

YOUTH ADVOCACY CENTRE INC

Submission in relation to:

the Review of the *Anti Discrimination Act 1991*



MARCH 2022

The Youth Advocacy Centre (YAC) appreciates the opportunity to contribute to the review of Queensland's *Anti-Discrimination Act 1991* (the AD Act). Together with the *Human Rights Act 2019*, the AD Act underpins the community's need to ensure that its members are treated equitably and fairly. After 30 years of operation, it is timely to review how well the AD Act overall, and the processes it sets out, have worked in supporting people who have been subject to discrimination.

As a community legal and social welfare agency which supports 10–17-year-olds in the youth justice and associated systems, and young people who are homeless up to the age of 25, YAC's submission will respond to those aspects which are of most relevance to our client group. Key areas which involve children and young people are education, employment, accommodation and sexual harassment – the latter often in the context of employment.

We have not responded to all the questions as it would be more appropriate for those with lived experience or who support people with specific attributes to address what is relevant to them and their situation.

Purpose and objectives of the AD Act (Discussion paper (DP) Q 19)

It seems appropriate to commence with the purpose and objectives as does the AD Act itself. These are important in setting the broad parameters of any legislation and providing guidance as to overall intent. The current preamble should be replaced by more modern purpose and objective clauses. YAC is supportive of those proposed in the Discussion Paper:

- To eliminate discrimination, sexual harassment, and other objectionable conduct to the greatest extent possible
- to further promote and protect the right to equality set out in the Human Rights Act
- to encourage identification and elimination of systemic causes of discrimination
- to recognise the cumulative effect of discrimination based on a combination of attributes
- to promote and facilitate the progressive realisation of equality, as far as reasonably practicable
- to progress the aim of substantive equality.

We would also support a clause similar to section 4AA of the *ACT's Discrimination Act 1991*:

This Act must be interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so consistently with—

- (a) the objects of this Act; and
- (b) human rights under the Human Rights Act

Key concepts (DP Q 1-9)

The concepts of direct and indirect discrimination are not readily understandable by the community. YAC is supportive of moving to tests of 'unfavourable treatment' and 'unreasonable disadvantage' respectively which are likely to be more understandable and less complex in implementation.

The description that the ACT Discrimination Act is "about unfavourable treatment of persons and subjecting persons to disadvantage because of the attributes they possess" (DP p33) is a succinct and helpful explanation.

Additionally, the two concepts should not be mutually exclusive because, as noted, some situations may have elements of both. This would avoid the challenges that may come with a unified test.

Since the discrimination may be on a number of ground, the AD Act should enable action on the basis of a combination of attributes.

YAC's view is that a positive duty to provide reasonable adjustments or accommodations is preferable to discrimination being framed in the negative. It encourages a prevention or early intervention approach to avoiding discrimination rather than waiting for it to occur before addressing it – being proactive rather than reactive.

What is reasonable will depend on the person and the context. We would support the Victorian approach in determining reasonableness specific to each area of activity. While this may make the legislation somewhat lengthy, it will ensure greater effectiveness.

Where government is the service provider, or funds the service provider for the activity, there should be a greater expectation that the accommodation can be made, particularly where the main barrier is cost. For smaller businesses or non-profits (assuming that the anomaly there is addressed), the cost may be a key factor. Many businesses and organisations will be leasing premises and their ability to make changes may be compromised in this regard.

YAC notes the positive duty to advance equality imposed on public authorities in other countries. The Queensland government, and therefore government departments, could take a leadership role in terms of anti-discrimination through provisions similar to the UK *Equality Act 2010*. This would model best practice and set a cultural norm for others to follow.

In terms of the burden of proof, YAC believes that it is appropriate to require the complainant to establish a prima facie case for the respondent to then prove, on the balance of probabilities, that their actions were not discriminatory. This would also address the potential for vexatious or misconceived claims.

Grounds of discrimination (DP Q 25 – 39)

YAC supports the modernising and updating of the attributes. The precise definitions should be developed in consultation with those members of the community who have these attributes to ensure that they appropriately cover their situation.

Mental health is being increasingly identified as a concern and has been a consequence of the COVID epidemic. It should therefore be recognised as an attribute.

YAC supports including the grounds of irrelevant criminal record and spent criminal record. It is challenging for people to turn their lives around when they effectively continue to be punished by discrimination on the basis that they have been in trouble before. This undermines the aim of rehabilitation and reintegration.

This should include amendment of the *Education (General Provisions) Act 2006* whereby schools are able to suspend children on a charge of an offence or exclude on a conviction of an offence irrespective of whether it occurred on school grounds or during a school activity and whether or not it was in school time. This is a serious interference with the child's right to education which may have lifelong impacts.

In terms of education, consideration should be given to a child being discriminated against because of behaviours which relate to a diagnosed behavioural disorder or cognitive impairment. There should be a requirement on State Schools as a minimum, that where a child's behaviour is problematic, that they support parents or carers in assessment of the child to ensure that reasonable accommodations can be put in place to keep the child connected with school.

(We note YAC's support for including an attribute of expunged homosexual conviction, while not relevant to our client group, on the basis of fairness and justice.)

Some of the children YAC staff work with are homeless. Particularly with respect to education, there is a need to ensure that children are not being suspended or excluded because they are struggling with uniform or homework requirements because of their situation.

Areas of activity (DP Q 52 - 55)

There seems to be a serious anomaly in relation to non-profit service providers. There are, of course, good reasons why goods and services may be limited. From YAC's perspective, the focus of our work is assisting disadvantaged and vulnerable children and young people involved in, or at risk of involvement in, the youth justice and associated systems, including homelessness. It is critical that the AD Act continues to allow for services catering to specific needs for the benefit of cohorts with particular attributes.

However, this should not mean that non-profit providers are generally excluded from the operation of the AD Act as a whole. This seems particularly perverse in that the employment discrimination provisions do apply and therefore a non-profit cannot discriminate in relation to its employees but can do so in relation to those who may access its services.

It is particularly important that non-profit providers who receive funding from government (that is, the public purse) are not able to discriminate in provision of their services beyond that of providing for a specific cohort.

With respect to the definition of a 'club', any list as per federal disability law should include 'artistic' purposes unless it is considered that music, theatre, and similar amateur groups would be covered by the term 'cultural'.

Exemptions (DP Q 40 – 51)

Assuming that the anomaly relating to non-profit organisations is addressed, religious organisations should not be exempted from coverage by the AD Act except to the extent that they are delivering services to a specific cohort, particularly if they receive funding from government for any service which they deliver. This includes educational facilities.

If religious bodies are operating commercially, they should be subject to the same law as any other commercial entity. This includes educational facilities.

With respect to prisoners, YAC notes that a prisoner's punishment is losing their freedom. Under general human rights principles, they have the same right to complain about unfair treatment as any other member of the community and the AD Act should reflect this.

YAC would support a clause similar to that in the ACT legislation which protects people from discrimination on the grounds of their visa status but provides an exemption if the discrimination is 'reasonable' having regard to relevant factors. In relation to children in particular, all decisions must be made in the best interest of the child. Any exclusion from access to key services undermines this right.

Dispute resolution (DP Q 10 – 18)

This is the area of greatest concern from the perspective of the children and young people we work with. The process is not consumer friendly and certainly not child friendly. Matters take too long to be assessed and then for resolution. For children who are facing other challenges in their lives, it is simply too hard and too long.

Rights and protections are not of value unless they can be effectively enforced. QHRC's ability to do seems compromised. We note that the website includes the following message:

We are currently receiving a large number of complaints, and the wait time to hear if we can accept your complaint may be up to 6 months.

As well as consideration of the resources required to manage the dispute resolution system, reform of the system may assist in managing workload or timeframes.

The Supreme Court is not a realistic option for the general member of the public, and certainly not for children. The costs associated with it are a major barrier and it is highly legalistic. The only way this may be possible would be for the Commission to be able to take over the matter on behalf of the complainant.

It is our understanding that the amalgamation of specialist tribunals into QCAT did not include specialist panels to address specific types of matter. From an administrative point of view, this may have been beneficial, but QCAT is called upon to deal with a wide variety of matters, some of which can be complex and have a significant impact on people's lives, such as reviewable decisions under the *Child Protection Act 2000*. Discrimination is also a complex and sensitive area of law.

If QCAT continues to play a role in discrimination matters, we believe it would be highly desirable to establish panels of expertise, one of which would be discrimination cases.

We have had the opportunity to consider *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report (2008)* which proposed the dispute resolution Victoria now uses, based on a New Zealand approach. The key elements are:

- early and active intervention by the Commission to facilitate both compliance with the Act and dispute resolution;
- the Commission offers flexible dispute resolution processes in a way that supports the objectives of the Act;
- claims may be taken directly to VCAT (it [is not] a pre-requisite to lodge a complaint at the Commission);
- the provision of legal advice and representation by a specialist advice service outside the Commission from the early stage of a dispute;
- equal and effective access to VCAT;
- and the development of jurisprudence to clarify rights and responsibilities in this area (p 60)

It would be helpful to know if this revised Victorian model has been effective in resolving matters in a timely and effective manner.

Greater use of Restorative Justice processes may also support early resolution of matters in a non-adversarial manner. With respect to terminology, one suggestion could be "Petitioner" and "Responder" to "a matter of concern".

YAC supports consideration of the Commission having a monitoring and compliance role alongside the complaint mechanism. The model described in the DP (p 79) is a well-established and tested framework with escalating educative, co-regulation, investigation and compliance components. It provides an opportunity to undertake sector engagement to address systemic issues proactively where possible in a coherent and collaborative manner which increases the chances of compliance.

With respect to time limits, YAC recommends children be given 3 years from the date that they turn 18 years to bring a complaint, which would align with the usual civil law processes.

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