudes, or structures entrenched in organisations or broader community
- b) which are often seemingly neutral
- c) but create, perpetuate, or reinforce a pattern of relative disadvantages for some groups; and
- d) can be the result of multiple barriers across multiple systems.

In some situations, historical disadvantage or social marginalisation gives rise to, or contributes to, systemic discrimination. These same factors may also operate as barriers or deterrents to accessing protections available under anti-discrimination laws through making and pursuing a complaint. Eliminating systemic discrimination as far as possible can therefore be viewed as a vehicle for achieving substantive equality.

This conversation is connected to ideas about formal and substantive equality. Formal equality refers to the concept that all people should be treated the same. It encourages neutrality and asserts that people should be judged on the basis of merit and not their characteristics.⁸ While formal equality is simple to understand and apply, it does not actively address the causes of inequality and can perpetuate structural disadvantages. Same treatment does not necessarily create an equal outcome.

Substantive equality focuses on ensuring that people have quality opportunities in a real sense,⁹ and focuses on outcomes.¹⁰ Rather than evaluating whether or not two people were

⁶ Council of Europe, *Identifying and Preventing Systemic Discrimination at the Local Level – Policy Study* (October 2020).

⁷ Canadian Human Rights Commission, *Protecting their rights: a systemic review of women’s rights in correctional centres for federally sentenced women* (2003); Council of Europe, *Identifying and Preventing Systemic Discrimination at the Local Level* (Policy Study, October 2020); Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 38.

⁸ Dominique Allen, ‘An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)’ (2020) 44(2) *Melbourne University Law Review* 459, 461–462.

⁹ Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 22.

¹⁰ Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 266, referring to S Fredman, ‘Equality as a Proactive Duty’ (2012) 60 *American Journal of Comparative Law* 12.

treated in the same way, substantive equality requires correcting or equalising a person's position to move towards equal outcomes. In essence, this requires addressing social inequalities at their cause.

A simple way to summarise these concepts is that if the same groups are always 'winning', and the same groups are always coming last, this is indicative of inequality.¹¹

This reflects a problem increasingly articulated by academic and evidence-based research – while we continue to learn more about the nature of discrimination, relevant legislation is primarily aimed at achieving formal equality and is failing to address discrimination on a systemic level.¹²

Given that the Terms of Reference ask us to consider whether there is a need for any reform to best protect and promote equality,¹³ including whether a more positive approach is required to eliminate discrimination,¹⁴ these questions must be considered by the Review.

¹¹ Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 461–462.

¹² *Ibid.*

¹³ Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 2.

¹⁴ Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(b).

What is intersectional discrimination?

The term 'intersectional discrimination' refers to the experience of multiple forms of intersecting discrimination, for example on the basis of gender, race, disability or sexuality. The concept of 'intersectionality' recognises that discrimination such as racism and sexism combine, overlap or intersect.¹⁵

The Review was told that people who experience discrimination because of a cumulative effect of having more than one protected attribute are at greater risk of experiencing discrimination, but also find it harder to bring and prove a claim. We heard that the current law may not sufficiently recognise or protect people who experience intersectionality,¹⁶ including ensuring recognition of the compounding impact multiple attributes can have.

These concerns are reflected in academic literature, which has identified intersectionality as one of the cultural and systemic drivers of discrimination and sexual harassment.¹⁷ While anti-discrimination legislation is structured around discrete protected grounds or characteristics, this does not always translate to the way discrimination is experienced.¹⁸

In discussing this issue, one organisation told the Commission:

So, you know, people do feel discriminated against, but they don't really know why. Which part of me is being discriminated, for example, by the fact I've got a mental illness, or I'm Indigenous, or I'm gay, or I'm not allowed a voice. It's that combination of things. And you have to get so specific and legal, that it's a very big deterrent. One of the issues we're grappling with is intersectionality, and how you do justice to someone who has been discriminated against.¹⁹

An intersectional approach is also conceptually linked to the experience of systemic discrimination. Given that people who live with multiple grounds of disadvantage may often experience discrimination on the basis of overlapping and compounding grounds, discrimination is often subtle rather than overt, and can be multi-layered, systemic, and embedded in institutional cultures.²⁰

¹⁵ *Merriam-Webster Dictionary*, (Online at 23 November 2021) 'Intersectionality'.

¹⁶ The term 'intersectionality' was created by American critical race theorist, Professor Kimberlé Crenshaw, to explain how people experience discrimination and inequality differently based on divergent but intersecting categories. See K Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(6) *Stanford Law Review* 1241.

¹⁷ Beth Goldblatt 'Intersectionality in International Anti-discrimination Law: Addressing Poverty in its Complexity' (2015) 21(1) *Australian Journal of Human Rights* 47.

¹⁸ Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An empirical critique of the legal framework', (2020) 43(3) *UNSW Law Journal* 773.

¹⁹ Review consultation, 12 August 2021, Karyn Walsh, Micah Projects.

²⁰ Ontario Human Rights Commission, 'An intersectional approach to discrimination: Addressing multiple grounds in human rights claims', (Web Page, 23 November 2021) <<http://www.ohrc.on.ca/en/intersectional-approach-discrimination-addressing-multiple-grounds-human-rights-claims/introduction-intersectional-approach#fn14>>

Discrimination is harmful

The impacts of discrimination can be profound and devastating at both an individual and societal level. Discrimination and sexual harassment often have a negative impact on people's mental health and wellbeing. It can lead to social exclusion, which is associated with factors including not being and feeling safe, being unable to access services, low self-esteem and confidence, poor physical health indicators, and few social supports.

Discrimination can be pervasive and occur across a range of areas in which a person participates in public life, including:

- health care and public health settings
- social services and supports, including housing
- interactions with police and the criminal justice system
- employment settings
- in everyday participation in society.

Discrimination and sexual harassment can create barriers to people seeking and receiving services, including health services,²¹ and can have an impact on economic security and opportunities for professional advancement.

For example, in making a submission to the Review about what makes it hard for people who have experienced discrimination, sexual harassment, and/or other unfair treatment, a woman from a culturally and linguistically diverse background responded:

Power/level, age and gender imbalances. [It's] career limiting to speak up. No guarantee of resolution, humiliating to bring up and likely would still need to be in contact with the offender due to the nature of the work.²²

Impacts can be immediate, but also reverberate across a person's lifetime. They may also be felt and experienced differently by different groups of people, for example by First Nations people, people from culturally and linguistically diverse backgrounds, people with disability, from the LGBTIQ+ community, sex workers, people experiencing homelessness, people who are HIV positive, women, children and older people, and people who have had interactions with the criminal justice system.

²¹ Queensland Mental Health Commission, *Changing attitudes, changing lives: Options to reduce stigma and discrimination for people experiencing problematic alcohol and other drug use* (2018) 5 <https://www.qmhc.qld.gov.au/sites/default/files/downloads/changing_attitudes_changing_lives_options_to_reduce_stigma_and_discrimination_for_people_experiencing_problematic_alcohol_and_other_drug_use.pdf>.

²² Review submission SUB.FORM.60, 24 October 2021, name withheld.

While the overwhelming experience of discrimination appears to be negative, not all people have the same experience. Some people are able to find strength and resilience through the process. For example, one First Nations woman who identifies as part of the LGBTIQ+ community wrote in her submission:

For me, it has made me more determined to show I'm able to do whatever I put my mind to.²³

In addition to direct impacts, the Review was told that bringing as well as defending a complaint of discrimination or sexual harassment can have negative impacts for both complainants and individual respondents. That process can be challenging and can amplify the initial harm.

For individual respondents, protracted delays can mean they feel as though they do not have the chance to defend the allegations at an early stage. This can have particular impacts in work settings, if the complainant and respondent have an ongoing work relationship.

Some literature, including reviews conducted by federal and state jurisdictions, have attempted to assess the downstream economic impacts of discrimination and sexual harassment on the individual, industry, and the community.²⁴ While difficult to comprehensively capture in a single study, these studies have confirmed the significant and widespread economic costs of discrimination and sexual harassment.

²³ Review submission SUB.FORM.59, 23 October 2021, name withheld.

²⁴ Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020), Appendix 7; Deloitte Access Economics, *The Economic Costs of Sexual Harassment in the Workplace* (Final Report, March 2019); C Willness, P Steel and K Lee, 'A meta-analysis of the antecedents and consequences of workplace sexual harassment', (2007) 60(1) *Personnel Psychology* 127-162.

Limitations of a reactive system

The current legislation relies on complaints to remedy harm and to deter discrimination and sexual harassment.

When this conduct has occurred, a person may make a complaint and attempt to resolve the complaint through the conciliation process, which might include financial and non-financial outcomes such as an apology, training for the respondent, or policy review. If requested, their matter may proceed to a tribunal or court for final determination, or to a court if there is an appeal. Outcomes at the tribunal stage are almost exclusively financial.

While complaints have played an important role in achieving outcomes for individuals, one of the clearest messages received through the initial consultations was that the current approach lacks a preventative focus. That is, the law is limited in its capacity to stop discrimination happening in the first place. Linked to this issue, we heard that the individual complaints model is limited in its capacity to achieve broader systemic outcomes. This section discusses some key components of these issues.

Barriers to bringing a complaint

The Review was told that people face a range of barriers in making a complaint to the Commission about discrimination or sexual harassment.

Some people may not realise they are experiencing discrimination or sexual harassment because it has been normalised by them, the workplace, or the community. Even if they do feel discriminated against, they may not be aware that the law protects them against this conduct, or that they have a right to bring a complaint.

This can have a disproportionate impact on some groups of people, including First Nations people, older people, and children. One organisation that provides legal services to First Nations women told the Review:

So just again, not knowing that they are being discriminated against or not knowing that there is actually legislation that prevents it, and a pathway to complain and remedies that can be sought is a huge barrier.²⁵

Another organisation told us that:

I think there some definite complexities in relation to the Anti-Discrimination Act that are certainly onerous, and at times barriers for our clients in bringing complaints.²⁶

²⁵ Review consultation, 25 August 2021, Natasha Priestly, Queensland Indigenous Family Violence Service.

²⁶ Review consultation, 15 September 2021, Terri Kempton, Basic Rights Queensland.

Agencies and organisations that support children told the Review that complaint processes are generally oriented towards an adult response, and children face specific barriers to the complaints process. These issues are compounded for children navigating other challenges including out-of-home care and interactions with the youth justice system. Overall, these organisations felt that placing the onus on a child to assert a right under the Act creates a clear barrier for children. There was a sense that the Anti-Discrimination Act was therefore only conceptually for children.

Similar issues were identified by organisations that support older people and people with disability.

People who are aware of the process may be deterred by the length and complexity of the process. Complaints can take a lot of time and energy to resolve, and there are often delays.²⁷ The complaints process places a psychological burden on both the people who make complaints and people who respond to complaints. It can be stressful and require the people involved to have to recall, retell, and relive painful experiences.

The Review also heard that, for some people, the outcomes often do not justify the burden involved, particularly when considered against competing demands and the time and investment of resources required. We were told that many people who experience discrimination are often also experiencing other challenges with higher priority, including housing and food security, or raising children as a single parent. Where basic needs, such as food and housing, are not being met, enforcement and realisation of rights is unlikely to be prioritised.

Some people fear that making a complaint will have negative repercussions, or they may not want to make a complaint because they are fearful of government authorities. This was raised by people whose communities have experienced a traumatic legacy in their involvement with authorities, including people from newly settled communities who have experienced persecution in their country of origin and who may not speak English, as well as First Nations people. One community leader told the Review:

There are psychological barriers for anything to do with government or being trouble, especially [for people] coming from South African apartheid, for example. It's hard to trust departments and officials. It takes a long time before you get to a level beyond all the government advice. So, I can imagine some people coming from that don't complain because of the distrust of government.²⁸

²⁷ We also note that, at the time of writing, the Commission's website indicates that the Commission is currently receiving a high volume of enquiries and complaints. As a result, there may be a delay of up to six months before the Commission can assess a complaint.

²⁸ Review consultation, 20 August 2021, Habib Jamal, Islamic Council of Queensland.

There may also be cultural or social factors that mean a person is less likely to complain about discrimination because of shame and stigma. Even the word ‘complaint’ can carry negative assumptions and connotations. For example, one organisation said that:

When you say the word complain to people... the word complaint is very big for them. They are afraid that if they complain, if they're young persons, their parent will say, it's you – why are you complaining? Second thing is, they are afraid that they're going to lose their job. The third thing would be, they're afraid that they will not get a good reference for the next job... Where I come from complaining is a big thing, because that's how we grew up. People who grew up here may feel comfortable, so that would be an intergenerational issue as well.²⁹

There are also other specific barriers to making a complaint. The law requires complaints to be in writing, however paper-based processes can be challenging for many people including First Nations people, people from non-English speaking backgrounds, and people with low literacy.

Structural power differentials that operate between a person experiencing discrimination and the individual or organisation who responds to the complaint was also identified as a barrier to the complaints process. We heard that this is particularly prohibitive for people subject to statutory interventions, including for people experiencing mental health conditions and are subject to involuntary treatment, parents whose children are in out-of-home care, and people who are subject to guardianship orders.

Access to affordable or free legal advice is a critical factor in whether or not people have equitable access to the complaints process, and also in the outcomes they achieve. Although the Commission’s conciliation process is a low-cost jurisdiction, many people will not have access to free legal representation and legal costs are prohibitive.

When discussing the reasons for not engaging in the complaints process, many organisations told us that, for a lot of their clients, the complaints process is just not an option. We heard that for many people making a complaint is just not worth it, given the processes involved, and the likely outcomes. And yet, the most marginalised communities, who are most at risk of discrimination and who have the lowest resources, are the least likely to make a complaint.

Enforcement of the law relies entirely on individual people who feel they have experienced unfair treatment to make and prove their complaint.³⁰ Illustrating this issue, one stakeholder told the Review that:

I think it's very difficult to put the onus on the person who feels discriminated, to put their case by themselves. ... people will probably struggle, or wouldn't think it's worth it.³¹

²⁹ Review consultation, 23 August 2021, Suan Muan Thang, Queensland Program of Assistance to Survivors of Torture and trauma (QPASTT).

³⁰ Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 57.

³¹ Review consultation, 12 August 2021, Karyn Walsh, Micah Projects.

Need for a preventative approach

Given the barriers to accessing the complaints process, many stakeholders considered that additional mechanisms are required to alleviate the burden on individuals to address discrimination through making complaints. Achieving compliance with the Act through making complaints is reactive.

There was strong support from stakeholders for the Commission to have a more positive role in eliminating discrimination and sexual harassment to the greatest extent possible. Taking a preventative approach requires a mix of actions ranging from educative measures, complaint and compensatory processes, legal protections, and regulatory approaches to enforcement.

The Terms of Reference specifically ask us to consider whether the Anti-Discrimination Act should be changed to include a positive duty on organisations to eliminate discrimination and sexual harassment, which would require them to take active steps to prevent this conduct. We are also required to consider whether the current functions and powers of the Commission are sufficient to address systemic discrimination.

Legislative improvements

Some of our initial consultations and research identified weaknesses in the current legislation. Many stakeholders who provide legal or non-legal supports to people who experience discrimination or sexual harassment referred to challenges for complainants proving matters to the requisite standard.

Some of the challenges identified include: the complex tests and high threshold to establish direct or indirect discrimination, the allocation of the burden of proof for elements of those tests, and difficulties proving discrimination on multiple, combined grounds.

We also heard support for introducing interpretative provisions – for example, an objects clause to clearly identify the purpose of the legislation, and as a means of aiding construction of substantive terms within the legislation.

We were also told that the Anti-Discrimination Act is overly complex and needs to be simplified so that it can be better understood and accessed. The Anti-Discrimination Act prohibits sexual harassment and provides a means to redress unfair discrimination and vilification in public life and applies to all people in Queensland. However, the Act is technical and complex. Any capacity to simplify the law and improve consistency was also strongly supported by bodies that represent respondent groups.

Compatibility with human rights

In addition to potential legislative improvements, we have been asked to consider whether the Anti-Discrimination Act is compatible with the Human Rights Act.

Since the introduction of the Human Rights Act which came into effect in 2020, all legislation must be assessed for compatibility with the Human Rights Act. This Review therefore provides a timely opportunity to undertake this process.

In undertaking the assessment, we will need to identify provisions within the legislation that engage or limit human rights, assess their compatibility with human rights, and determine whether any limitation on a human right imposed by the provision is reasonable and demonstrably justifiable.

We start this assessment process in this Discussion Paper, where we identify provisions of the Anti-Discrimination Act that engage human rights.

Education, awareness, and support

We also heard about ways to tackle discrimination that complement the law, but do not require legislative change.

Stakeholders told the Review that education and awareness are critical to addressing the underlying causes of discrimination, and are required across sectors to improve overall understanding of the Anti-Discrimination Act.

A further key message was that resourcing of individual and systemic advocacy and legal support that allows people effective access to protections in the Act is imperative to bring the law to life in practice.

We also heard about a range of complex social issues that cannot be addressed solely through this Review. These demonstrate the interconnection between anti-discrimination laws and broader social policy.

This relationship was important given that the Review identified that stakeholders consider the legislation as a form of essential architecture underpinning and informing broader social attitudes.

This is not only true for rights, but also exemptions. We heard that some exemptions may have a 'chilling effect' which can deter people from making complaints. Sometimes this was based on incomplete information. For example, if a person had experienced an unsuccessful complaint because of an exemption that only applied in the area of goods and services, they may be deterred from making a complaint about workplace discrimination.

Across our initial consultations and the range of stakeholders, there was cautious optimism for the capacity of Queensland's discrimination laws to play a central role in further consolidating and protecting equality and belonging in our communities.