Queensland Nurses & Midwives' Union

Submission to

Queensland Human Rights Commission

Review of Queensland's Anti-Discrimination Act

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submission

Contents

Introduction

The Queensland Nurses and Midwives' Union (QNMU) thanks the Queensland Human Rights Commission (QHRC) for the opportunity to comment on the Review of Queensland's *Anti-Discrimination Act 1991* (QLD) (the 'AD Act').

Nursing and midwifery is the largest occupational group in Queensland Health (QH) and one of the largest across the Queensland government. The QNMU is the principal health union in Queensland covering all classifications of workers that make up the nursing and midwifery workforce including registered nurses (RN), midwives, nurse practitioners (NP) enrolled nurses (EN) and assistants in nursing (AIN) who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 65,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNMU.

The QNMU considers that reforms to the AD Act are necessary to keep up to date with the changing needs of society and best protect and promote equality, non-discrimination, and the realisation of human rights.

The AD Act is now 30 years old and requires considerable review to bring the legislation in line with other contemporary Australian and international discrimination legislation.

The following submission can be read in conjunction with the submission provided by the Queensland Council of Unions (QCU).

Our submission responds to the QHRC discussion paper questions as they are relevant to our nursing and midwifery members and are grouped by subject rather than the numerical order of the question number.

Recommendations

The QNMU recommends that the Queensland Human Rights Commission include in their review:

- amending the meaning of direct discrimination to be based on 'unfavourable treatment' and remove the need for a comparator;
- amending the meaning of indirect discrimination to be based on 'disadvantage' test;
- including an express statement that claims of direct and indirect discrimination are not mutually exclusive;
- amending the meaning of discrimination to provide that discrimination can be direct, indirect or both;
- amending the AD Act to protect against discrimination because of an attribute, or a combination of protected attributes;
- introducing a shifting onus of proof for discrimination complaints;
- amending the meaning of direct discrimination to remove the requirement that an attribute is a '~~**substantial'**~~ reason for the discrimination;
- adopting the meaning of sexual harassment provided in the *Discrimination Act* 1991 (ACT);
- omitting the high threshold of sex-based harassment being '~~seriously'~~ demeaning in nature';
- amending the AD Act to expressly prohibit creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex;
- including a positive duty that cover all forms of prohibited conduct, including discrimination, sexual harassment, and victimisation;
- defining "inherent requirement" or distinguish the terms, by use of examples in the AD Act;
- consulting with people who identify as having a disability, in relation to any amendments made to the 'impairment' protected attribute;
- amending the definition of 'family responsibilities' to include carer responsibilities;
- reviewing all suggested new attributes for inclusion in the AD Act, specifically irrelevant medical and criminal records, immigration status, employment activity; domestic and family violence;
- extending the complaints time limit to at least 24 months, with extension of time similar to industrial law;
- expanding current prohibitory relief to mandatory relief before a tribunal instead;
- allowing unions to have standing for individual matters as well as for a cause of action in relation to the enforcement of positive obligations;
- enable unions and other representative groups to bring representative claims to court on behalf of others;
- lobbying for the Government to provide significantly more funding and resourcing to enforcing the jurisdiction;
- implementing a regulator to enforce positive duty obligations;
- the tribunal deals primarily with anti-discrimination matters and is accompanied by specialist anti-discrimination decision makers;

- shifting from an equality of opportunity approach towards a commitment to promoting substantive equality;
- reframing special measures and equal opportunity as part of a substantive equality approach.

Discrimination of nurses and midwives

Nursing and midwifery are significantly female dominated professions. 88% of all QNMU members identify as female and therefore, much of the discrimination members face is considered through a gendered lens.

The discrimination of nurses and midwives is especially difficult to address because of its often subversive and systemic nature in society and existing workplace culture. Many find it difficult to even identify what form of discrimination they have experienced or define the most substantial reasons for mistreatment.

Nurses and midwives experience discrimination across a broad scale and these attributes are often intertwined. It could be identified as sex-based discrimination, that hinders members career progression, pay inequity, or superannuation benefits. Or racial prejudice, such as exploitation of workers from culturally and linguistically diverse backgrounds or using culturally offensive language or remarks. Members can also experience gender discrimination when returning to work after a pregnancy or taking parental or carers leave, having difficulty negotiating flexible work arrangements and having trouble progressing their careers after a period of leave. Discrimination could also look like an employer's reluctance to make accommodations for members who experience an impairment or disability and could impact their current or future employment outcomes. Another key concern for nurses and midwives is age discrimination. Members have reported employers placing restrictions on their duties or employment opportunities, being pressured to retire earlier than they would like or difficulty securing employment.

These are just a few examples of the discrimination our members experience.

A significant barrier to addressing discrimination is that it is widely underreported. This is potentially due to the perceived power imbalance between employers and employees, where members fear raising issues due to the potential for victimisation and further discrimination.

Workforce and societal culture need to change, and the AD Act review offers a significant opportunity to create meaningful and systemic improvements to eliminate discrimination, as far as possible.

Meaning of discrimination

Discussion question 2 - Should the test for direct discrimination remain unchanged, or should the 'unfavourable treatment' approach be adopted?

The AD Act prohibits both direct and indirect forms of discrimination. A clear distinction is necessary to ensure the AD Act can address unlawful discrimination that arises from different circumstances.

In Queensland, direct discrimination occurs on the basis of an attribute where a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different.[1] By contrast, indirect discrimination arise on the basis of an attribute where a person imposes, or proposes to impose a term with which a person with an attribute does not or is not able to comply; and with which a higher proportion of people without the attribute comply or are able to comply; and that is not reasonable.[2]

Direct discrimination is often illustrated by obvious, blatant, unequal treatment or prejudice. However, there are instances where discrimination is more discrete or difficult to identify, such as indirect forms of discrimination. In practice, the complexity and confusion arising from the current definitions of discrimination can make it difficult to distinguish between the two types of discrimination (Reece et al., 2018).

To prove direct discrimination in Queensland, it must be shown that a person was treated 'less favourably' and is known as a comparator. The comparator is a real or hypothetical person who would be treated better in the same or similar circumstances. In many cases a comparator is a costly and time-consuming barrier to accessing justice, as it is complex and can be difficult to establish or construct.

In order to address these barriers, some Australian jurisdictions have removed the comparator from their anti-discrimination laws. For instance, the Australian Capital Territory (ACT) and Victoria have adopted an 'unfavourable' test instead of the current 'less favourable' test, which does not require the use of a comparator.[3]

The QNMU expresses a preference for retaining both direct and indirect discrimination based on 'unfavourable treatment' rather than the current 'less favourable' test and negates the complexity of a comparator.

[1] s 10(1) *Anti-Discrimination Act 1991* (QLD)

[2] s 11 (1) *Anti-Discrimination Act 1991* (QLD)

[3] s 8(1) *Equal Opportunity Act 2010* (VIC)

Discussion question 3 - Should the test for indirect discrimination remain unchanged, or should the 'disadvantage' approach be adopted?

The current test to establish indirect discrimination requires a person to identify a relevant group of people who do not have the attribute and creates similar issues to proving the hypothetical comparator for direct discrimination.

An alternate approach has been adopted in Victoria and the ACT that considers whether a requirement, condition or practice has, or is likely to have, the effect of unreasonably disadvantaging persons with an attribute. This test does not require consideration of whether a person can or cannot comply, or who might be an appropriate comparative group of people without the attribute.

This requirement to compare is similar to the direct discrimination test and is considered to unduly complicate matters with the focus on the comparator or comparison group as opposed to the unfavourable or disadvantage created by the treatment. The QNMU preferences the use of a 'disadvantage' test.

Discussion question 1 - Should the Act clarify that direct and indirect discrimination are not mutually exclusive?

The QNMU supports the inclusion of an express statement that claims of direct and indirect discrimination are not mutually exclusive.

Discussion question 4 - Do you support a unified test for both direct and indirect discrimination? Why or why not?

The current definitions create confusion and often give rise to complaints that are made about both direct and indirect forms of discrimination. However, only one type of discrimination can be chosen as the substantial reason for discrimination if it is taken to a tribunal (ACT Law Reform Advisory Council, 2015). We recommend adopting a definition of discrimination that is consistent with the definition contained within the *Anti-Discrimination Act 1991* (ACT), as follows:

> **Section 8 Meaning of discrimination -**
>
> (1) For this Act, discrimination occurs when a person discriminates either **directly or indirectly, or both,** against someone else.

Discussion question 7 - Is there a need to protect people from discrimination because of the effect of a combination of attributes?

The AD Act defines discrimination by reference to 'an attribute' but does not explicitly recognise the intersectional nature of many discrimination matters, where more than one or a combination of attributes might co-exist. It is often difficult and at times reductive, to identify a single attribute as the reason for discriminative conduct.

The current process operates so that discrimination is only unlawful if one particular attribute can be proved to be a substantial reason for discrimination. In practice, this requires a complainant to make a complaint based on a single attribute or to make multiple, individual complaints. Not only does this single axis approach present challenges for establishing a comparator, but it fails to recognise the unique lived experiences of those who are discriminated against on multiple grounds.

QNMU members often experience discrimination based on multiple attributes that could include a combination of age, race, sex, impairment to name a few. This means that if a nurse is an older working female, who comes from a culturally and linguistically diverse background (CALD), is refused an opportunity for a promotion or higher duties, she would need to establish which one of her gender, age or racial status was the basis for the employer's discriminatory conduct.

The AD Act should be reviewed to recognise combined attributes to protect people experiencing intersectional disadvantage. This has been demonstrated in several international jurisdictions. In the *Canadian Human Rights Act 1985,* discrimination is defined '... on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds'.[4] Similarly, in the United Kingdom it is unlawful to discriminate against someone 'because of a combination of two relevant protected characteristics'.[5] We recommend this approach should be adopted in the AD Act.

The QNMU also notes that some Commonwealth laws in Australia do not require proof that a protected attribute (such as sex, age, disability or race) was the substantial reason for discrimination. Instead, it is only necessary to prove that the protected attribute was one of the reasons for the discrimination. The QNMU recommends this approach should also be considered in the Queensland legislation.

Discussion question 7 - What are some examples of where the current law does not adequately protect people from discrimination on combined grounds?

The QNMU seeks greater recognition of intersectional discrimination within the AD Act, particularly in a work context. We recommend that the AD Act is amended to protect against discrimination because of an attribute, or a combination of protected attributes.

[4] *Canadian Human Rights Act, 1985*, R.S.C., 1985, c. H-6

[5] *Equality Act 2010* (UK)

Case Study 1

The following case study demonstrates the need for an amendment to protect against discrimination because of an attribute, or a combination of protected attributes. The single axis approach presents challenges for establishing a comparator, but it fails to recognise the unique lived experiences of those who are discriminated against on multiple grounds.

For five years, the QNMU fought a recovery of alleged overpayments from a member that was female, of retirement age but had been medically retired from employment some years earlier, had mental health concerns and was homeless due to domestic violence.

Due to life circumstances, our member "on paper" owned assets however these were held and possessed by her husband. Further, due to the way her marital assets and other financial arrangements during her marriage had been set up, she was unable to access her superannuation without this significantly impacting on her estranged husband. Even if she were to access her superannuation, it was significantly less than her younger female colleagues due to the accumulative effect of mandatory superannuation commencing mid-career and her taking time out of her career with caring responsibilities. The employer recovered a significant amount of monies for alleged overpayments from our member's separation pay in 2019, even though it was known to the employer that the alleged overpayments were in dispute. In accordance with the Industrial Relations Act 2016 it was an unlawful act to recover monies for overpayments made before 14 August 2012 without authority or consent from an employee.

It was argued that our member gave consent to have monies deducted via her signature on a separation form. The QNMU argued the form was unconscionable, given the drafting was an outdated form and did not provide our member with any opportunity to refuse consent. This action financially disadvantaged our member with monies being taken from her separation pay.

The employer was also claiming a tax component of an alleged net overpayment. The relevant statutory timeframe for keeping documents for tax purposes had passed and she was out of time to apply for a reassessment of her 2011/2012 taxable income. Our member would have needed to pay to engage a tax expert to lodge an objection with the ATO and formally commence an action.

Case Study 2

The following case study demonstrates the need for an amendment to protect against discrimination because of an attribute, or a combination of protected

attributes. It is often difficult and at times reductive, to identify a single attribute as the reason for discriminative conduct.

At the time our member reached retirement age, they experienced a volatile marriage break down and their home was sold as part of a property settlement. Our member was in a position of having to withdraw money from their superannuation to financially support themself and find a new place to live.

Our member did not have a superannuation balance commensurate to their colleagues due to the limited years of compulsory superannuation payments made on their behalf, their gender, age, modest wage remunerated and personal circumstances of taking time off work to care for and tend to family responsibilities. Our member's superannuation balance was very modest.

Due to no fault of their own, they had been financially disadvantaged by the employer not proceeding with a repayment plan that they had actively put in place 11 years earlier when they were earning an income.

Our member was now reliant on the sole aged pension as the only source of income. The member had been through a very difficult separation and was traumatized. Concurrent to their retirement from paid employment and their marriage separation, they began to receive aggressive phone calls directly from the employer pressuring them to enter a repayment plan.

The QNMU wrote to the employer requesting they cease communication immediately and redirect their communication to the QNMU. The QNMU made further submissions citing our member's change in life circumstances and sought cessation of the recovery. This request was refused on the basis it did not meet "extenuating circumstances" to justify a waiver in accordance with the employer's policy.

The process further placed our member at risk of imposing a secondary abuse to an already vulnerable person who had endured significant hardship and trauma at this juncture in their life. The employer's recovery process subjects our member to less favourable treatment because of our member's age, sex and other protected attributes. In 2022, the employer continues to pursue our member for documentary evidence of this traumatic time of their life.

Onus of proof

Discussion question 8 – Should the onus of proof shift at any point in the process? If yes, what is the appropriate approach?

Currently, courts are reluctant to infer discrimination in the absence of direct evidence and the complainant bears the entire onus of proof in most situations. This can be particularly challenging and difficult to prove when dealing with indirect discrimination and systemic discrimination.

Introducing a shifting onus of proof for discrimination complaints would mean that a complainant would need to prove on the *balance of probabilities* they were treated unfavourably or were disadvantaged (if the recommended definitions are implemented), and that they have a protected attribute. It would then shift to the respondent to prove that the unfavourable treatment or disadvantage was because of a reason other than the protected attribute. This is intended to provide greater balance between the complainant and a respondent, where the respondent is much more likely to have evidence of reasons for treatment.

This might potentially remove s 10(4) of the AD Act which allows for reasons other than discrimination on the basis of a prohibited attribute (a substantial reason test), unless this is clarified. This currently applies for direct discrimination only.

Whilst the QNMU expresses broad support for shifting the onus of proof, we note that complainants should have to establish a 'real' case in the first instance, for it not to be refuted. Despite the clear benefits of reversing the onus, complainants might still have difficulty establishing the technical legislative definitions of discrimination (Allen, 2009). It should also be noted that the *Briginshaw* principle applies a heavy evidentiary burden that has been insurmountable in several discrimination cases.[6]

The QNMU recommends the following:

- A complainant must prove on the balance of probabilities that they were *unfavourably treated or disadvantaged* and that they have a protected/prohibited attribute. This would mean that there is no requirement to prove causation as onus shifts;
- In cases of direct discrimination, the respondent must prove that the unfavourable treatment was for a reason other than a prohibited attribute;
- Clarity should also be provided in the legislation that the *Briginshaw* principle is only intended to apply *as it relates to the standard of evidence*. This could be included by way of a legislative note;
- The QNMU recommends that the meaning of direct discrimination be amended to remove the high evidentiary burden of an attribute being the 'substantial reason' for the treatment. We seek the following recommendations to the AD Act:

S 10 Meaning of direct discrimination – [7]

> *(4) If there are 2 or more reasons why a person treats, or proposes to treat, another person with an attribute ~~less favourably~~ **unfavourably**, the person treats the other person ~~less favourably~~ **unfavourably** on*

[6] *Briginshaw v Briginshaw* (1938) 60 CLR 336

[7] Amendments made in **bold** (strikethrough)

*the basis of the attribute if the attribute is a **~~substantial~~** reason for the treatment.*

Sexual harassment

Discussion question 9 - Should the additional words 'in the presence of a person' be added to the legal meaning of sexual harassment in the Act? What are the implications of this outside of a work setting?

The QNMU acknowledges the additional words 'in the presence of a person' could potentially broaden the scope of sexual harassment and should ensure inclusion of sexual harassment conducted via technology or other means (i.e. online, email, telephone).

The QNMU supports the wording used in the ACT legislation, the *Discrimination Act* 1991 (ACT) which reads:

> **Section 58 (2)** – [8]
>
> *In this section: conduct, of a sexual nature, includes the making of a statement of a sexual **nature to, or in the presence of, a person,** whether the statement is made orally or in writing*.

In our view, the ACT anti-discrimination legislation provides a clear and inclusive definition of sexual harassment and should be considered for use in the AD Act.

Discussion question 9 - Should a further contravention of sex-based harassment be introduced? If so, should that be applied to all areas of activity under the Act?

In accordance with the Respect@Work 2020 report recommendations, we recommend that the AD Act introduce a clear definition for sex-based harassment. The QNMU seeks consistent definitions for sex-based harassment across all relevant legislative instruments.

The QNMU supports a stand-alone offence of sex-based harassment, in accordance with recommendation 16(B) of the Respect@Work report (Australian Human Rights Commission, 2020). This has since been adopted in the recent amendments to s 28AA of the *Sex Discrimination Act 1984* (SD Act). The amendment provides a distinction that sex-based harassment does not necessarily have to be sexual in nature.

However, the high threshold of conduct being 'seriously demeaning in nature' is concerning. Discrimination and harassment often happen through frequently repeated,

[8] Amendments in **bold**

or nuanced transgressions, rather than overt, dramatic actions. It is critical that current and further contraventions of sex-based harassment reflect the contemporary presentations of sex-based conduct. We strongly suggest the word 'seriously' be removed from the *Sex Discrimination Act 1984* and be omitted from the AD Act.

Discussion question 9 - Should the Act explicitly prohibit creating an intimidating, hostile, humiliating, or offensive environment on the basis of sex? If so, should that apply to all areas of activity under the Act?

The Respect@Work report 2020 recommended that the SD Act be amended to expressly prohibit creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex (Australian Human Rights Commission, 2020). The intent of recommendation 16(c) is to prohibit conduct that creates a hostile work environment in a general sense, rather than requiring conduct to be directed towards a particular person.

The QNMU supports the proposed amendment however, disappointingly this recommendation has not been adopted in the recent SD Act review. Australian case law, however, recognises the concept of a hostile work environment in relation to complaints of sexual harassment and sex discrimination.[9]

In *Johanson v Michael Blackledge Meats*, hostile work environment was defined as 'conduct of a sexual nature in which another person, whether the intended target or not, who has not sought or invited the conduct, experiences offence, humiliation or intimidation and, in the circumstances, a reasonable person would have anticipated that reaction'.[10] The concept of a hostile work environment has also been found to apply where a pattern of behaviour is designed to exclude a person on the basis of sex and make them feel uncomfortable and unwelcome (Attorney General's Department, 2022).[11]

If a provision is implemented consistently with recommendation 16(c), it may apply to any person who plays a role in creating or facilitating an intimidating, hostile, humiliating or offensive work environment on the basis of sex. For instance, a person who witnesses this conduct and fails to address it.

Whilst we express general support for the provision, we suggest the application of this approach should be further considered, particularly in relation to implications for bystanders or workers with little control over their workplace environment.

Positive duty

[9] O'Callaghan v Loder and the Commissioner for Main Roads [1983] 3 NSWLR 89.

[10] Johanson v Michael Blackledge Meats [2001] FMCA 6, [89].

[11] Hill v Water Resources Commission [1985] EOC 92-127

Discussion question 21 - Do you support the introduction of a positive duty in the Anti-Discrimination Act?

The QNMU is supportive of implementing a positive duty, consistent with other Australian jurisdictions, as a proactive measure to prevent discrimination, wherever possible. Introducing a positive duty addresses the responsibility for giving effect to anti-discrimination law between individuals who experience discrimination, and the people and organisations who have a duty not to discriminate in the first place (ACT Law Reform Advisory Council, 2015). A positive duty will require employers to create safe environments that actively encourage diversity and seek to prevent mistreatment.

In many cases the duty holder, who is often the employer, is in a more powerful position than an individual and is better placed to take action which would prevent a potential situation of discrimination from occurring (ACT Law Reform Advisory Council, 2015).

The QNMU proposes that a positive duty requirement on employers under the AD Act could make reasonable adjustments for prospective employees and employees with a disability and to make reasonable accommodations for prospective employees, employees of retirement age and employees with carer or family responsibilities. This recommendation is based on adopting similar provisions to the *Equality of Opportunity Act 2010* (VIC). The QNMU notes however, that the repeal of the enforcement mechanisms for positive duties in 2011 by the Victorian Coalition Government has been a significant barrier to success in Victoria. The QNMU seeks that an enforcement model with regulator compliance and cause of action mechanisms is implemented in the Queensland legislation, to account for the deficiency seen in the Victorian model.

Discussion question 21 - Should a positive duty cover all forms of prohibited conduct including discrimination, sexual harassment, and victimisation? Why, or why not?

The QNMU submits that a positive duty should cover all forms of prohibited conduct, including discrimination, sexual harassment, and victimisation. Implementing a positive duty for all forms of prohibited conduct would better reflect the intersectional nature of discrimination and provide a proactive measure for addressing all forms of discrimination.

Positive duty - Age discrimination

Age discrimination in the workplace is a significant concern for QNMU members, particularly those who are transitioning to retirement.

Although age is a protected attribute under QLD anti-discrimination legislation, there remains a lack of any systematic recourse for nurses and midwives to take when they experience discrimination. Implementing a positive duty for employers to eliminate discrimination as far as possible, would go a long way in preventing age related discrimination at work.

Discrimination based on age can have a profound impact on nurses and midwives' incomes, access to promotions, access to training and career development, and can be further exacerbated by the requirement to adapt to new technologies. Age discrimination can also lead members to resign, retire earlier than planned or change employers to avoid further discriminatory conduct.

Some examples of age discrimination include members being asked to undergo medical assessments as a pathway to compulsory early retirement or being treated less favorably with shifts, leave entitlements, or refused higher duties.

Members often report experiencing psychological and physical illness because of the systematic discrimination they have faced, often after many years in their profession.

Age and physical limitations are often associated, where members have cited that there is no mechanism for employers to accommodate nurses or midwives' who have minor disabilities or illness. Instead, members are often discouraged from seeking reasonable adjustments to their work.

Discrimination, particularly age related, is often subtle and difficult to prove. This leads members to avoid taking action or experience difficulty providing evidence to satisfy discrimination under the AD Act. Other reasons members are reluctant to pursue claims are due to fear of further punishment or consequences or the stress involved in bringing a claim, often whilst continuing to work in the same workplace.

Positive duty - Carers and family responsibilities

Many Australians struggle to combine work and family responsibilities and experience significant discrimination and inequality as a result (Human Rights and Equal Opportunity Commission, 2007).

The QNMU has received reports from members who face gender discrimination upon returning to work after maternity leave. Declining applications for flexible working arrangements, refusal to reinstate employees at their previous pay rate, and being overlooked at career progression opportunities due to gaps in continuous employment are just some of the ways in which women can be disadvantaged for having children and/or having family responsibilities. While individually, these types of cases may suggest issues at the micro level, it is critical to consider the cumulative impact of individual cases of discrimination and the broader systemic implications and messaging it creates.

The QNMU strongly supports a positive legal duty on employers to reasonably accommodate the needs of workers who are pregnant, have carer or family responsibilities, or request flexible working arrangements to support their duties.

Case study

The following case study supports the need for positive duty obligations placed on employers to better support workers to balance carer and family responsibilities and their employment.

Member sought part-time work 4 days a week due to work life balance reasons but was not permitted by their employer. The member then went on leave and sought return to work arrangements part-time in their role but was denied. The member was given other duties commensurate with a lower duty position. The member then ceased work.

Positive duty - Sexual harassment

The QNMU urges the QHRC to implement recommendation 17 of the Respect@Work (2020) report to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible (Australian Human Rights Commission, 2020).

To date, this recommendation has been contested on the basis that employers already have a positive duty under work, health and safety legislation. The Respect@Work report recognises that there is a positive duty in workplace health and safety laws to eliminate or manage hazards and risks to a worker's health, which includes psychological health and therefore sexual harassment.

In our view, this does not go far enough. A positive duty, by contrast, imposes a higher obligation for employers to prevent sexual harassment and can include going beyond the workplace to take action in the community.

Case study

The following case study demonstrates the need for positive duties to implement safer workplace cultures.

A QNMU member submitted a sexual harassment complaint to their human resource (HR) department. The perpetrator was the member's afterhours supervisor. The HR department responded by stating they would make sure the member was not on shift with their supervisor. However, it was at the members discretion to contact HR and ensure they would not be rostered on at the same time. As the afterhours supervisor role was said to be 'difficult to replace', it was considered easier to reschedule the member's shifts. As a result, the member relinquished late shift and weekend penalty rates, whilst the supervisor continued to receive them.

Approximately three months later the member involved the QNMU to assist, as the matter had not progressed. An internal investigation took place six months after the member lodged the complaint. It took a significant amount of time for the investigation report to be finalised and any action to be taken. The supervisor was given a show cause letter and stood down. During this time, the member could resume their original shifts. The member became increasingly frustrated at the inaction of their employer and wanted to proceed to the Anti-Discrimination Commission but there was a significant time delay. The member suffered depression as a result and was financially burdened with the cost of attending consultations with private psychologists and doctors and the loss of income (penalty rates) due to the employer rescheduling their shifts.

Positive duty - Impairment

Placing a positive duty on employers to make reasonable adjustments for employees with an impairment or disability would provide significant support to members who might otherwise be discriminated against. Similar provisions have been adopted in the *Equality of Opportunity Act 2010* (VIC).[12]

There are some situations where an impairment would be a relevant consideration. This means that an employer may still be exempt from changing an employee's job to suit the employee's particular impairment or disability if the employer's particular

[12] s 20 *Equality of Opportunity Act 2010* (VIC).

requirement is a 'genuine occupational requirement' or an 'inherent requirement' of the work.

Establishing a genuine occupational requirement under anti-discrimination law can be a difficult threshold to meet. Employers need to carefully consider whether particular job requirements can be adapted so that they meet both the employee's and the employer's needs.

This has been exemplified in the appeal tribunal decision of *Chivers v State of Queensland.*[13] In the original case, *Chivers v Queensland (Queensland Health)*, a graduate nurse, who was unable to work night shifts due to a brain injury she suffered as a result of an accident, claimed she had been discriminated against on the grounds of her disability when her employer continued to roster her for night shifts. The case reviewed issues such as whether working night shift was a "genuine occupational requirement", whether "reasonable adjustments' had been made in accordance with the Qld Health's policy, including the length of providing that adjustment and whether working night shift endowed the nurse with the required clinical skills. The employer relied on the genuine occupational requirement exception in the *AD Act,* arguing that it was a requirement that a nurse working on a 24-hour ward is able to work night shifts. The alternate special services or facilities and 'unjustifiable hardship' provisions were not referred to in the proceedings. The Supreme Court overturned the Queensland Civil and Administrative Tribunal (QCAT) Senior Member's decision that there was indirect discrimination on the basis that night duty was a genuine occupational requirement of the job.

The appeal decision in *Chivers v State of Queensland* has now been adversely applied in the different jurisdictions across Australia, in various occupations and industries.

This has had a significant and negative impact on our members, particularly in relation to reasonable adjustment offered upon a return-to-work plan negotiated after work-related and non-work-related injury or illness or where night shift is involved. We are unable to get past the first hurdle of 'genuine occupational requirements' being held as a test for exclusion rather than considering whether a particular requirement in a role without adjustment was reasonable.

On a broader application, it is often relied on when negotiating flexible working arrangement and has an adverse impact on our female members returning to work after maternity leave in relation to making "reasonable adjustment" and when our members are transitioning to retirement. For our female members transitioning to retirement, and reliant on superannuation to fund their retirement, the impact is multi-level.

[13] *Chivers v State of Queensland (Queensland Health)* [2014] QCA 141

To overcome this barrier, the QNMU recommends that an amendment is made to define “inherent requirement” or to distinguish the terms, by use of examples in the AD Act. The introduction of a positive obligation to make reasonable accommodations for workers with respect to parental, caring or on the grounds of a disability can therefore be considered through flexible working arrangements on these grounds and potentially address the indirect discrimination that can occur because of interpretations on the inherent requirements of the job.

The following case studies identify member’s experiences with discrimination on the basis of an impairment.

Case study 1

The member was on workers compensation after injuring their neck while working in a sterilising department. The injury occurred when the member was lifting heavy theatre instrument trays out of the steriliser. After completing a Functional Capacity Assessment, the member was unable to return to their substantive position and resumed an administrative role. While the member was given temporary work and then finally permanent work, the position paid less per hour than the member’s position at the time of injury. The member’s hours were cut from 72 to 48 hours per fortnight. Although the employer made reasonable adjustments to accommodate their permanent injury, the member still lost out financially. The member is a single woman, with a mortgage and 20 years left to work until retirement.

Case study 2

The member injured their shoulder whilst working in the sterilizing department. After completing a Functional Capacity Assessment, the member was unable to return to their substantive position. The member was placed in a temporary position while the employer reviewed a reasonable adjustment of their position in sterilising. The temporary position paid less per hour and had no penalty rates. The member was then retrained in administrative work but has not been able to secure a job as they have no administrative experience.

Case study 3

The member was not allowed to work part time at their place of work whilst being treated for breast cancer. The member sought a graduated return to work post treatment, 3 days per week. The employer said they were “not able to support for the member’s role” and “unable to support a job share arrangement”.

Protected attributes

The AD Act prohibits discrimination on the basis of a number of personal attributes. These protected attributes have not been comprehensively reviewed since the AD Act commenced 30 years ago. The following discussion draws on the experiences of our members, recent law reform and consultation in other Australian jurisdictions to recommend possible amendments to the current attributes and recommend additional attributes to be included in the AD Act.

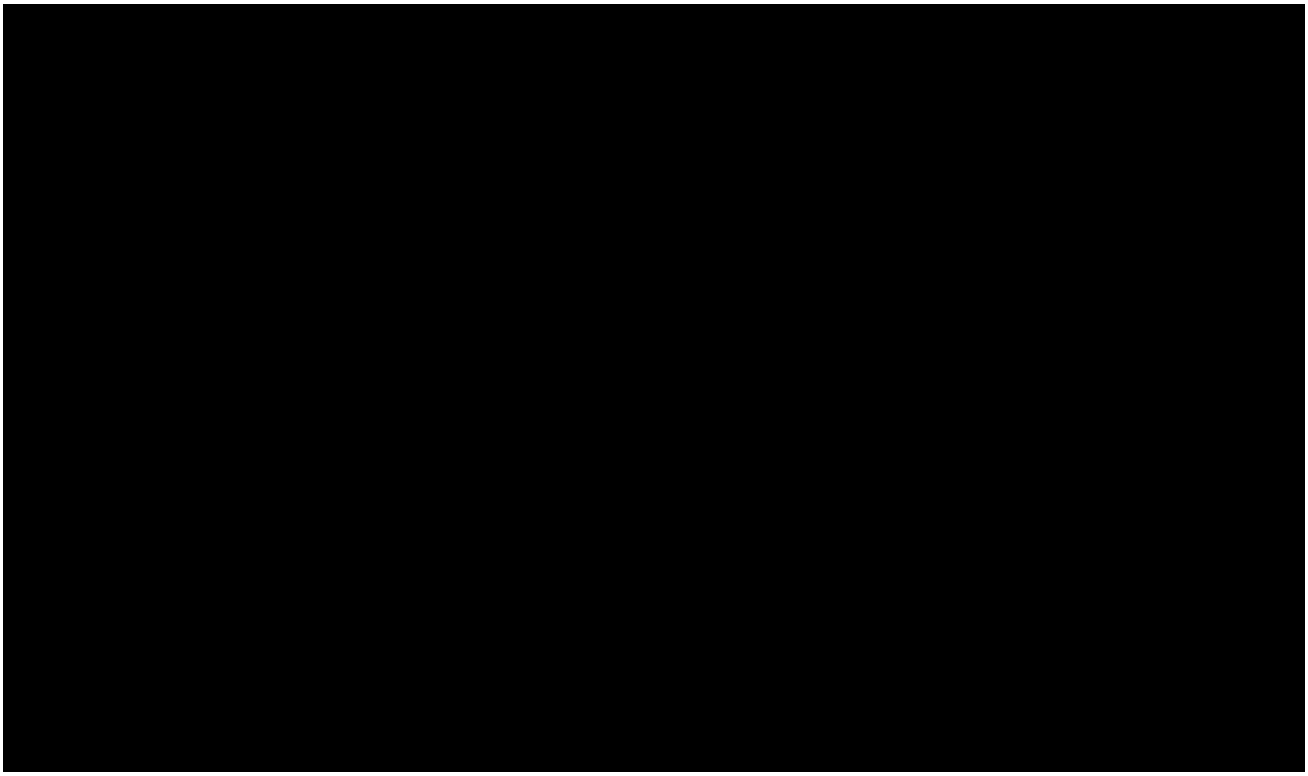
Discussion question 25 - Should the attribute of impairment be replaced with disability?

The QNMU cautions the change of 'impairment' to 'disability' without further consideration of the unintended consequences, such as the potential to narrow the scope of people covered by the attribute. For instance, this could have significant impacts on workers seeking to return to work with injuries or impairments.

The QNMU encourages consultation with, and defers to people who identify as having a disability or impairment in relation to any amendments made.

Discussion question 29 - For attributes that have a legislative definition in the Act, do those definitions need to change?

The QNMU identifies the following attributes for inclusion in the AD Act. Please note this is not a conclusive list and we encourage the QHRC to consider all suggested additional attributes for inclusion.



[redacted]

Family responsibilities

The QNMU suggests that the attribute 'family responsibilities' should be amended to 'family or caring responsibilities' to reflect other contemporary Australian discrimination legislation and capture the broad range of responsibilities that individuals face.

The following case study provides an example of our member's difficulty when seeking recognition of family and carer responsibilities by their employers.

Case study

[14] *Gilbert v Metro North Hospital Health Service & Ors* [2021] QIRC 255, 86-7 [409]-[417]

[15] Additions provided in **bold**

The member sought to return to their substantive fulltime work, from part time arrangement whilst pregnant. The employer refused because the member was pregnant.

The grievance and dispute then progressed to the Queensland Industrial Relations Commission (QIRC). The basis of the employer's position was that the member agreed to an ongoing part time arrangement, to be determined on balance of probabilities. Submissions have essentially rendered the employment relationship destroyed as the employer accused the member of lying. The employer did not comply with their parental leave and part time arrangements. The member is now due to return to work from parental leave, but in the lead up to the hearing feels unable to attend and has accessed sick leave. Both QIRC and QHRC will only offer financial compensation to our member.

Additional attributes

Discussion question 30 – Is there a need to cover discrimination on the grounds of irrelevant criminal record?

The QNMU recommends that the AD Act is amended to include "record" as a protected attribute, with the aim to protect individuals from discrimination regarding employment, qualifications or by registered bodies. Failure to recognise this form of discrimination as being unlawful perpetuates a position of disadvantage for individuals and can act as a barrier to employment or registration. We take the view that any criminal records that are accessed and utilised by employers should be in relation to the job requirements only.

Discussion question 31 – Is there a need for the Act to cover discrimination on the grounds of irrelevant medical record?

Another common risk that can arise is the risk of discriminating against an employee based on their medical records. Discrimination may occur where a particular action is taken on the basis of an imputed, presumed or past condition regarding an employee's medical record. In our view, the use of any information in a medical record that is not specifically relevant to the circumstances should be codified as unlawful discrimination under the AD Act.

Most employers have a standard, very broad "medical authority" they provide to employees when an employee attempts to return to work following a work or non-work-related injury or illness. This authority is not usually specific to any injury or illness and is not confined to seeking information about the impact an injury or illness may have on employment; rather, it requests access to all medical records and authority to communicate with all treating medical practitioners. Due to the imbalance of power and fear of not being returned to work, members feel obliged to sign the form at the employer's request.

Further, irrelevant medical records can be improperly used in the screening of potential employees as well as in disciplinary measures, for Workcover issues, or as a mechanism to medically retire staff. Including 'irrelevant medical records' as a protected attribute would address the discriminatory conduct that many workers, including our members, face in the work setting.

Case study

Our member was advised a temporary contract of deployment would be terminated because of their mental health diagnosis disclosure. Our member questioned if their mental health disclosure was the reason for their secondment being terminated.

Upon further review of the background information, there appeared to have been inappropriate disclosures from our member's substantive employer regarding their health history. This had an adverse effect on our member who was then subjected to a 'police welfare check' due to becoming upset at the disclosure and consequential diminished employment opportunities. The ensuing events included the member being injured during the welfare check and devastating consequences of the loss of a pregnancy.

Discussion question 32 – Is there a need for the Act to cover discrimination on the grounds of immigration status?

The QNMU agrees that people in Queensland should have full cover for discrimination on the grounds of immigration status. For nurses and midwives, immigration status is an attribute that gives rise to cohorts of workers who were born overseas becoming segregated in specific employment sectors, such as aged care or agency work, particularly whilst on temporary visas.

These sectors tend to have lower paid wages and are unregulated in terms of providing safe working environments, including the ratio of the number of patients to qualified staff. When considering the compounding effect of discrimination based on immigration status for our members in the workplace, in addition to the disadvantage of access to services in the community generally, having this as a protected attribute could only serve to address the already apparent power? imbalance faced by our members.

Discussion question 33 – Is there a need for the Act to cover discrimination on the grounds of employment activity?

Employment activity discrimination occurs when an employer treats an employee unfairly after raising a question or concern about their entitlements or rights at work. This form of discrimination, like many others, is often discrete and difficult to identify. For nurses and midwives, employment activity discrimination is a significant issue, and perpetuated by fear of further mistreatment or punishment for raising concerns about their rightful entitlements including requests to be paid for working overtime and through meal breaks or wearing personal protective equipment to perform their duties.

There is a potential gap in the coverage of general protections and adverse action law, that an employment activity protected attribute could provide.

Discussion question 35 – Should an additional attribute of subjection to domestic violence be introduced? Should it be defined, and if so, how?

Discrimination against victims of domestic violence is a significant issue in the area of employment. Although there is a growing recognition for leave entitlements in enterprise agreements and legislation, the provisions require a person to identify themselves as experiencing or having previously experienced domestic and family violence. This disclosure leaves workers vulnerable to discrimination, where the current anti-discrimination legislation in QLD does not protect employees on this basis.

Workers are still experiencing discriminatory actions such as termination of their employment, inability to secure stable employment or access leave entitlements, or being subjected to prejudice or unfair treatment at work that coincides with the worker's experience or disclosure of domestic and family violence.

The *Industrial Relations Act 2016* (QLD) provides for adverse action on the grounds of domestic and family violence. However, members have reported having their employment terminated on the basis that they pose a work health and safety risk, because of the employer's duty of care obligations under the *Work Health and Safety Act 2011* (QLD).[16]

The QNMU strongly recommends that domestic and family violence is recognised as a protected attribute within the AD Act.

[16] s 296 *Industrial Relations Act 2016* (QLD); s 19 *Work Health and Safety Act 2011* (QLD)

Case study

A QNMU member was contacted by their employer on a day off to meet and discuss a concern that the employer had. Our member was escaping a domestic violence relationship. The member requested to bring a union representative as a support to the meeting, however the employer declined. Our member requested to then access Domestic Family Violence leave entitlements. The employer responded with a termination of employment letter and without engaging in any natural justice. The QNMU lodged a General Protections application with dismissal and this application is still pending. Our member has no real prospect of maintaining an employment relationship with the employer and will become unemployed.

Human rights analysis

Discussion question 56 – Are any provisions in the Anti-Discrimination Act incompatible with human rights? Are there any restrictions on rights that cannot be justified because they are unreasonable, unnecessary or disproportionate?

The *Human Rights Act 2019* (QLD) at section 13(2) enables the limitation of human rights if it is proportionate and justified. The QNMU poses the question of whether a similar approach is required to handle exemptions for the QHRC and other tribunals (ACT Law Reform Advisory Council, 2015). Further consideration is required.

Complaints processes

The QNMU expresses concern with the number of constraints to accessing the jurisdiction for work related matters. Time constrains, costs, stress and resourcing are significant barriers to accessing the current complaints process. Such issues significantly limit or may act as a deterrent for accessing justice.

Resourcing

A barrier to accessing the jurisdiction currently is the lack of resourcing of specialist skills, experience and understanding of discrimination and sexual harassment matters in the QCAT and QIRC by decision makers.

Costs

The QNMU considers the cost implications of using the Supreme Court to be prohibitive. The use of tribunals should be considered where possible to mitigate costs.

Discussion question 14 – Is 1 year the appropriate timeframe within which to lodge a complaint? Should it be increased, and if so, by how long?

The AD Act provides that generally, a person is only entitled to make a complaint within 1 year of the alleged contravention of the Act. The QNMU expresses significant concern that 1 year is too short to provide reasonable time for complainants. This is reverberated by the Respect@Work report recommendations that suggest an extension for limits under the *Sex Discrimination Act 1984* Act from 6 months to 24 months (Australian Human Rights Commission, 2020). The QNMU supports a similar amendment to be made in the AD Act.

Often people are reluctant to lodge a complaint whilst they are still in the environment where the discrimination has or is occurring for fear of further mistreatment or victimisation. Some QNMU members report experiencing trauma or mental illness as a result of being discriminated against. The QNMU seeks the capacity for extension of time, in particular for complainants who are traumatised and for those who wish to make concurrent criminal and civil complaints. The QNMU considers that the time limit should be extended to at least 24 months, with extension of time similar to industrial law.

Representative action

In Queensland, many cases brought by individuals are settled confidentially. This means more expensive legal actions and outcomes are limited to only remedying individual situations. Confidential settlements also mean that other complainants in the same position cannot benefit from the resolution of the case. A class action regime under the AD Act, could provide for greater benefit to groups of people who experience similar discrimination.

Injunctive relief

Under the current Act, when seeking injunctive relief from a tribunal, the tribunal may provide prohibitory relief to stop a party from taking a particular action. If a direct right of access is allowed to the Supreme Court, consideration should be given to whether the remedies should be extended to both mandatory and prohibitory injunctive relief. That means that the Supreme Court may be able to make an order requiring a party to do something, or to stop them doing something. The QNMU considers that shifting injunctive relief to the Supreme Court could create an additional cost burden and limit access to the jurisdiction. The QNMU suggests the option to expand current prohibitory relief to mandatory relief before a tribunal instead.

Unions to have standing for individual matters

The QNMU suggests the potential for unions to have standing for individual matters as well as for a cause of action in relation to the enforcement of positive obligations (i.e. the lack of systems and procedures within an organisation). This would negate the need to rely on individual's making complaints and provide alternative mechanisms to focus on preventative strategies. This should also supplement what the QHRC should be able to do as a regulator.

Case study

This case study demonstrates an example of an employer's policy that constitutes an alleged contravention in a matter that is of genuine concern to our female members who are of retirement age, have a disability or impairment as it adversely impacts on and disadvantages them. Members in this affected group may be reluctant to make a complaint due to their life circumstances, including psychosocial, health and ability to do so.

Between 2018 – 2020, the QNMU requested an employer to provide contemporaneous evidence to substantiate a claim from our member for recovery of several thousand dollars alleged to have been overpaid between 2010-2012 (historic overpayments). In the information provided by the employer, there appeared to be inconsistent amounts of historic overpayments being recovered from alleged overpayments between 2010 – 2012. Our member was also very concerned they had repaid monies as they had formally initiated a repayment plan in 2011.

At the end of 2020 the QNMU was informed:

- *a payroll error had occurred upon our member's separation from employment which created an additional overpayment;*
- *in accordance with the QNMU's query of an alleged overpayment, it was discovered a further payroll error had occurred and our member had been underpaid;*
- *due to the moratorium on the recovery of overpayments implemented in 2011, the repayment plan our member had formally entered into was never commenced;*
- *inconsistent amounts of alleged overpayments had been resolved as part of a bulk waiver which focused on employees who had overpayments that had a combined monetary value of less than $200.00; however, the waiver activity was a one-off piece of work conducted at a point in time and could not be applied to matters after the fact; and*
- *missing retrospective payslips were provided.*

In 2021, the QNMU wrote to the employer requesting they cease communication immediately with our member and redirect their communication to the QNMU. Our member was finding the pressure from their employer to repay alleged overpayments from 11 years earlier very stressful. She was now reliant on the sole aged pension as her only source of income, had just been through a very difficult separation and was traumatized.

The QNMU made further submissions citing our member's change in life

circumstances and sought cessation of the recovery. This request was refused on the basis it did not meet "extenuating circumstances" to justify a waiver in accordance with the employer's policy. The QNMU notes there was no definition of "extenuating circumstances" in the employer's policy and that the employer made a subjective decision not to use their discretion to cease recovery.

The employer insisted our member complete a Financial Hardship self-assessment form and provide objective documents to substantiate their claim of financial hardship. The QNMU again wrote to the employer highlighting the needless trauma and excessive hardship being imposed on our elderly member. The QNMU noted our member did not borrow money from the employer, and completion of the form would be commensurate to a loan application, requiring our member to disclose their most personal and financial information, with no guarantee the employer would subjectively consider their situation "extenuating" enough.

The process further placed our member at risk of imposing a secondary abuse to an already vulnerable person who had endured significant hardship and trauma at this juncture in her life

Discussion question 16 – Should a representative body or a trade union be able to make a complaint on behalf of an affected person about discrimination? Why or why not?

Unions currently have no standing in the QLD jurisdiction to bring representative claims to court. As recommended by the Respect@Work report, the *Australian Human Rights Commission Act 1986* (AHRC) should be amended to allow unions to bring representative claims to court on behalf of others. This would be consistent with the existing provisions in the AHRC Act that allow unions to bring a representative complaint to the AHRC on behalf of one or more people aggrieved by conduct amounting to unlawful discrimination (AHRC, 2020).

Role of the QHRC & tribunals

Discussion question 22 – Should the statutory framework be changed to incorporate a role in regulating compliance with the Anti-Discrimination Act and eliminating discrimination?

The QHRC has a specific role and functions under both the AD Act and the *Human Rights Act 2019*, which primarily underpin an educative and a complaints-handling function for both Acts.

Under the AD Act, discrimination, sexual harassment and victimisation complaints must be made in the first instance to the QHRC. The QHRC is limited to conciliating complaints. If a complaint is conciliated, a conciliation agreement may be filed in the QIRC or relevant court for enforcement purposes.

Key limitations of the QHRC are under-resourcing in handling discrimination and sexual harassment complaints, limited regulatory capacity and duplication of processes, such as conciliation being conducted by the QHRC and the QIRC/QCAT for individual complaints. This duplicated conciliation process for work-related matters appears to be overly burdensome and can unnecessarily extend the trauma for many victims of discrimination and sexual harassment. Also, the QHRC cannot independently commence legal proceedings or conduct a compliance campaign against key discriminators or regulate critical community issues affecting large groups of people.

Due to these issues, other avenues are often relied on to deal with complaints which would fall within work-related areas such as industrial or work health and safety jurisdictions for discrimination and sexual harassment matters, even though the AD Act jurisdiction is on its face a more favourable jurisdiction.

A proactive, powerful statutory body is required, that is adequately resourced and empowered to conduct investigations, enforce breaches of the laws, make sure all parties comply with agreed obligations or decisions. The QHRC should be given the additional powers and resources it needs to take an active role in the elimination of unlawful discrimination, sexual harassment and vilification.

The implementation of positive duties and the need to address systemic disadvantage, requires a regulator. This regulator should be separated from the QHRC or tribunals performing the role of conciliation or hearing of complaints. The regulator should have all the powers to ensure compliance with the National Compliance and Enforcement Policy (i.e., educative, infringement notices, compliance notices, enforceable undertakings, prosecution and civil penalties).

Regardless of the models proposed, it is crucial that the Government provides significantly more funding and resourcing to enforcing the jurisdiction. However, without the creation of a regulatory body to ensure compliance with the new positive obligations, then the object of substantive equality is difficult, if not impossible to achieve. This is demonstrated by the learnings of the Victorian legislation, where there is limited power to actively enforce compliance with positive obligations of the *Equal Opportunity Act 2010* (Vic).

Specialist tribunal

Previously, Queensland had a specialist tribunal with an exclusive anti-discrimination jurisdiction. However, the QCAT or, in workplace-related matters, the QIRC now deals with anti-discrimination matters.

Both tribunals are generalist decision makers and have a large scope of law to cover. In practice, they are often not well equipped to deal with complexities and sensitivities of anti-discrimination law. This can lead to inconsistent approaches by decision makers in addressing foundational anti-discrimination concepts.

The QNMU suggests a tribunal is required that deals primarily with anti-discrimination matters and is accompanied by specialist anti-discrimination decision makers.

Objects

Discussion question 19 – What should be the overarching purposes of the Anti-Discrimination Act? Should an objects clause be introduced?

Substantive equality is a widely accepted approach to equality that recognises that it may be necessary to make adjustments, or take special measures, to address past disadvantage and enable people to have equal access to available opportunities (Fredman, 2016). The QNMU encourages the AD Act to shift from an equality of opportunity approach towards a commitment to promoting substantive equality. We view this as a proactive measure to redress systemic disadvantage.

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?

The QNMU expresses general support to reframe special measures and equal opportunity as part of a substantive equality approach. This would be consistent with a new purpose or objectives of the Act and not as an exemption as currently described.

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