Part C:
Options for reform

Key concepts

The Terms of Reference for this Review ask us to consider the definition of discrimination.

Meaning of discrimination

In Part B we identified a gap between community expectations and understandings of what discrimination means including how it is felt and experienced, and the extent of the protections provided by the Act. Perhaps because inequality is hard to define, the tests for discrimination have become complex and challenging to interpret.

Direct or indirect?

All Australian jurisdictions include tests for direct and indirect discrimination. The distinction between direct and indirect can be conceptually challenging, and this is particularly so for people involved in a complaint who are not legally represented.

Despite the High Court providing authority that direct and indirect discrimination are mutually exclusive,[32] tribunals have found that conduct has amounted to both direct and indirect discrimination.[33]

To address this issue, the legislation in the Australian Capital Territory has clarified that conduct can be both direct and indirect, by using the words 'when a person discriminates either directly or indirectly, or *both*, against someone else' and then separately defining the two concepts.[34]

Discussion question 1:

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

[32] *Waters v Public Transport Corporation* (1992) 173 CLR 349; [1991] HCA 49 (disability discrimination under *Equal Opportunity Act 1984* (Vic)); *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165; [1989] HCA 56 (treatment that is facially neutral would not fall within direct discrimination under *Anti-Discrimination Act 1977* (NSW)); *Australian Medical Council v Wilson* [1996] FCA 1618 (under *Racial Discrimination Act 1975* (Cth)); *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78; [1997] FCA 1311 (under *Sex Discrimination Act 1984* (Cth)).
[33] For example, *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249 (under appeal).
[34] *Discrimination Act 1991* (ACT) s 8. This was an intentional clarification following a review of Australian Capital Territory discrimination laws. See ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991* (ACT) (Final Report, 2015) 31. This approach was also incorporated into the Exposure Draft of the federal Human Rights and Anti-Discrimination Bill 2012 (which ultimately failed).

Direct discrimination

The Terms of Reference ask us to consider 'whether the requirement for less favourable treatment, as imported by the concept of the comparator, remains an appropriate requirement to establish discrimination, or whether there are other contemporary responses that would be appropriate'.

Direct discrimination under the Act is where a person treats a person with an attribute less favourably than another person without the attribute in circumstances that are the same or not materially different.[35]

Given that Parliament's intention for the Anti-Discrimination Act was to incorporate protections contained in international human rights instruments in state law,[36] consideration of commentary by the United Nations Human Rights Committee is instructive. In interpreting the right to equality and non-discrimination,[37] the Human Rights Committee defines 'discrimination' as:

> any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[38]

This definition emphasises the impact of treatment rather than focusing on the differential nature of it.

[35] *Anti-Discrimination Act 1991* (Qld) s 10.
[36] The Preamble to the Act states that Parliament recognises and supports Australia's ratification of human rights instruments which have been incorporated into federal legislation, but that there is a need to extend the law, apply it consistently throughout the state, and ensure that the law is enforceable.
[37] *International Covenant on Civil and Political Rights*, art 2(2).
[38] United Nations Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess (10 November 1989) 7.

Comparative experience

The different variations of direct discrimination are defined as follows:

Direct discrimination	Jurisdictions
Less favourable treatment compared to a person without the attribute in the same or similar circumstances	Queensland Western Australia New South Wales South Australia Commonwealth: *Age Discrimination Act 2004* *Disability Discrimination Act 1992* *Sex Discrimination Act 1984*
Less favourable treatment than a person without the attribute	Tasmania Northern Territory
Unfavourable treatment because of an attribute	Victoria Australian Capital Territory

Less favourable treatment test

The current test for direct discrimination in Queensland as well as most Australian jurisdictions is based on less favourable, or differential, treatment, sometimes called the 'comparative model'.

This approach requires comparison between the treatment of a person because of a prohibited attribute, and treatment that is or would be afforded to a real or hypothetical person – the 'comparator'.[39]

In most jurisdictions, the comparator must be a person in the same or similar circumstances who does not have the protected attribute of the person who makes the complaint.[40] While there are occasionally actual comparators, for example where an older person is not given a

[39] This is the case in Queensland, Western Australia, New South Wales, Tasmania, South Australia and the Northern Territory

[40] Consideration of the 'same or similar circumstances' is required in Queensland, South Australia, Western Australia, New South Wales, and under the *Age Discrimination Act 2004* (Cth), Disability *Discrimination Act 1992* (Cth), and *Sex Discrimination Act 1984* (Cth).

promotion in favour of their younger colleague, in the majority of cases the comparator must be entirely constructed – this is called a 'hypothetical' comparator.

A hypothetical comparator can be difficult to construct and may produce a contrived and convoluted result. It requires courts and tribunals to:

> engage in the artificial exercise of deciding how the respondent would have treated a hypothetical person without the complainant's relevant attribute had such a person been in the same circumstances.[41]

This can take the focus away from the impact of discrimination on the affected person.

For people whose behaviours form part of their disability, the challenge of constructing a real or hypothetical comparator can be insurmountable. Where the manifestation of an attribute is the reason for discrimination, cases heard before tribunals and courts have often been unsuccessful, with a finding that a hypothetical person would have been treated the same.[42] This has become a complex and controversial area of discrimination law that some stakeholders consider has significantly reduced the effectiveness of the Act for people with disability.

Discrimination because of cumulative or intersectional disadvantage is also difficult to establish where a comparative approach is required, for example, where a person is discriminated against specifically because they are an older person with a disability – that is the combined effect of both attributes. Considering this specific issue, the Canadian Supreme Court has determined that strict reliance on a comparator should be rejected to accommodate an intersectional approach.[43]

For more on intersectionality see Part B and 'Discrimination on combined grounds' in this section.

Unfavourable treatment test

The Australian Capital Territory and Victoria have now moved away from a differential treatment test towards a test of 'unfavourable treatment'. By removing the comparator as an essential element, considerations by a decision-maker about the comparator become part of their analysis only when it is a useful exercise, rather than an element that must be established to a particular standard.

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[41] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 95.
[42] This is a line of reasoning based on the High Court case of *Purvis v New South Wales* (2003) 217 CLR 92; [2003] HCA 62. But this case was distinguished in Queensland by *Woodforth v State of Queensland* [2018] 1 Qd R 289; [2017] QCA 100 because of the different provisions in the Queensland Act (including section 8) and the irrelevance of the reasoning in *Purvis* to subject matter unrelated to 'behaviour'.
[43] *Withler v Canada* [2011] 1 SCR 396, 58.

The word 'unfavourable' may seem to invite a comparison of treatment afforded to a person with and a person without the relevant attribute.[44] However, the Australian Capital Territory Administrative Appeals Tribunal has articulated the difference:

> While the term 'disadvantage' might be thought to imply comparison, it does not necessarily do so. The context in which it is used may invite comparison, as where it is clear that what is in issue is comparative treatment, but it may also be used in a context where comparison is absent... The primary meaning of 'advantage' does not import comparison; the same dictionary gives it as 'any state, circumstance, opportunity or means specially favourable to success, interest, or any desired end'. The Discrimination Act is therefore about unfavourable treatment of persons and subjecting persons to disadvantage because of the attributes they possess.[45]

This approach has been confirmed by Victorian cases since the Act was amended to the 'unfavourable' approach.[46] For example, a man was banned from all council buildings because of behaviour that was a manifestation of his mental health and cognitive disabilities. The tribunal found that this was discrimination, and confirmed that, while analysis may be informed by consideration of the treatment afforded to others, the 'unfavourable' approach only requires 'an analysis of the impact of the treatment on the person complaining of it.'[47]

Discussion question 2:

- Should the test for direct discrimination remain unchanged, or should the 'unfavourable treatment' approach be adopted?
- Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach?

[44] The *Macquarie Dictionary* meaning of unfavourable includes 'disadvantageous' and 'adverse; and the *Oxford Dictionary* meaning of unfavourable includes 'likely to lead to an adverse outcome'.
[45] *Re Prezzi and Discrimination Commissioner* [1996] ACTAAT 132, 22.
[46] *Kukyen v Chief Commissioner of Police* [2015] VSC 204.
[47] *Slattery v Manningham City Council (Human Rights)* [2013] VCAT 1869.

Indirect discrimination

Indirect discrimination happens when an unreasonable requirement is imposed that a person cannot comply with because of their attribute, and more people without the attribute can comply with the requirement.[48]

For example, while a minimum height requirement for all workers may seem a neutral standard, it may disadvantage women and people of some races. If the requirement is not needed to perform the work effectively, the discrimination will be unlawful because the requirement is unreasonable, there being no genuine occupational reason to justify it.

Comparative experiences

Across Australian jurisdictions, indirect discrimination is generally expressed as imposing a requirement, condition, or practice (or term) that is not reasonable. Where jurisdictions differ is that in some states, the person must establish their inability to comply with the term, with or without a proportionality test. In other jurisdictions, the test is whether the term creates a disadvantage to a person with the attribute.

The different variations are:

Indirect discrimination	Jurisdictions
Disadvantage persons with an attribute	Victoria Australian Capital Territory Commonwealth: Age Discrimination Act and Sex Discrimination Act
Disadvantage persons with an attribute more than people without the attribute	Tasmania
Inability to comply & higher proportion of people without the attribute can comply	Queensland South Australia Western Australia New South Wales
Inability to comply & disadvantages persons with the attribute	Commonwealth: Disability Discrimination Act and Racial Discrimination Act
Does not contain indirect, but includes failure to refuse or accommodate a special need	Northern Territory

[48] *Anti-Discrimination Act 1991* (Qld) s 11.

Inability to comply with a term

The current Act requires identification of a 'term' that a person must comply with and consideration of whether the person *can comply*.

This provision has been given a liberal and practical interpretation by courts. For example, while a person of Sikh faith *could* technically take off their turban, they cannot do so in practice.[49]. Usually, a respondent will not be able to successfully argue that because a person is 'coping', they are 'able to comply'.[50]

Although courts and tribunals have interpreted an ability to comply in a practical way, few complaints ever proceed to a hearing. The indirect discrimination provision is hard to explain and interpret for a non-lawyer, and it is problematic when the words 'cannot comply' are literally interpreted.

The current requirement for a complainant to identify the relevant pool of people who do not have the attribute and who are able to comply is onerous and difficult and presents a significant evidentiary burden. When introducing changes to the Sex Discrimination Act designed to shift away from this approach, the then federal Attorney-General commented that the provisions on indirect discrimination 'have proven complicated and difficult to apply in practice and which have been criticised for being overly technical, legalistic and complex'.[51]

Similar to the challenges with the hypothetical comparator, compiling the technical evidence needed to establish the 'higher proportion of people' requirement is difficult and time-consuming. Identifying the appropriate membership of the pool is easier for a sex discrimination claim,[52] but might require complex statistical evidence where it relates to race or disability.[53] It can also take focus away from the detrimental treatment. In some cases the statistical evidence will be unavailable to the complainant without orders being made by the tribunal.

[49] *Mandla v Dowell Lee* [1983] ICR 385; [1982] UKHL 7.
[50] *Hurst v State of Queensland* [2006] FCAFC 100.
[51] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 1995, 2460 (Michael Lavarch, Attorney-General).

[52] *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165; [1989] HCA 56.
[53] Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 5th ed, 2019) 47.

Disadvantaging persons with an attribute

The alternative approach adopted by Victoria, the Australian Capital Territory, and under certain Commonwealth legislation (the *Age Discrimination Act 2004* (Cth) and the *Sex Discrimination Act 1984* (Cth)) involves considering whether a requirement, condition, or practice has, or is likely to have, the effect of unreasonably *disadvantaging persons with an attribute.* This does not require consideration of whether a person can or cannot comply, or who might be the appropriate comparative pool of people without the attribute.

The difference of this approach is best demonstrated by an example:

> A factory makes all employees start at 6am. This might seem to treat everyone equally, but it could disadvantage employees needing to care for children, who are usually women. If it is not a reasonable requirement, this will be indirect discrimination.[54]

For the example, under the current provisions of the Anti-Discrimination Act, a person who could not start work at 6am because of family responsibilities would have to prove that more employees who do not have family responsibilities are able to start at 6am, and that the term is not reasonable. This requires complex and detailed analysis when compared with a relatively simple test of whether this *unreasonably disadvantages* the workers who are parents.

Discussion question 3:

- Should the test for indirect discrimination remain unchanged, or should the 'disadvantage' approach be adopted?
- Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach?

Unified test

While all Australian jurisdictions retain separate and distinct direct and indirect discrimination tests, some international approaches have adopted a single, unified test.[55]

This option was considered in the 2011 review of Commonwealth discrimination laws, which considered whether having two different categories was artificial, and has created unnecessary complication.[56]

[54] Victorian Equal Opportunity and Human Rights Commission, *Discrimination* (Web Page) Different kinds of discrimination: Indirect discrimination <www.humanrights.vic.gov.au/for-individuals/dictionary/>.
[55] Canada, South Africa, United States of America, and New Zealand.
[56] Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011) 13.

For example, in South Africa discrimination means:

> 'any act or omission, including a policy, law, rule, practice, condition or situation which **directly** or **indirectly** –
> imposes burdens, obligations or disadvantage on; or
> withholds benefits opportunities or advantages from any person on one or more of the prohibited grounds.'[57]

A unified approach has been adopted in Canada since the late 1990s where a policy or practice is invalid if it disadvantages a protected group, whether directly or indirectly, unless the treatment falls within a defence (like an exemption). Some case law indicates this was because of the complexity of maintaining the distinction and because 'conventional analysis may serve to legitimise systemic discrimination'.[58] Given the issues identified in Part B that indicate that the current law may not be adequately addressing systemic discrimination, the unified approach deserves consideration.

Adopting a unified approach would be a significant departure from the scheme operating in Australian jurisdictions. As Australian jurisprudence could not be adopted in Queensland, such a significant change would necessarily require new jurisprudence to provide guidance on interpretation of the law.

However, the international case law, especially from Canada, could be instructive. One benefit may be reducing complexity for unrepresented parties who often find it hard to determine whether to argue direct or indirect discrimination.

Discussion question 4:

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

[57] *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (South Africa) s 1(viii) (emphasis added).
[58] *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3, [50]–[53].

Unjustifiable hardship and reasonable accommodations

The Terms of Reference require the Review to consider key definitions in the Act, including the definition of unjustifiable hardship.[59] The term appears in the following contexts:

- An exemption to workplace impairment discrimination where the circumstances of a person's impairment causes unjustifiable hardship for an employer, depending on the impairment and the nature of the work.[60]
- An exemption where the supply of separate sleeping accommodation for men and women working together would cause unjustifiable hardship to the employer.[61]
- Special services and facilities exemption in the areas of accommodation,[62] goods and services, work, education, and clubs.[63] The exemption allows for impairment discrimination if a person 'would require special services or facilities, the provision of which would impose an unjustifiable hardship'.

Special services or facilities

The Act sets out an illustrative list of factors that might contribute to unjustifiable hardship where special services or facilities are required. These include:

- the nature of the special services
- costs
- financial circumstances of the person required to supply them
- disruption
- benefit or detriment to all people concerned.

The Act gives an example of unjustifiable hardship where making the workplace accessible for a person in a wheelchair would be very expensive or impose another significant hardship.[64]

In the education setting the special services or facilities exemption has permitted discrimination against children in both state and private schools. For example, this has been successfully

[59] Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(e).
[60] *Anti-Discrimination Act 1991* (Qld) s 36. The Review has noted that only in relation to the area of work, unjustifiable hardship may be argued even in the absence of the need to provide special services and facilities
[61] *Anti-Discrimination Act 1991* (Qld) s 30.
[62] *Anti-Discrimination Act 1991* (Qld) s 92.
[63] *Anti-Discrimination Act 1991* (Qld) ss 51, 35, 44, 100.
[64] *Anti-Discrimination Act 1991* (Qld) s 5. Unjustifiable hardship in the context of work accommodation is similarly provided for by s 30(2). Unjustifiable hardship in the context of employment under s 36 is undefined.

argued by a state school that excluded a student in a wheelchair from attending an excursion,[65] and a private school that refused to enrol a student with development delays.[66]

In other cases, it was unsuccessfully argued by a body corporate that failed to make adjustments to common property,[67] and by a government department that refused to allow an employee to continue in their role while they needed to take breaks for dialysis.[68]

Another consideration is whether the 'relevant circumstances' for determining unjustifiable hardship strike the right balance between the rights of people with disability and the competing interests of employers, schools, accommodation providers and others, having regard to the overarching goal of promoting equality and inclusion.

Currently, unjustifiable hardship is framed as a 'cost-benefit analysis', which does not expressly take into account the circumstances and impacts on the person who requires the special services or facilities. This may mean that some people with disability may be more disadvantaged than others. For example, where a screen reader may cost $5–10,000 to accommodate a blind employee, adjustments for a wheelchair user may be in the hundreds of thousands of dollars.[69]

On the other hand, there may be genuine concerns about affordability for some adjustments, especially for small and medium sized businesses.

Similar provisions exist in all Australian equality jurisdictions, but there is considerable variation in how they are constructed.

Discussion question 5:

- Should an exemption of unjustifiable hardship relating to the supply of special services or facilities be retained? If so, in which areas?
- Should the factors relevant to determining unjustifiable hardship be redefined, and if so how?
- How can the compliance costs for business and organisations be appropriately considered and weighed?

[65] *I v O'Rourke* [2001] QADT 1.
[66] *K v N School* [1997] QADT 1.
[67] *C v A* [2005] QADT 14.
[68] *Vale v State of Queensland* [2019] QCAT 290.
[69] Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 5th ed, 2019) 151–152.

Reframing to a positive obligation

The concept of reasonable accommodations refers to making suitable provisions or adjustments to accommodate a person's attributes to avoid discrimination and achieve substantive equality. The provision of accessible toilets is an example of reasonable accommodation for a person with disability.

The special services and facilities exemptions outlined above imply an obligation to supply 'special services or facilities', or in other words to make 'reasonable accommodations', for a person with impairment, unless it would impose unjustifiable hardship.

The Act also implicitly provides for 'reasonable accommodations' in the definition of indirect discrimination, where discrimination occurs if a term imposed is not reasonable.[70]

As currently drafted, an obligation to make reasonable accommodations is difficult to understand and is not easily enforced. An express positive duty may provide clarity and greater certainty regarding obligations and entitlements for all parties.

In response to concerns raised by the High Court decision in *Purvis*, an obligation to make reasonable adjustments was incorporated into the definition of direct discrimination in the *Disability Discrimination Act 1992* (Cth).[71] It is then a defence to discrimination if avoiding discrimination would cause unjustifiable hardship.[72]

Under Commonwealth law, direct discrimination occurs if a person does not make, or proposes not to make, reasonable adjustments that has the effect on the person with disability of being treated less favourably. However, the intent of the provision has been negated by *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128, in which it was held that a discriminator's reasons for not making reasonable adjustments must still be 'because of' the person's disability for direct discrimination to occur. For example, in order to succeed, an employee must show that the employer's reason not to provide a screen reader was because the employee is blind.

In Victorian legislation, the Act includes a stand-alone obligation to provide reasonable adjustments for people with disability, separate to definitions of direct or indirect discrimination, in the areas of employment (sections 20, 22A, 33), education (s 40), and provision of services (s 45). There is also an obligation to provide reasonable adjustments in relation to workers who are parents or carers. The term or defence of unjustifiable hardship is not used.

[70] *Anti-Discrimination Act 1991* (Qld) s 11.
[71] *Disability Discrimination Act 1992* (Cth) s 5(2).
[72] *Disability Discrimination Act 1992* (Cth) ss 21B and 29A.

This creates a positive obligation, rather than existing as an arguable exemption as is currently the situation in Queensland.

Another variation in the Victorian approach is that factors determining reasonableness are specific to each area of activity. For example, factors that must be considered in the education area include the person's circumstances, the nature of the adjustment, the effect on the person when making the adjustment, the effect on others, and any other consequences.[73]

This approach appears to allow flexibility in determining whether an adjustment is reasonable. The specific obligation to make reasonable adjustments, and corresponding exceptions, only appear in the areas of employment, education, and goods and services.[74]

Reasonable accommodations beyond disability

The requirement to make reasonable accommodations is most commonly thought of in relation to discrimination against people with disability.[75] Affirmative actions are often required to create an equal outcome for people with disability. However, the same reasoning could apply to discrimination on the basis of other attributes. Victoria's Gardner Review recommended that an express requirement to make reasonable adjustments be limited to discrimination on the basis of impairment and parental or carer status. This approach was thought to be fairer on employers and service providers, provided clearer and more effective obligations, and allowed for targeting of resources. However, this did not mean the requirement could not be expanded to other attributes at a later stage.[76]

Another issue to consider is whether a requirement to make reasonable accommodations should only apply to specific areas of activity, or to all areas of activity.

Both Northern Territory (s 24 *Anti-Discrimination Act 1992* (NT)) and Canadian anti-discrimination laws provide for reasonable accommodation for all attributes in all areas, for which there is the defence of unjustifiable hardship.

[73] *Equal Opportunity Act 2010* (Vic) s 40(3).
[74] There is another exception based on unreasonableness in the area of accommodation (*Equal Opportunity Act 2010* (Vic) s 58).
[75] This aligns with Article 5 of the *Convention on the Rights of Persons with Disabilities* which obliges State Parties to ensure 'reasonable accommodation' is provided to promote equality and eliminate discrimination.
[76] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 92 [5.68]–[5.71].

Discussion question 6:

- Should the Act adopt a positive duty to make ‘reasonable adjustments’ or ‘reasonable accommodations’?
- If you consider that this approach should be adopted:
    - Should this be a standalone duty?
    - What factors should be considered when assessing ‘reasonableness’ of accommodations?
    - Should it apply to disability discrimination, other specific attributes, or all attributes?
    - Should it apply to specific areas of activity or all areas? For example, should it apply to goods and services, work, education, and accommodation?
    - How would any amendments interact with exemptions involving unjustifiable hardship? Would there be a need to retain the concept of unjustifiable hardship at all?

Discrimination on combined grounds

As discussed in Part B, the law is currently based on separate and distinct grounds of discrimination (attributes). The Review has identified this may not adequately protect people who experience intersectional discrimination, where people experience discrimination because of the cumulative or combined effect of having more than one protected attribute.

This appears to be because people who experience intersectional discrimination find it harder to meet the requirement of a discrimination complaint to be ‘on a ground’, and if they do, it may be more difficult for them to establish their complaint to the relevant threshold to be accepted.

While there is nothing to prevent a person from alleging discrimination on the basis of more than one attribute, the current legislation does not address the cumulative nature of disadvantage. A hypothetical example might be where a young man of colour says he has been followed by a shopkeeper while buying groceries. However, in bringing a complaint it may be hard to argue it was because of his age, his race, or his sex alone, but rather because of a confluence of his personal characteristics.

To address this issue, following a similar legislative review of their equivalent legislation, the Australian Capital Territory introduced the words 'one or more protected attributes'[77] as recommended by the ACT Law Reform Advisory Council's report.[78]

In South Africa the words 'one or more grounds'[79] has been interpreted to include discrimination based on combined grounds. A recent case exploring intersectionality involved the treatment of Black women who make up the overwhelming majority of domestic workers, but were being excluded from a statutory definition of 'employee' for workplace injury and death.[80] The case was successfully argued on the combined grounds of gender and race.

The words 'combined grounds' are used in United Kingdom and Canadian legislation. The Canadian Human Rights Act confirms that:

> For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.[81]

We consider other legislative mechanisms that may ensure the law can better protect people who experience intersectional discrimination in our discussion of the Objectives of the Act.

Discussion question 7:

- Is there a need to protect people from discrimination because of the effect of a combination of attributes?
- If so, how should this be framed in the Act?
- Should other legislative amendments be considered to better protect people who experience discrimination on the basis of combined grounds?
- What are some examples of where the current law does not adequately protect people from discrimination on combined grounds?

[77] *Discrimination Act 1991* (ACT) ss 8(2) and 8(3).
[78] ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015) 33–34.
[79] *Constitution of the Republic of South Africa 1996* (South Africa) ch 2 'Bill of Rights', s 9.3.
[80] *Mahlangu v Minister of Labour* [2020] ZACC 24 (Constitutional Court).
[81] *Canadian Human Rights Act*, RSC 1985, c H-6, pt I, 3.1.

Burden of proof

The Terms of Reference ask us to consider protections, processes and enforcement mechanisms in other Australian discrimination laws. This discussion will consider whether the allocation of the burden of proof is the most fair and balanced approach.

In Queensland, the complainant generally has the burden of proving a complaint of discrimination,[82] , except that respondents are required to prove reasonableness for indirect discrimination,[83] or that an exemption applies in the circumstances.[84] In each of these instances, the standard of proof is 'on the balance of probabilities'. However, the 2017 prohibitions on employment discrimination against people in regional communities by large resource projects require a *presumption* of discrimination, unless the respondent can prove otherwise.[85]

Many complainants have found it challenging to discharge the burden of proof, particularly when it comes to race discrimination, where courts have often been reluctant to draw inferences of racism.[86] For example, where a complainant claims that race discrimination was the reason they did not get a job, the respondent need only point to 'merit', which relies on only knowledge that the respondent holds.[87]

Comparative experience

There are a number of different models that could be considered with respect to the allocation of the burden of proof.

International approaches

In the United Kingdom,[88] European Union,[89] and Canada[90] the burden of proof shifts to the respondent once the complainant has established a prima facie case of discrimination. To successfully defend a claim in these jurisdictions, the respondent must prove, on the balance of probabilities, that they did not act unlawfully. If that explanation is inadequate or unsatisfactory,

[82] *Anti-Discrimination Act 1991* (Qld) s 204.
[83] *Anti-Discrimination Act 1991* (Qld) s 205.
[84] *Anti-Discrimination Act 1991* (Qld) s 206.
[85] *Anti-Discrimination Act 1991* (Qld) ss 131E and 131F.
[86] Loretta de Plevitz, 'The Briginshaw "Standard of Proof" in Anti-Discrimination Law: "Pointing with a Wavering Finger"' (2003) 27(2) *Melbourne University Law Review* 309, 332.
[87] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 578; Fiona Allison, 'A limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens' (2013) 17(2) *Australian Indigenous Law Review* 3, 15.
[88] *Equality Act 2010* (UK) s 136.
[89] *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16, 31.
[90] *Ontario Human Rights Commission v Simpson-Sears Limited* [1985] 2 SCR 536, 28.

the court or tribunal must find that discrimination occurred. The shifting burden of proof is described in the Explanatory Notes to the United Kingdom's *Equality Act 2010*:

> …the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act…[91]

The Commonwealth contemplated following the United Kingdom approach in the draft Human Rights and Anti-Discrimination Bill 2012 (Cth).[92] The Exposure Draft Explanatory Notes to the Bill explain how this would have worked in practice:

> Under this rule, the complainant must provide evidence from which the court could decide, in the absence of any other explanation, that the alleged reason is the reason the respondent engaged in the conduct. Once the complainant has discharged this burden, the reason for the conduct will be presumed unless proven otherwise by the respondent.
> The respondent bears the burden of establishing defences (including that conduct is a special measure to achieve equality, that it is justifiable or covered by another exception or exemption...[93]

In this approach much of the burden still remains on the complainant, who must prove:

- they have a relevant attribute, and their complaint falls in an area of activity
- unfavourable/less favourable treatment occurred
- the causal nexus – there is a link between their attribute and the treatment.[94]

The respondent would then need to prove there was another, non-discriminatory reason for the treatment, that it was reasonable to discriminate (if it was an indirect case), or that an exemption applies.

A more complex variation of this approach is shown in United States case law. Here the complainant must establish a prima facie case, then the respondent must provide evidence which could support a finding that there was a legitimate and non-discriminatory reason for their actions, and then the onus shifts back to the complainant to show that the respondent's reason is a pretext for discrimination.[95]

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[91] Explanatory Notes, *Equal Opportunity Act 2010* (UK) s 136 'Burden of proof' 443.
[92] This Bill did not ultimately pass.
[93] Exposure Draft Explanatory Notes, Human Rights and Anti-Discrimination Bill 2012 (Cth) 4.
[94] This was the approach included in the Exposure Draft Human Rights and Anti-Discrimination Bill 2012 (Cth).
[95] *McDonnell Douglas Corporation v Green*, 411 US 792 (1973).

In response to recommendations from a legislative review, the Australian Capital Territory changed its laws in 2016 to amend the burden of proof. However, because of the way the provision is constructed,[96] in practice this has resulted in the complainant retaining the primary burden of proof, defeating the original policy intention.[97]

Australian industrial laws

Since 1904, an employer responding to industrial claims has been subject to a shifting burden of proof when defending a claim of dismissal on the basis of trade union activity.

This approach is now reflected in the Fair Work Act[98] in relation to all general protections well beyond the scope of industrial action. There is significant overlap with the jurisdiction of the Anti-Discrimination Act since discrimination is a form of unlawful 'adverse action' and many of the protected 'grounds' (or attributes) are the same or similar[99].

Under the Fair Work Act general protection laws, with which most employers (except for state government) must comply in Queensland, the employee or prospective employee need only establish that adverse action was taken and that they had one of the relevant attributes. It is then presumed that the adverse action was taken because of the attribute, unless the employer can prove otherwise.[100]

This approach, sometimes called a rebuttable presumption, merely requires a person to establish that they possess the relevant attribute, and then it is assumed that the employer acted unlawfully, unless they are able to prove otherwise.[101]

[96] *Human Rights Commission Act 2005* (ACT) s 53CA has a rebuttable presumption that discrimination has occurred once the complainant has established a prima facie case and presents evidence that would enable the tribunal to decide in the absence of any other explanation that the treatment is linked to the attribute.
[97] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 119–120.
[98] *Fair Work Act 2009* (Cth) s 361.
[99] The *Fair Work Act 2009* (Cth) s 351 prohibits adverse action on the following grounds, many of which are also protected attributes under the Anti-Discrimination Act – race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
[100] *Fair Work Act 2009* (Cth) s 361(1).
[101] *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647; [2012] HCA 32.

Replicating the Fair Work Act approach would mark a departure from the approach of equality jurisdictions in Australia and overseas. The advantage to this approach is that it promotes consistency between state and federal laws and would simplify the law for employers. However, it should be considered whether this places too great a burden on employers, and particularly small to medium businesses. The Anti-Discrimination Act contains situations outside of the work area, and careful consideration would be required as to whether this is the appropriate standard for all areas of activity under the Act.

Discussion question 8:

- Should the onus of proof shift at any point in the process?
- If yes, what is the appropriate approach?

Meaning of sexual harassment

The Terms of Reference for the Review ask us to consider the recommendations from the *Respect@Work: Sexual Harassment National Inquiry Report*[102] and, in particular, to include options for legislating for a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation as far as possible.

The *Respect@Work* report found that sexual harassment in the workplace is prevalent and increasing,[103] with 33% of people having experienced harassment in the last 5 years. It also found that women and young workers are at the greatest risk. However, despite the high occurrence of sexual harassment, few complaints are received compared with discrimination and human rights complaints.[104]

Queensland has broad protections against sexual harassment by prohibiting it in all circumstances, both public and private. Nonetheless, over 80% of sexual harassment complaints made to the Queensland Human Rights Commission last year were about harassment occurring in the workplace.[105] Most other jurisdictions confine sexual harassment to areas of activity, much like discrimination.

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[102] Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020).
[103] Ibid 98. The rates of sexual harassment reported by survey respondents has increased significantly from 21% in 2012, but this may be the effect of increased community awareness.
[104] Queensland Human Rights Commission, *Annual Snapshot 2020-21*: 7.4% of accepted complaints in 2020-21, compared with discrimination at 49.1% and human rights at 25.5%.
[105] Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 2021) *36.*

As outlined in Part D, there are no exemptions to sexual harassment. The Act simply states, 'A person must not sexually harass another person' [106].

Relational aspect

The current approach in Queensland contains what is called a 'relational aspect'. That is, conduct to amount to sexual harassment, it must be directed towards a person. The Act uses the words 'in relation to the other person', or 'relating to the other person'.

There is generally a requirement that the conduct must be either done with that person in mind or have a connection with that person.[107]

The requirement to prove the relational aspect can pose issues where the complainant has been required to work in a highly sexualised environment. Some case examples include where a work Christmas party employed a topless waitress,[108] or where posters that could be considered to sexualise women were present in the work area. [109]

While such situations will usually amount to sex discrimination, extending the scope of sexual harassment to clearly incorporate these 'toxic' environments might clarify the law and have an educational aspect.

One option to fill this gap is seen in the Australian Capital Territory legislation which clarifies that sexual harassment may be 'to, or in the presence of' the person.'[110]

Addressing underlying culture

Sexual harassment often thrives in environments where there is a culture of acceptance of inappropriate behaviour, particularly where an employer has failed to take reasonable steps to address the issue.

Respect@Work noted that the case law regarding indirect sex discrimination may not be readily understood and suggested prohibiting both:

- 'sex-based harassment', as a separate contravention,[111] and
- the act of 'creating an intimidating, hostile, humiliating or offensive environment on the basis of sex'.[112]

[106] *Anti-Discrimination Act 1991* (Qld) s 118.
[107] *Streeter v Telstra Corporation Limited* [2007] AIRC 679.
[108] *Carter v Linuki Pty Ltd trading as Aussie Hire & Fitzgerald* (EOD) [2005] NSWADTAP 40.
[109] *Perry v State of Queensland & Ors* [2006] QADT 46.
[110] *Discrimination Act 1991* (ACT) s 58(2).
[111] Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 458.
[112] Ibid 460.

However, these recommendations should be considered in the context that sexual harassment in Queensland includes *all* settings, public and private, and these expectations of conduct might be unreasonable outside of formal environments such as workplaces and schools.

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

Dispute resolution

The Terms of Reference for this Review ask us to consider:

a) whether the Act should reflect protections, processes and enforcement mechanisms that exist in other Australian discrimination laws

b) legislative barriers that apply to the prohibition on discrimination

c) ways to improve the process and accessibility for bringing and defending a complaint of discrimination, including how the complaints process should be enhanced to improve access to justice for victims of discrimination

d) options for more tailored approaches towards, or alternative existing frameworks for, dispute resolution that enable systemic discrimination to be addressed, as well as discrimination complaints that raise public interest issues.

This section focuses on enforcement of the Act through the dispute resolution process.

Two-stage enforcement model

One means of achieving the purpose of the Act is to allow a complaint to be made against the person who unlawfully discriminated. Dispute resolution (or 'conciliation') is how the Commission attempts to resolve complaints. The aim of conciliation is to 'challenge discrimination by an informal and consensual process involving negotiation and agreement wherever possible.'[113]

Conciliation is compulsory and there is no right of direct access to courts or tribunals for an alleged breach of anti-discrimination legislation. This is consistent with other jurisdictions within Australia, except for in Victoria.[114]

A complaint is assessed by the Commission to check that it sets out reasonably sufficient details to indicate an alleged contravention of the Act.[115] If accepted, the matter proceeds through compulsory conciliation.[116] If the matter does not resolve at the conciliation conference, the complainant may elect to have their complaint referred to the relevant tribunal.[117] Around

[113] Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (LexisNexis Butterworths, 2nd ed, 2002) 363.
[114] *Equal Opportunity Act 2010* (Vic) s 122.
[115] *Anti-Discrimination Act 1991* (Qld) s 136.
[116] *Anti-Discrimination Act 1991* (Qld) pt 1 div 1.
[117] *Anti-Discrimination Act 1991* (Qld) ss 164A and 165.

one in three accepted complaints is referred to a tribunal. A very small proportion of complaints before a tribunal proceed to a hearing, decision, and published outcome.[118]

The process of conciliation by the Commission followed by the option for referral to a tribunal has been referred to as the 'two-stage enforcement model'.[119] The two-stage enforcement model creates a gatekeeping role for the Commission that is common among Australian human rights agencies, with the exception of Victoria. In Victoria a person may elect to complain to the Victorian Commission or proceed directly to the relevant tribunal. In the United Kingdom an application is made directly in the county court or employment tribunal and the Commission does not have a dispute resolution role[120]

Some academic commentators have identified limitations in the two-stage enforcement model, because the process can take a long time if early resolution is not achieved, and because of the lack of transparency and public exposure in the first stage (conciliation).[121]

Previous reviews of discrimination laws have also questioned the fairness and appropriateness of this process.[122] As extremely few complaints result in a tribunal decision, there is a 'limited opportunity for the community to learn about the rights and obligations created by anti-discrimination laws'.[123]

Most parties benefit from early resolution through the specialised conciliation process at the Commission. However, for complaints that are systemic in nature, or where the desired outcome is a declaration that a particular policy or practice is discriminatory, there may be limited benefit to parties being engaged for a protracted period in early resolution. This may also have a chilling effect for complainants who would otherwise seek to bring a complaint to raise public interest issues. This is particularly the case where the tribunal runs a separate conference process prior to setting the matter down for hearing, which means that two conciliation processes are required before a matter can be heard.

[118] In 2020 calendar year, the Review identified 26 decisions that had been published by the tribunals, many of which were about procedural matters.
[119] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 58.
[120] *Equality Act 2010* (UK) ss 114 and 120.
[121] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 58–65.

Public policy reasons behind the two-stage enforcement process include to:

a) encourage informal resolution which may also have an educative function for the parties involved

b) avoid an influx of vexatious or misconceived claims which create too much of a burden on respondents,[124] and

c) protect the privacy of the parties[125]

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This is particularly the case where the tribunal runs a separate conference process prior to setting the matter down for hearing, which means that two conciliation processes are required before a matter can be heard.

Another issue when considering whether there should be a direct right of access to the tribunals is the capacity of the tribunals to manage a potential increase in claims if complainants gain direct access.

[124] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 71.
[125] New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Discussion Paper 30,1993) 6.15.
[126] New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Discussion Paper 30,1993) 6.52–6.56; Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 70–73.
[127] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 64.

Injunctive relief in matters of public interest

Under the current Act, a complainant or the Commissioner may apply to the tribunal for an order prohibiting a person from doing an act that might prejudice the investigation or conciliation of the complaint, or an order that a tribunal might make after a hearing.[128]

Where a matter raises a significant public interest issue, and where the circumstances require urgent determination, it may be appropriate to allow a person to apply to the Supreme Court when legislative criteria are satisfied.

Allowing the Supreme Court to determine matters under the Anti-Discrimination Act would ensure quick and determinative resolution of matters of public interest. It would also establish precedent, and therefore achieve systemic outcomes.

Under the current Act, when seeking injunctive relief from a tribunal, the tribunal may provide prohibitory relief – that is, they can stop a party from taking a particular action. If a direct right of access was allowed to the Supreme Court, consideration could 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.

Risks associated with this potential action could include that the parties enter a costs jurisdiction at an early stage.

In New Zealand the equality legislation allows for the tribunal to refer a case back to conciliation before the Commission where they consider that an attempt at resolution has not been made, *unless* the conciliation process will not be constructive, will not be in the public interest, or will undermine the urgent or interim nature of the proceedings.[129] A similar approach could be adopted under the Anti-Discrimination Act.

[128] *Anti-Discrimination Act 1991* (Qld) s 144.
[129] *Human Rights Act 1993* (NZ) s 92D.

Discussion question 10:

- Should the Act include a direct right of access to the tribunals?
- Should a complainant or respondent be entitled to refer the complaint directly to a tribunal?
- Should a person be entitled to apply directly to the Supreme Court where the circumstances of a complaint raises matters of significant public interest? If so:
    - Should it be confined to certain matters?
    - What remedies should be available to the complainant?
    - Who would have standing to bring the complaint?
- What are the risks and benefits of any direct right of access?
- What circumstances could this right of access apply to?
- How could the process be structured to ensure that tribunals and the Supreme Court are not overwhelmed with vexatious or misconceived claims?

Terminology

The Queensland law uses the terms ‘complaint’, ‘conciliation’, ‘complainant’ and ‘respondent’. This reflects the approach taken in all Australian jurisdictions except Victoria.

Following 2010 reforms in Victoria, terminology shifted to ‘bring a dispute’ and ‘dispute resolution’,[130] although the Victorian Commission still uses the terms complaint and conciliation interchangeably with dispute resolution.[131]

As discussed in Part B, being classed as a ‘complainant’ may have negative connotations and may be culturally inappropriate, particularly for people who come from communities where there is stigma around the act of complaining, or when people come from countries where it is unsafe to complain to the government.

A respondent may also feel that they are unfairly required to defend themselves against allegations of serious conduct, such as racism or sexism. The ‘complainant’ and ‘respondent’ terminology can set up an adversarial environment from the outset, and this may create a perception that the Commission takes the side of the complainant, which can be counter-productive to resolving the complaint. The term ‘conciliation conference’ may also imply a formal and intimidating process, particularly for unrepresented parties.

Less legalistic terms such as ‘dispute resolution’, ‘dispute parties’ and ‘conflict resolution’ are common in alternative dispute resolution settings, including statutory dispute resolution services.

Discussion question 11:

- Should the ‘complaint-based’ terminology be changed?
- If so, what should it be replaced with?

[130] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 65–67 and 134, Recommendation 83. This wording change reflected a shift in focus to no longer dealing with ‘complaints’ but assisting in resolving discrimination issues.
[131] Victorian Equal Opportunity and Human Rights Commission, ‘Make a complaint’, (Web page) <https://makeacomplaint.humanrights.vic.gov.au>.

Written complaints

Under the Anti-Discrimination Act, complaints must be made in writing.[132]

A written complaint forms the legal basis for the Commission to accept the complaint and notify the respondents of the substance of the complaint.[133] To ensure procedural fairness, respondents should be able to understand what allegations are contained in the complaint and the reason the complaint has been accepted.

However, the requirement for a written complaint may create a deterrent or significant barrier for many people to access the complaints process. This may have a disproportionate impact on people who speak a language other than English, people with low literacy, and Aboriginal and Torres Strait Islander peoples.[134] These groups may be under-represented in the Commission's complaints data.

Under the Human Rights Act,[135] the Commission can provide 'reasonable help' to a complainant where satisfied that the complainant needs help to put the complaint in writing.

Discussion question 12:

- Should non-written requests for complaints be permitted, for example by video or audio?
- Alternatively, should the Commission be allowed to provide reasonable help to those who require assistance to put their complaint in writing?
- How would this impact on respondents?
- How can the right balance be achieved between ensuring certainty for the respondent about the contents of the complaint while addressing the barriers to access?

[132] *Anti-Discrimination Act 1991* (Qld) s136.
[133] *Anti-Discrimination Act 1991* (Qld) s143(1) the Commission must notify the respondent in writing of the substance of the complaint if the complaint is accepted.
[134] Fiona Allison, 'A limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens' (2013) 17(2) *Australian Indigenous Law Review* 3, 14.
[135] *Human Rights Act 2019* (Qld) s 67.

Efficiency and flexibility

Of all Australian human rights agencies, Queensland appears to have the most onerous procedural requirements for parties to a complaint. This includes set timeframes for notifying parties about a complaint, which must be done within 28 days, and for arranging a conciliation conference, which must be conducted within 4 to 6 weeks of the notification.[136] This sets up a resource-intensive 'one-size fits all approach' which also fails to respond to urgency and priority.

The Act requires the Commission to attempt conciliation if the Commissioner believes it 'may be resolved' through conciliation.[137] This wording anticipates a situation where the Commission may decide a complaint will be likely to not resolve that way, implying that a conciliation conference should not always take place.[138] However, this is inconsistent with other sections.[139]

These provisions were changed in 2002 in an attempt to enhance the efficiency of the complaint resolution process[140] but arguably this had the opposite effect by limiting the Commission's capacity to tailor the process to the needs of the parties and the nature of the dispute.

The Gardner review of Victoria's equality legislation recommended that dispute resolution should adopt approaches that are tailored to the individual dispute. On some occasions the parties may be better served by an informal phone conversation or a shuttle negotiation (otherwise known as 'early intervention'), particularly if a swift resolution to preserve relationships in education or employment is the desired outcome.[141] This flexible approach is now used in Victoria and was based on the New Zealand legislation.

The *Human Rights Act 2019* (Qld) has recently allowed the Commission more discretion in dispute resolution service delivery[142] with indications of early success. More human rights complaints have been resolved by the process of early intervention than through formal conciliation conferencing in the second year of operation of that Act.

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[136] In 1991, the only requirement was to 'promptly' notify the respondent of the substance of the complaint in writing – *Anti-Discrimination Act (No 85) 1991* s 141(2).
[137] *Anti-Discrimination Act 1991* (Qld) s158.
[138] *Anti-Discrimination Act 1991* (Qld) s158.
[139] *Anti-Discrimination Act 1991* (Qld) s143(2)(g) requires that a conciliation conference date is provided on notification, and section 164A allows for referral of a complaint after a conciliation conference has been held. In contrast, *Anti-Discrimination Act* (NSW) allows discretion under section 91A about whether conciliation is attempted, allows for separate or joint discussions and section 93C allows the Anti-Discrimination Board to form an opinion that the nature of the complaint is such that it should be directly referred to the Tribunal.
[140] Explanatory Notes, Discrimination Law Amendment Bill 2002 (Qld) 5–7. These Explanatory Notes raised concerns that the process had become 'unnecessarily protracted and, accordingly, expensive and frustrating for parties' and was no longer meeting its objective of being a 'cheap and speedy process'.
[141] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 65 Recommendation 16.
[142] *Human Rights Act 2019* (Qld) s 79.

Timeliness is vital for procedural fairness and to promote early resolution; but balancing this consideration with the need for flexible responses can be frustrated by legislative mandates. The Victorian approach has been to set reasonable overall closure targets without the need for mandated timeframes, and has a goal of finalising complaints within 6 months on average.[143]

Discussion question 13:

- How can the law be adapted to allow a more flexible approach to resolving complaints?
- Should the current provisions that require set notification and conference timeframes be retained, changed or repealed?
- Should all complaints proceed through the same conciliation model, or should early intervention be an option?
- What legislative or non-legislative measures should be in place to ensure procedural fairness, timeliness, and efficiency?

Time limits

Legislative timeframe

In most Australian jurisdictions, a discrimination complaint must be made within 1 year. Northern Territory legislation and federal age, race, and disability laws have a 6-month time limit,[144] whereas discrimination complaints in the Australian Capital Territory and complaints under the federal legislation vary between 6 months and 2 years depending on the protected attribute.[145]

The *Respect@Work* report includes detailed discussion about the particular impacts of a 12-month timeframe for people who have experienced sex discrimination at work.[146]

[143] Victorian Equal Opportunity and Human Rights Commission, *2018–19 Annual Report* (Report, 2019) – 76% were finalised in 2018–19 in 6 months.
[144] *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b).
[145] The Sex Discrimination and Fair Work (Respect at Work) Amendment Bill amends the *Australian Human Rights Commission Act 1986* section 46PH(1). This means that sexual harassment, sex, sexuality, gender identity and intersex status discrimination have a 2 year but all other matters are subject to a 6-month timeframe.
[146] Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020).493.

The 1-year timeframe under the Queensland Act[147] is much shorter than the limitations for personal injury (3 years), tort or contract (6 years), or the general protections breaches under the *Fair Work Act 2009* (6 years).[148] However, complaints to the Queensland Ombudsman have a time limit of one year.[149]

Currently no explicit dispensation for children or people with impaired decision-making capacity exists in the Act, but their circumstances would be a relevant consideration in a complaint made out of time.[150]

Process

The Commission has a discretion to accept an out of time complaint, if the complainant 'shows good cause'.[151] If the Commission exercises this discretion and accepts a complaint, but it is not resolved through conciliation, the complainant may request that the matter be referred to the relevant tribunal. However, at this point, the complainant faces an additional hurdle. The tribunal may deal with a complaint more than 1 year after the alleged contravention, if it 'considers that, on the balance of fairness between the parties, it would be reasonable to do so'.[152] This means that the out of time issue may be considered twice – once by the Commission and again by the tribunal.

If the Commission does not accept an out of time complaint (because the complainant has not shown 'good cause') the complainant may seek a judicial review of that decision before the Supreme Court. Such a review is a formal court proceeding, and likely to be intimidating for unrepresented parties. In Victoria, the Australian Capital Territory, South Australia, and under federal Acts, a complainant may pursue an appeal against a refusal to accept an out of time complaint in the relevant court or tribunal that would usually hear the discrimination complaint, but in some jurisdictions risk the matter being summarily dismissed.

The Victorian jurisdiction provides that a complainant may proceed directly to the tribunal without first lodging a complaint with the Victorian Equal Opportunity and Human Rights Commission, but the tribunal may summarily dismiss the complaint if it occurred more than 12 months prior to the application [Schedule 1 *Victorian Civil and Administrative Tribunal Act 1998*].

[147] *Anti-Discrimination Act 1991* (Qld) s 138.
[148] *Fair Work Act 2009* (Cth) s 544.
[149] *Ombudsman Act 2001* (Qld) s 20(1)(c); *Information Privacy Act 2009* (Qld) s 168(f).
[150] *Buderim Ginger Ltd v Booth* [2003] 1 Qd R 147; [2002] QCA 177.
[151] *Anti-Discrimination Act 1991* (Qld) s 138; *Buderim Ginger Ltd v Booth* [2003] 1 Qd R 147; [2002] QCA 177 [22].
[152] *Anti-Discrimination Act 1991* (Qld) s 175.

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?
- Should there be special provisions that apply to children or people with impaired decision-making capacity?
- Should out of time complaints that have been accepted at the Commission as showing 'good cause' be subjected to the further requirement of proving 'on the balance of fairness between the parties, it would be reasonable to do so' before being dealt with by the tribunal?
- Should the tribunal review the Commission's decisions to decline complaints instead of the Supreme Court?

Representative complaints

If a complaint alleges that a number of people were subjected to the alleged discrimination or other contravention by the respondent, the Commissioner must determine whether to deal with a complaint as a representative complaint. The tribunal may subsequently make its own determination

A set of detailed criteria for determining whether a complaint is a representative complaint apply at both the Commission and tribunal stages. The Commissioner or tribunal must be satisfied that:

- the complainant is a member of a class of people, the members of which have been affected, or are reasonably likely to be affected, by the respondent's conduct; and
- the complainant has been affected by the respondent's conduct; and
- the class is so numerous that joinder of all of its members is impracticable; and
- there are questions of law or fact common to all members of the class; and
- the material allegations in the complaint are the same, similar or related to the material allegations in relation to the other members of the class; and
- the respondent has acted on grounds apparently applying to the class as a whole.

or alternatively, if satisfied that:

- the complaint is made in good faith as a representative complaint; and
- the justice of the case demands that the matter be dealt with by means of a representative complaint.[153]

[153] *Anti-Discrimination Act 1991* (Qld) ss 146-152, 194-200.

To make a representative complaint, the individual complainants must be eligible to make the complaint, either as an affected individual, an agent of an individual, or a 'relevant entity' in relation to a vilification matter.

Each complainant to a representative complaint must choose whether to proceed as a party to the representative complaint or make an individual complaint.

The value of a representative complaint appears to be:

- The interests of other people who have been affected, or are likely to be affected by the alleged contravention, will be served without them having to be named, and their consent is not required. Such people would have to be a member of the class of people taking the action.
- It allows for efficient use of resources, rather than dealing with many individual complaints based on the same facts.
- People in the class of people being represented might be entitled to compensation ordered by the tribunal, even though they are not a party.

In practice, these provisions have been rarely used. For example, in one case brough to the tribunal in 1999, the complaints alleged that the respondents contravened the Act in relation to a number of people who were wheelchair users in the Cairns area, and that the tribunal should deal with the matter as a representative complaint. The tribunal declined on the basis that the criteria were not met as the class of complainants could not be ascertained with sufficient particularity.[154]

Conceptually, representative complaints could be considered as a way of addressing systemic discrimination given the outcomes apply to more than one person. However, this appears to have limited value in practice.

Discussion question 15:

- Are there any changes that would improve the accessibility and utility of representative complaints?
- What factors influence the capacity for affected people to assert their rights as a representative complaint?

[154] See the case of *Harris v Transit Australia Pty Ltd* [2000] QADT 6.

Organisation complaints

Under the current law, a complaint must be made by the person who experienced discrimination, or by someone who has been authorised by the person or by the Commissioner to make the complaint on their behalf.[155]

An organisation (called a 'relevant entity' in the Act) can make a complaint but only in relation to vilification,[156] where the organisation has a primary purpose to promote the interests or welfare of persons of a particular race, religion, sexuality, or gender identity, and the Commission is satisfied that:

- The complaint is made in good faith.
- The allegation is about conduct that has affected, or is likely to affect, people whose interests and welfare is a primary purpose of the organisation to promote.
- It is in the interests of justice to accept the complaint.[157]

The provisions for relevant entity complaints were added in 2002 and the policy reasons for the amendment include that: 'people within an affected group may be reluctant to make a complaint for fear of being singled out for victimisation'.[158] The same reasoning may apply to discrimination.

One argument against permitting organisations to bring discrimination complaints is that such organisations may advocate for positions that are not in the best interests of individuals within the group of persons they purport to represent. However, a requirement that organisations have permission before they can make a complaint may minimise this concern.[159]

Representative body complaints

In Victoria, a representative body may make an application on behalf of a named person or persons, if the Commission or tribunal is satisfied that:

- Each person is entitled to bring a dispute and has consented to the making of the application.
- The representative body has sufficient interest in the application, meaning that the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects, or has the potential to

[155] *Anti-Discrimination Act 1991* (Qld) s 134.
[156] *Anti-Discrimination Act 1991* (Qld) s 124A.
[157] *Anti-Discrimination Act 1991* (Qld) s 134(3)-(5).
[158] Explanatory Note, Discrimination Law Amendment Bill 2002 16.
[159] The Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Discussion Paper, August 2021) 190, 6.13.4.

adversely affect, the interests of the body or the interests or welfare of the persons it represents.
- If the organisation represents more than one person, the alleged contravention arises out of the same conduct.[160]

New South Wales has similar representative body provisions to Victoria. [161]

Trade union complaints

Tasmanian legislation allows a trade union to complain where a member was the subject of alleged discrimination, or an organisation against which the alleged discrimination or prohibited conduct was directed, if the Commissioner is satisfied that a majority of members of that organisation are likely to consent.[162]

Western Australia also allows trade unions to make a complaint for their members.[163]

The Australian Human Rights Commission can accept complaints from representative bodies and corporate or trade unions on behalf of one or more 'aggrieved persons'.[164] However, if the matter is not resolved at conciliation, these bodies cannot commence action in court on behalf of the aggrieved person.[165]

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?
- Should representative complaints be confined to the conciliation process, or should they be able to proceed to the tribunal?

[160] *Equal Opportunity Act 2010* (Vic) ss 114 and 124.
[161] *Anti-Discrimination Act 1977* (NSW) ss 87A and 87C.
[162] *Anti-Discrimination Act 1998* (Tas) s 60.
[163] *Equal Opportunity Act 1984* (WA) s 83(1)(c).
[164] *Australian Human Rights Commission Act 1986* (Cth) s 46P.
[165] *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1) provides that only the person 'affected' can make an application to the courts.

Complaints by prisoners

Following a 2007 Supreme Court appeal decision[166] that found Queensland Corrective Services' failure to provide fresh halal meat in prison was unlawful discrimination, the government introduced a series of preconditions that must be met before a prisoner is entitled to make a discrimination or sexual harassment complaint against correctional service staff, service providers in prisons, and community corrections.[167]

The internal complaint process, which takes up to five months to complete, requires the prisoner to write to the General Manager of the prison about the alleged contravention, and wait four months for a response.[168] Then, if the prisoner is still detained and there has been no response or the response is unsatisfactory, they are then required to make a written complaint to an Official Visitor about the allegations, and wait another month.[169] The stated purpose of the changes was to require prisoners to make 'reasonable use of all of the internal mechanisms available'.[170]

The provisions have resulted in significant practical challenges, because:

a) No exceptions are available for urgent situations where a delay of up to 5 months is inappropriate.

b) Prisoners do not generally retain a copy of their written internal complaint, and if they are unable to refer to the original complaint, the second complaint to the Official Visitor (and then the third complaint to the Commission) may contain new or different facts and allegations.

c) If the complaint contains several allegations, the prisoner may comply with the internal complaint requirements for one or two allegations, but not for all allegations. This becomes administratively challenging and resource-intensive for complaint parties, the Commission, and the tribunal. The prisoner may need to re-start the internal process and additional conferences scheduled for similar matters.

d) No exceptions are available to the Act's 12-month time limit on making a complaint for prisoners, even though up to 5 months will have elapsed through the mandatory internal process.

e) The problems are exacerbated because of the nature of the cohort involved – many prisoners are Aboriginal or Torres Strait Islanders, many have low literacy, many

[166] *State of Queensland v Mahommed* [2007] QS 18. By the time of the hearing of this complaint, all Muslim prisoners in Queensland prisons were being provided with halal food and it has been observed in *Ali v State of Queensland* [2013] QCAT 319 that halal diets are now generally available in Queensland correctional centres.
[167] *Corrective Services Act 2006* (Qld) pt 12A 'Discrimination complaints'.
[168] *Corrective Services Act 2006* (Qld) s 319E.
[169] *Corrective Services Act 2006* (Qld) s 319F.
[170] Explanatory Notes, Corrective Services and Other Legislation Amendment Bill 2008 (Qld), 2.

struggle with the convoluted written process, and proving compliance is challenging in a prison environment where paperwork regularly is often misplaced or misfiled.[171]

In its *Women in Prison Report*, the Commission recommended these provisions be repealed as they are a significant hurdle for prisoners, and inhibit and delay the independent oversight of such complaints.[172]

Effective and early resolution of complaints could support better management of the prison population, reduce the risks of corruption, and support the human rights of prisoners.

Discussion question 17:

- Should the additional requirements for prisoners to make complaints be retained, amended, or repealed?
- Do the current provisions strike the right balance in ensuring access to justice while encouraging early resolution?
- Should any internal complaint requirements for prisoners be retained, and if so, how can they be simplified to overcome practical concerns?

Other issues

The Commission welcomes feedback on any other issues about complaint processes.

Discussion question 18:

- Are there any aspects of the complaint (dispute resolution) process that should be considered by the Review?
- If so, what are the issues and your suggestions for reform?

[171] Anti-Discrimination Commission Queensland, *Women in Prison 2019: A Human Rights Consultation Report* (Report, 2019) 49.
[172] Ibid.

Eliminating discrimination

The Terms of Reference ask us to consider whether a more positive approach is required to eliminate discrimination and sexual harassment.

This section outlines options we have identified that may enhance the capacity of the Anti-Discrimination Act to eliminate discrimination. These could provide additional mechanisms to supplement the complaint-based model.

Objectives of the Act

Is there benefit to an objects clause?

The Anti-Discrimination Act currently contains a preamble and a purpose provision, but not a clause outlining the objectives of the Act.

An objects clause is a provision, usually located at the beginning of a piece of legislation, that outlines the intended purposes of the legislation. These provisions underpin the entire Act and can be used to resolve uncertainty and ambiguity. Objects clauses have been described as a 'modern day variant on the use of a preamble to indicate the intended purpose of legislation'.[173]

They also provide an explicit starting point for the interpretation of legislation. An objects clause may assist courts and others to interpret legislation. This is recognised by the *Acts Interpretation Act 1954* (Qld) which requires that, in interpreting a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred.[174]

In discussing effective communication in legislation, the *Queensland Legislation Handbook* identifies devices that can simply, accurately, and unambiguously state the intention of the legislation; assist to organise, orient, and explain legislation; and help establish its context, relevance, and meaning.[175]

[173] D Pearce and R Geddes, *Statutory Interpretation in Australia* (6th ed, LexisNexis Butterworths, 2006) 154.
[174] *Acts Interpretation Act 1954* (Qld) s 14A.
[175] See Department of the Premier and Cabinet (Qld), *The Queensland Legislation Handbook: Governing Queensland* (State of Queensland, 2019).

Current preamble and purpose

The Anti-Discrimination Act currently contains a preamble that outlines Parliament's reasons for enacting the legislation when it was introduced in 1991.

The preamble confirms Parliament's support of the Commonwealth's ratification of international instruments that recognise the need to protect and respect the principles of dignity and equality for everyone. The second reading speech of the Anti-Discrimination Bill also noted that the 'principles of dignity and equality for everyone are the foundations of the Bill.'[176]

A list of international human rights instruments is included, however some of these are now out of date.[177]

The preamble also states that Parliament considers that:

- everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination
- the protection of fragile freedoms is best affected by legislation that reflects the aspirations and needs of contemporary society
- the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone.

The preamble and second reading speech provide indicators of what the intentions of the legislators were at the time it was introduced. As part of the Review, we have been asked to consider whether that purpose should remain the same, or change.

The Act also includes a purpose provision that states that one of the purposes of the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation.[178] This purpose is to be achieved by prohibiting discrimination, and providing for enforcement through a complaints process.[179]

[176] Queensland Parliament, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 3193 (DM Wells, Attorney-General.
[177] The *Declaration on the Rights of Mentally Retarded Persons* and the *Declaration on the Rights of Disabled People* have now been replaced by the *Convention on the Rights of Persons with Disability*.
[178] *Anti-Discrimination Act 1991* (Qld) s 6(1).
[179] *Anti-Discrimination Act 1991* (Qld) s 6(2).

Comparative experiences

Equality legislation in Western Australia, the Australian Capital Territory, Northern Territory, and Victoria all contain objects clauses. Of those jurisdictions, the relevant clauses refer to the following objectives:

- eliminating discrimination and sexual harassment to the greatest extent possible[180]
- promoting and protecting human rights[181]
- recognising the causes of discrimination[182]
- identifying and eliminating systemic causes of discrimination[183]
- progressing the aim of substantive equality[184]
- recognising that discrimination can cause social and economic disadvantage.[185]

What should the objectives be?

If an objects clause were to be introduced, it would lay the foundation for the way the Act seeks to eliminate discrimination and provide outcomes for affected people. This would affect the interpretation of the legislation and guide the Commission's functions and allocation of resources.

Having regard to the issues identified in Part B, and drawing on the provisions included in other jurisdictions, the objectives of the Act may include:

- eliminating 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.

It would also be important for the preliminary provisions and/or those establishing the functions of the Commission to confirm that the objectives of the Act are to be achieved by the Commission taking a proactive role in eliminating discrimination.

[180] *Equal Opportunity Act 1984* (WA) s 3; *Discrimination Act 1991* (ACT) s 4; *Anti-Discrimination Act 1992* (NT) s 3; *Equal Opportunity Act 2010* (Vic) s 3.
[181] *Discrimination Act 1991* (ACT) s 4, *Equal Opportunity Act 2010* (Vic) s 3.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Ibid.

Discussion question 19:

- What should be the overarching purposes of the Anti-Discrimination Act?
- Should an objects clause be introduced?
- If so, what are the key aspects that it should contain?
- If the purposes of the Act change, should the name of the legislation change to ensure it reflects those purposes?

Systemic discrimination

In Part B we identified that a complaints-based system, while important, is not sufficient to address systemic discrimination and to eliminate discrimination to the greatest extent possible.

Systemic discrimination is difficult to address because of the following issues:

Identification: Systemic discrimination is often invisible, and only becomes evident after analysing the experiences of, or unequal outcomes for, a group of people.

Complexity: The complex and hidden nature of systemic discrimination is a barrier to public awareness and understanding.

Proof/liability: Systemic discrimination may be difficult to prove when the experience of only one individual is in evidence. Definitions of unlawful direct or indirect discrimination may be inadequate for issues of systemic discrimination, or may not be attributable to a particular respondent.

Outcomes/remedies: For many people who make a complaint, the focus is on compensation for the detriment they have suffered, rather than remedies that produce broader change for more people. Outcomes agreed through the conciliation process do not make findings of unlawful treatment, are often subject to confidentiality, and if all tribunal decisions are not published, this limits public awareness, understanding, and practice to address systemic discrimination. Whether awards of damages have a deterrent effect, or a broader impact on systemic discrimination, is difficult to measure.

Special measures

Special measures in Australian equality jurisdictions are provisions that permit actions to be taken for the benefit of people with protected attributes and have been considered by past reviews of equality legislation to be essential to achieving substantive equality.[186]

An example of a special measure includes where:

> A company operates in an industry in which Aboriginal and Torres Strait Islanders are under-represented. The company develops a training program to increase employment opportunities in the company for Aboriginal and Torres Strait Islanders.[187]

In the current Act, there are two exemptions to discrimination that fall into the category of 'special measures':

- Welfare measures188 – where an act is done for the welfare of the members of a group of people with a protected attribute.
- Equal opportunity measures189 – where an act is done to promote equal opportunity for a group of people with a protected attribute.

However, the Australian Capital Territory Law Reform Advisory Council in 2015 recommended that special measures should not be seen as *exemptions* to discriminatory conduct but rather as a *positive measure* to promote equality.[190] The Victorian Gardner review also noted the inconsistency between special measures in the Charter of Human Rights and in the narrower approach in the Victorian anti-discrimination legislation.[191]

Similarly, in Queensland, the right to recognition and equality before the law contains an internal limitation as follows:

> Measures taken for the purpose of assisting or advancing person or groups of persons disadvantaged because of discrimination do not constitute discrimination.[192]

[186] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 34–35; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015) 24, 122–126.
[187] *Equal Opportunity Act 2010* (Vic) s 12(1).
[188] *Anti-Discrimination Act 1991* (Qld) s 104.
[189] *Anti-Discrimination Act 1991* (Qld) s 105.
[190] ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015) 125.
[191] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 33.
[192] *Human Rights Act 2019* (Qld) s 15(5).

To closer align the approach to special measures in the Human Rights Act with the Anti-Discrimination Act, while distinguishing them from exemptions, one option would be to incorporate special measures into the meaning of discrimination, currently under ch 2 pt 2 of the Act.[193] In Victoria, special measures appear under 'Part 2 – What is discrimination?' rather than under general exemptions.

This would reframe special measures from being a defence to discrimination to an essential element of the legislative framework with the goal of achieving substantive equality. If a positive duty is implemented, this approach may provide reassurance that equal opportunity measures used to prevent discrimination to the greatest extent possible are lawful.

If special measures are elevated to a key concept under the Act, it may be necessary to closely examine the proposed definition to ensure that it is not open to misuse. The special measures provision in Victoria takes an approach aligned more closely with a human rights proportionality assessment by requiring the measure is:

- Undertaken in good faith to promote or realise substantive equality for members of a group with a particular attribute
- Reasonably likely to achieve this purpose
- A proportionate means of achieving the purpose
- Justified because the members of the group have a particular need for advancement or assistance.[194]

Discussion question 20:

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

[193] *Anti-Discrimination Act 1991* (Qld) ss 7 and 8.
[194] *Equal Opportunity Act 2010* (Vic) s 12.

Positive duties

Shifting the focus to prevention

Positive duties are an emerging feature of discrimination laws. They offer a partial response to weaknesses identified in the capacity of the law to proactively eliminate discrimination and sexual harassment, including systemic discrimination. Creating clear legislative obligations can inform cultural norms and reflect social expectations.

In Part B we identified that change may be required to shift away from the reactive nature of discrimination laws and foster a proactive approach to preventing discrimination and sexual harassment.

Given the significant complexity of the current law, a positive duty may make existing obligations clearer. Those existing obligations include an implied duty not to discrimination or sexually harass, which we discuss further below.

In any discussion about a positive duty, it is important to keep in mind the underlying drivers that contribute to discrimination and sexual harassment. These include cultural and social attitudes that can be difficult to identify and shift.

Comparative experience

Recommendations of past inquiries

A number of Australian reviews and inquiries have recommended that discrimination laws include a positive duty. These have applied in different settings and contexts.

The 2008 Senate inquiry into the effectiveness of the *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality recommended that:

- the Sex Discrimination Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements, to accommodate family or carer responsibilities
- that further consideration is given to amending the law to provide for positive duties for public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment, and promote gender equality.

Also in 2008, the Gardner Review recommended that the Victorian Act should contain a duty to eliminate discrimination as far as possible.

In 2015, the ACT Law Reform Advisory Council's inquiry into the *Discrimination Act 1991* recommended that:

- The Discrimination Act should be amended to include a positive duty to eliminate discrimination.
- The positive duty should apply to public authorities immediately, and should apply to private bodies and community organisations after a period of three years.
- The Australian Capital Territory Human Rights Commission should be empowered with a range of regulatory tools to monitor, investigate and enforce the positive duty.

In 2020, the Australian Human Rights Commission's *Respect@Work* report recommended that:

- The Sex Discrimination Act be amended 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.
- That the Australian Human Rights Commission be given the function of assessing compliance with the positive duty, and for enforcement.

In 2021, the Victorian Legislative Assembly Legal and Social Issues Committee's Inquiry into anti-vilification recommended that the existing positive duty for discrimination, sexual harassment and victimisation matters should be expanded to vilification.

Current Australian law

Currently, the only jurisdiction that has enacted a positive duty is Victoria. It provides that a person must take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible.

In determining whether a measure is reasonable and proportionate, a number of factors must be considered, including:

a) the size of the person's business or operations
b) the nature and circumstances of the person's business or operations
c) the person's resources
d) the person's business and operational priorities
e) the practicability and the cost of the measures.[195]

[195] *Equal Opportunity Act* (Vic) s 15(6)(a)–(e).

Some provisions in other state and territory discrimination laws contain elements or objectives that are similar to positive duties. Tasmania contains a duty for an organisation to take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct.[196]

Positive duties are also contained in other forms of legislation. For example, recent legislation introduced in Victoria in the *Gender Equality Act 2020* (Vic) requires workplace gender audits, action plans, and impact assessments on governments.

International approaches

Some international jurisdictions have also introduced positive duties into their equality and discrimination laws in the area of employment.

For example, in relation to the United Kingdom public service, the *Equality Act 2010* (UK) expressly recognises the need to advance equality through imposing a duty that includes a duty on public authorities to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Act.[197] The *Disability Discrimination Act 2005* (UK) also sets out a general duty to promote equality, and regulations require authorities to publish disability equality schemes that set out how the authority will carry out the general duty.

The *Northern Ireland Act 1998* (UK) provides a duty for public authorities to have regard to the need to promote equality of opportunity between various groups.[198]

In Canada, the *Employment Equity Act*, SC 1995, c 44 imposes an obligation on employers, including private sector employers, to implement employment equality by identifying and eliminating employment barriers for designated groups of people, instituting positive policies and practices, and making reasonable accommodations to ensure representation of people in the designated groups.[199]

[196] *Anti-Discrimination Act 1998* (Tas) s 104.
[197] *Equality Act 2010* (UK) s 149.
[198] *Northern Ireland Act 1998* (UK) s 75.
[199] *Employment Equity Act*, SC 1995, c 44, s 5.

Does this duplicate existing obligations?

Some past inquiries that recommended positive duties have received submissions or responses that form a view that duties to prohibit discrimination already exist within the vicarious liability provisions of discrimination laws, and in work health and safety laws.

Vicarious liability

Under the Anti-Discrimination Act, a person who contravenes the Act is civilly liable for the contravention.

If a person's worker or agent contravenes the Act in the course of work, both the person and the worker or agent are liable for the contravention.[200] However, it is a defence if an employer can prove that they took reasonable steps to prevent the worker or agent from contravening the Act.

Indirect discrimination happens where an unreasonable requirement is imposed that a person cannot comply with because of their attribute. Whether the requirement is unreasonable depends on all the circumstances, including the feasibility of an alternative requirement. The liability for indirect discrimination therefore creates an obligation to make reasonable adjustments for people with an attribute.

While these provisions require an employer to take reasonable steps to prevent unlawful conduct from happening, this defence is raised in response to conduct that has already occurred, rather than requiring proactive preventative action. This creates a fault-based system where there is limited positive onus on a duty holder to take positive steps against discrimination, sexual harassment and other objectionable conduct unless fault can be identified and attributed.

Relying on employers to take reasonable steps to prevent discrimination in order to defend potential complaints may not achieve the proactive aims of a positive duty. Defences cannot be proactively enforced, and the effectiveness of this approach in eliminating discrimination is unable to be tested.[201] Vicarious liability provisions also lack a normative setting approach, which would encourage shared accountability for proactive compliance.

Work health and safety law

Australia's Work Health and Safety (WHS) regime also provides an instructive model for the use of positive duties. Established in 2011 by Safe Work Australia, the model WHS laws comprise the Model WHS Act, the Model WHS Regulations, and 24 Model Codes of Practice which are maintained by Safe Work Australia. Each jurisdiction must separately implement them as their own laws to become legally binding. The *Respect@Work* report considered this framework to

[200] *Anti-Discrimination Act 1991* (Qld) s 133.
[201] Belinda Smith, 'It's about Time – for a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 131.

be a useful example of building a preventative practice through positive duties and clear understanding of workplace responsibilities.

The model WHS law framework has a three-tiered model based on the 'Robens model'. As set out in the *Respect@Work* report, this model recommends that duty holders be required to comply with:

- general duties of care set out in a broad-based WHS laws
- more detailed standards laid down in regulations
- codes of practice.

This model applies to all organisations, irrespective of their size or industry. While the obligations are framed as outcome-based, organisations can tailor their approach to fit with their circumstances, relative to the resources available to them.

A key element of the Model WHS Act is a positive duty for duty holders to eliminate or minimise risks arising from work. The primary duty is to identify, control, and address hazards and risks that may affect the physical and psychological health or safety of staff, so far as is reasonably practicable.

Submissions and government responses to recommendations that a positive duty be established have discussed the relationship between existing obligations under WHS laws and a positive duty in discrimination legislation, if it were to be introduced.

On one view, the WHS regime may lack comprehensive coverage to address the rationale for a positive duty in discrimination and sexual harassment laws because WHS laws apply only to workplaces. The purpose of WHS frameworks also have different orientations and focuses than the Anti-Discrimination Act.

Both Commonwealth and Queensland governments are currently developing a code of practice that will include sexual harassment as a general psychosocial risk, and will apply to the workplace. It will also cover matters including bullying, discrimination and other psycho-social risks.

In the *Respect@Work* report, the Australian Human Rights Commission considered that positive duties would interact with WHS laws in a mutually reinforcing way and have a complementary effect.[202]

[202] Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020).

What should a positive duty contain?

In essence, establishing a positive duty would add the requirement that a person must take reasonable and proportionate measures to eliminate discrimination, sexual harassment, and victimisation, as far as possible.

Who should the duty apply to?

If a positive duty is imposed, it may apply to any person who has an obligation under the current Act, or it could be confined to particular entities or areas of operation - for example, in workplaces, but not in club membership and affairs.

To assist with a requirement to take reasonable and proportionate measures, the Victorian Act includes a non-exhaustive list of factors that should be considered in determining whether a measure is reasonable and proportionate.

This approach allows the duty to be scaled depending on the size and structure of an organisation, and any industry-specific considerations including risk profiles.

It may also be appropriate to stagger the introduction of a positive duty to maximise awareness and compliance readiness.

How could compliance be supported?

It is critical that duty holders are supported to implement a positive duty to ensure that the obligations imposed play a role in preventing discrimination and sexual harassment.

Regulatory mechanisms such as education and industry guidelines would be required to embed understanding of a positive duty. At the same time, to ensure the positive duty carries sufficient weight to achieve its purpose, enforcement mechanisms should also be considered. These could include the ability for the Commission to issue compliance notices and enforceable undertakings, which are discussed below.

Taking a punitive approach would be a final resort. Striking the right balance between education and enforcement in the regulatory framework could support individuals and entities with obligations under the Act to proactively eliminate discrimination and sexual harassment.

Discussion question 21:

- Do you support the introduction of a positive duty in the Anti-Discrimination Act?
- Should a positive duty cover all forms of prohibited conduct including discrimination, sexual harassment, and victimisation? Why, or why not?
- Should a positive duty apply to all areas of activity in which the Act operates, or be confined to certain areas of activity, such as employment?
- Should a positive duty apply to all entities that currently hold obligations under the Anti-Discrimination Act?
- What is the extent of the potential overlap between WHS laws and a positive duty in the Anti-Discrimination Act? If a positive duty is introduced, what considerations would apply to the interface between existing WHS laws and the Anti-Discrimination Act?
- What matters should be considered in determining whether a measure is reasonable and proportionate?

A regulatory approach?

The Terms of Reference ask the Review to consider whether the functions, processes, powers and outcomes of the Commission are appropriately suited to ensuring it can further the objective of eliminating discrimination and other objectionable conduct under the Anti-Discrimination Act, to the greatest possible extent.[203]

Under the current Act, enforcement largely relies on complaints about contraventions,[204] and promotion of the law relies on the Commission's educative functions.[205] However, the issues identified in Part B suggest that a more proactive approach may be required to build a preventative culture to address discrimination.

This discussion paper also raises questions about:

- whether a positive duty to eliminate discrimination, sexual harassment and other objectionable conduct should be introduced
- limitations in addressing systemic discrimination under the current approach
- whether the Act should contain objectives that include a more positive approach to eliminating discrimination, including eliminating systemic discrimination.

[203] Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(j). We note that this item also refers to the processes and outcomes of the Commission, however these aspects are considered in other areas of the discussion paper.
[204] *Anti-Discrimination Act 1991* (Qld) s 235(b).
[205] Including *Anti-Discrimination Act 1991* (Qld) ss 235(d), (e), (i), (l).

If these approaches are adopted, a compliance framework that would operate alongside the individual complaints process would be required to ensure duties and objectives are able to be enforced.

This section discusses options for a regulatory framework overseen by the Commission. In establishing a regulatory role for enforcement of the Anti-Discrimination Act, impacts and consequences for a range of stakeholder groups and all issues will need to be considered. In addition, the right mix of regulatory approaches must be fully considered.

The Review invites submissions on the discussion questions, as well as any other matter or issue the Review should consider in relation to this topic.

What does regulation involve?

Regulatory powers are a suite of tools used by government agencies to ensure people and organisations comply with legislative requirements. Overseas jurisdictions, including Canada, the United Kingdom, and Ireland, have increasingly moved toward towards a regulatory model, while retaining dispute resolution functions within their human rights bodies. These regulatory models are based on the concept of the 'enforcement pyramid'.

The singular focus on dispute resolution by most Australian human rights agencies contrasts with the role of statutory bodies that enforce privacy obligations, workplace, and consumer protections. These entities have an active role in monitoring and enforcing compliance with legislation. Some relevant examples include the:

- Fair Work approach, including the Fair Work Commission and the Fair Work Ombudsman
- Office of the Information Commissioner Queensland
- Australian Securities and Investment Commission
- Australian Competition and Consumer Commission

Regulatory models of enforcement are often arranged around a pyramid of increasing measures to achieve compliance. The conceptual starting point for modern approaches is often referred to as 'responsive regulation,'[206] which considers that different tools are required to achieve compliance with the law. The kind of regulation depends on a range of factors, including the willingness and capacity of people and organisations.

The model is depicted in the form of a regulatory hierarchy or enforcement pyramid. Starting with an educative focus, the pyramid progresses from self-regulation within an organisation, to co-regulation with the regulatory body, to enforcement options that may include civil and

[206] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

criminal sanctions.[207] The following section presents some options that can be included at each level of the regulatory pyramid.

Level one: education and persuasion

For most organisations, regulation is most effective and efficient if the regulatory agency can achieve the desired behaviour by developing the least punitive measures – that is, the approaches at the bottom of the regulatory pyramid focus on education, assistance, and persuasion.[208]

In the context of discrimination law, this starting point acknowledges that, as a cohesive community, we all share accountability for eliminating discrimination and working towards the goal of substantive equality. It also acknowledges that most organisations do not want to discriminate, and are willing and able to create supportive and inclusive environments that benefit from diversity and equality.

Education

To ensure a responsive regulation scheme, the Commission's existing education functions would be informed and shaped by the objectives of the Act. If those objectives change and/or if a positive duty is introduced, dedicated resourcing of those functions would be required to ensure the Commission has capacity to undertake research and education to fulfil its role.

Some examples of education that could apply at this level of regulation may include campaigns aimed at business, government, and non-government to encourage compliance with the Act and best practice.

Research and recommendation powers

The Commissioner has broad research functions to consult with various organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions of the Act.[209] The Commission has previously used this function to prepare reports, including in relation to women in prison and health equity for First Nations people.[210]

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[207] Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28(4) *Sydney Law Review* 689; Dominique Allen, 'Barking and Biting: the Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311; Belinda Smith, 'It's about Time – for a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 131.

[208] Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28(4) *Sydney Law Review* 689; Belinda Smith, 'It's about Time – for a New Regulatory Approach to Equality' (2008) 36(2) *Federal Law Review* 117, 131.

[209] *Anti-Discrimination Act 1991* (Qld) s 235(e).

[210] See Queensland Human Rights Commission, 'Reports' (Web page, 9 December 2020) <http://www.qhrc.qld.gov.au/resources/reports>.

However, the Act does not contain powers to support this function, for example to require or compel information and data. This can mean the capacity to conduct thorough research and to monitor progress is limited.

The Gardner Report recommended that the Victorian Commission be given the power to compel public and private sectors to provide data that they can analyse, and to access information on tribunal decisions. The *Equal Opportunity Act 2010* (Vic) provides the Commission with the power to compel a person to produce information or documents.[211]

The capacity to obtain data would provide the ability to identify systemic issues and trends, including to inform the allocation of resources to facilitate its educative functions.

Guidelines

The Commission currently develops a range of materials, such as factsheets and guides to support duty holders to understand their obligations under the Act. However, unlike some jurisdictions, the Commission does not have a legislative function to produce formal guidelines to assist organisations to comply with their obligations under Act.

Guidelines are non-binding, practical tools to assist with decision-making and compliance. They have educative value and can demonstrate best practice approaches to various issues. These have particular value in areas where the law is complex and difficult to understand and apply in practice. Guidelines can also be updated as the law changes, and as new issues or approaches to best practice emerge.

Guidelines can also be developed through community and industry stakeholder engagement to ensure they are fit for purpose in different contexts and settings. This would also ensure that the development of guidelines is informed by the practical realities and resources of the relevant industry or entity. This approach recognises that people and organisations are better able to comply with the law when they have clear guidance on what their obligations are, and how they can be met.

[211] *Equal Opportunity Act 2010* (Vic) s134.

Level two: co-regulation

The second tier of the regulatory pyramid includes a compliance framework that combines a number of mechanisms to measure and enforce compliance. This may include action plans and voluntary audits.

Action plans

Action plans are voluntarily developed by organisations to assist them to plan for continuous improvement. Action plans can include provisions requiring the development of policies and programs to achieve the objectives of the Act, how those policies will be communicated, policy reviews to identify discriminatory practices, setting goals and targets and measuring success, and appointing people within the organisation to be responsible for implementing the plan.

The success of action plans has been considered by previous reviews,[212] including in relation to the Disability Discrimination Act which includes provisions for actions plans, including setting out what the plan must include.

Voluntary audits

Voluntary audits would provide a capacity for organisations to request the Commission to assist with reviews of their policies or programs to assess compliance with the Act. If the Commission agreed to the request, it could assist with developing a preventative culture by assisting an organisation to understand and meet their legislative obligations and prevent discrimination, sexual harassment, or other objectionable conduct from occurring. The audits may provide a valuable tool to support compliance with a positive duty.

[212] Productivity Commission (Cth), *Review of the Disability Discrimination Act 1992* (Inquiry Report No 30, 30 April 2004); Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011).

Level three: addressing non-compliance

Own motion inquiries

An own motion inquiry or investigation power would allow the Commission to take action without having to rely on an individual to make a complaint. Own motion inquiries go further than general research functions, as they provide the Commission with a reporting framework, and investigation and enforcement powers.

Own-motion powers range from Commission-initiated complaints, where the role and powers of the Commission and the outcomes are the same as if the Commission were an individual complainant, to completely separate inquiry and reporting processes and powers.

Outcomes of an own motion inquiry may include:[213]

- no action is taken
- informal agreement is reached upon the action to be taken
- an enforceable undertaking is entered into
- a compliance notice is issued
- a report is prepared that may, at the discretion of the Commission, be provided to the Attorney-General for tabling in Parliament.[214]

Under the current Anti-Discrimination Act,[215] the Commissioner must initiate an investigation if requested to do so by the Minister, or if the tribunal becomes aware of circumstances that may constitute a contravention of the Act and refers the matter.

The Commissioner may initiate an investigation if:

- a possible contravention against a group or class of people is discovered, the matter is of public concern, and the Minister agrees; or
- an allegation is made that an offence against the Act has been committed; or
- a possible offence against the Act is discovered.

However, the powers of investigation, such as compelling information and documents, are the same as for any complaint investigations, and the outcomes are limited to those available through usual complaint processes.

These powers are therefore restricted to circumstances when the Commission is requested to do so by the Minister or a tribunal, rather than when it identifies systemic issues that it considers

[213] As recommended by the Gardner Review.
[214] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 128, Recommendation 6.127.
[215] *Anti-Discrimination Act 1991* (Qld) s 155.

require investigation.[216] It also limits the outcomes of the investigation to the options available for individual complaints and does not include a power to produce a public report containing recommendations.

In practice, this provision is not used. There has never been a request from the Minister or a tribunal to the Commission to initiate an investigation. Similarly, the Commission has never requested agreement from the Minister to conduct an investigation.

The Victorian legislation is different, in that it allows the Commission to undertake investigations into systemic discrimination that have the potential to harm particular groups of people and can have flow-on effects for the broader community.[217] The example given within the legislation includes:

> An organisation has a policy that indirectly discriminates against persons with a particular attribute. The Commission has received several calls complaining about this policy and the policy has received media attention. Although some claims that the policy is discriminatory have been settled on an individual basis, the policy has not been changed. The Commission may decide that, in these circumstances, an investigation could help identify and eliminate a systemic cause of discrimination. [218]

This Victorian Equal Opportunity and Human Rights Commission (VEOHRC) has described this power as critical to relieve the burden from individual complainants and allow the Commission to use its enforcement powers to eliminate discrimination to the greatest extent possible.[219] In 2017, the VEOHRC commenced an own-initiative investigation into the travel insurance industry. The investigation found that, over an eight-month period, three major insurers sold more than 365,000 policies containing terms that discriminated against people with mental health conditions.[220]

Enforceable undertakings

The purpose of enforceable undertakings is to rectify contraventions of the Act.

Following an investigation where a contravention is identified, enforceable undertakings could allow the Commission to obtain agreement with the organisation involved to undertake steps to eliminate the identified discrimination, without a complaint being made.

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[216] Pursuant to *Anti-Discrimination Act 1991* (Qld) s155(2)(b)–(c), the Commissioner may also initiate an investigation if an allegation is made that an offence against the Act has been committed, or if while carrying out the Commission's functions, a possible offence against the Act is discovered.
[217] *Equal Opportunity Act 2010* (Vic) s 127.
[218] *Equal Opportunity Act 2010* (Vic) s 127 'Example'.
[219] Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019) 29.
[220] Ibid 11.

Compliance notices and injunctions

The purpose of compliance notices is to provide the Commission with the power to issue a notice where it has conducted an investigation or inquiry and found a breach of the duty to eliminate discrimination.

The notice could set out the details of the conduct or behaviour, or decision, policy or practice, that gives rise to the breach, and the steps that should be taken to comply within a specified timeframe. It may also require an action plan to be produced.

Another option would be for the Commission to apply to a court or tribunal for an order for compliance or an injunction restraining the person from committing the unlawful act.

Requiring the Commission to apply to a court or tribunal to issue a compliance notice has the advantage of emphasising the Commission's role as a facilitative body. It also means that the Commission does not have any determinative powers, and that this role is left exclusively to the tribunal.[221]

Civil penalties

In rare circumstances, following an outcome of an investigation, it may be appropriate for the Commission to have the power to apply to a court for an order that a person or entity alleged to have contravened a provision within the Act pay a civil penalty. This would only usually be used where other regulatory approaches have not been effective.

Other agencies with regulatory functions, for example the Office of the Australian Information Commissioner, have similar powers. They are required to act in accordance with their model litigant obligations, and the outcomes may be publicly communicated.

While there are currently some civil penalty provisions within the Anti-Discrimination Act, civil penalties may also attach to any additional powers to ensure enforcement of serious or repeated contraventions can be achieved. It is anticipated civil penalties would only be sought in very rare circumstances and may not ever need to be used.

Discretion to exercise use of powers

If powers are provided to the Commission to enforce a positive duty and to achieve the purposes of the Act, clear threshold criteria would need to be created that must be met before a power can be used.

[221] Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 131, [6.149].

In Victoria, the Commission may conduct an investigation into any matter relating to the operation of the Act if the matter:

- raises an issue that is serious in nature, and
- relates to a class or group of people, and
- cannot reasonably be expected to be resolved through the dispute resolution process or application to the tribunal, and
- there are reasonable grounds to suspect that one or more contraventions of the Act have occurred, and
- the investigation would advance the objectives of the Act.[222]

Examples that may require a regulatory approach

This section provides two examples of how a regulatory approach could be applied in practice, and how it differs from individual enforcement processes.

Asking questions about race on tenancy applications

During the initial consultation phase, the Review heard that some real estate agents in a regional area have a regular practice of asking people whether they are Aboriginal or Torres Strait Islander on their tenancy applications. Rather than being an isolated issue, this was widespread and affected many people.

While it is likely this is unlawful under the Anti-Discrimination Act, community members did not wish to bring complaints because of the strong possibility of being 'blacklisted', the impact of which is exacerbated in a tight rental market.

Rather than waiting for a complaint on the issue, the Commission could commence an own motion investigation after receiving information about the practice. The Commission could then use this example to create enforceable guidelines regarding tenancy applications.

Barriers to accessing financial services for people with intellectual disability

Another example is from a complaint received by the Commission, involving two siblings with intellectual disability. Their mother had been appointed as their guardian and administrator by QCAT.

After the appointment, the siblings received a letter from their bank to say that now an administrator had been appointed they had no powers to make transactions, including opening or closing an account, or obtaining account-related information. When one sibling lost her wallet containing her bank card, the card was cancelled, but the bank refused to issue her with a new

[222] *Equal Opportunity Act 2010* (Vic) s127.

card, despite them having used the card for many years without incident. Subsequently, the other sibling's card was also cancelled. There had been no issues with their use of the card.

The siblings made a discrimination complaint to the Commission against the bank. Their mother also claimed discrimination by association. The matter was conciliated, and both siblings receiving compensation. However, as far as the Commission is aware, the underlying policy position causing the discrimination did not change and could still be impacting people with disability.

In this example, the Commission could commence an own motion investigation into the conduct of the banks, which could result in recommendations for policy change or an enforceable undertaking. This may have a broad impact on people with intellectual disability. Given the inherent challenges people with intellectual disability face in accessing the complaints process, which may be further ingrained if they are subject to guardianship orders, a proactive approach could address the impacts of ongoing discriminatory practices for vulnerable people.

Role of the Commission

Having regard to the issues outlined in this Discussion Paper, the Review must consider whether the Commission should be required to undertake an effective regulatory role to ensure individuals and industry comply with legislative requirements that may be imposed.

In particular, regulation and enforcement functions would be required to ensure any positive duty is addressed.

Discussion question 22:

- Should the statutory framework be changed to incorporate a role in regulating compliance with the Anti-Discrimination Act and eliminating discrimination?
- If so, do you consider that the Commission should undertake this regulatory role, or is there a more appropriate entity? What are the strengths and limitations of the Commission undertaking a regulatory role?
- What should be the core components of the regulatory model, and what mechanisms and powers should it include?
- What key features should a regulatory approach adopt to ensure it achieves the right balance between supporting organisations to comply with the Act and ensuring organisations, particularly small and medium-sized entities, are not unnecessarily burdened with regulation?
- If you recommend an expansion of the Commission's functions and powers, what is the justification for this expansion?

Role of the tribunals

Two tribunals deal with matters under the Anti-Discrimination Act. For work-related matters the tribunal is the Queensland Industrial Relations Commission (QIRC) and for all other matters the tribunal is the Queensland Civil and Administrative Tribunal (QCAT).

Until December 2009 anti-discrimination matters were dealt with by the Anti-Discrimination Tribunal (QADT). The Anti-Discrimination Tribunal ceased to exist when QCAT was established and became responsible for dealing with anti-discrimination matters. Since March 2017 the QIRC has been responsible for work-related anti-discrimination matters, and QCAT continues to be responsible for all other anti-discrimination matters.

Complaints that are not resolved through conciliation in the Commission may be referred to the relevant tribunal for hearing and determination. The relevant tribunal is also responsible for granting temporary exemptions from the operation of the Act.[223]

The issues identified are at a preliminary stage, and we are seeking guidance about key issues related to the tribunals that the Review should consider.

Specialisation

The tribunals have a key role in interpreting and applying the Anti-Discrimination Act. We heard that since the QADT ceased, there may have been a reduction in the extent of specialisation in anti-discrimination law and this may not be beneficial for the development of case law.

Discrimination and sexual harassment law is complex and technical. It includes sensitive subject matter quite distinct from that of other disputes that come before the tribunals.

To enhance consistency, there may be some benefit in introducing specialist lists in the tribunals.

One example of this approach can be found in the *Child Protection Act 1999* (Qld) which requires that the constitution of the tribunal includes at least one legally qualified member who has extensive professional subject matter knowledge.[224]

[223] *Anti-Discrimination Act 1991* (Qld) s 113.
[224] *Child Protection Act 1999* (Qld) s 99H requires the member to be committed to key principles, with extensive professional knowledge and experience of children, and with demonstrated knowledge and experience in 1 or more of the fields of administrative review, child care, child protection, child welfare, community services, education, health, indigenous affairs, law, psychology or social work.

This approach may improve consistency in the way matters are case-managed and in outcomes achieved, and could be supported by ongoing education for members and the publication of a bench book or other instructive guidance material.[225]

Consistency

With a split jurisdiction, there will inevitably be inconsistencies between the approaches of the two tribunals, which are dealing with similar matters in different 'areas of activity' (work or non-work). A uniform set of rules and procedures in the form of a handbook may be one way to alleviate this issue.

Publishing outcomes and data

Educating the community on the meaning of the Act and the scope of its protections is challenging when so few matters are heard and finally determined by the Tribunals. More recently, reasons for decisions are not being published regularly in favour of oral reasons.

An absence of published reasons for decisions contributes to the limited guidance on the operation of the Act in practice. Published cases also have a normative role in framing community expectations about what behaviours are lawful and acceptable and can therefore have a systemic impact.

Further data on the outcomes of matters that proceed to the tribunal might be helpful to identify systemic themes and trends including in relation to the number of complaints settled or withdrawn prior to hearing. Improving data sharing between the two tribunals and the Commission may support greater visibility of outcomes and improve overall transparency at all stages of the process.

Commissioner interventions

Human rights agencies across Australia can generally intervene in proceedings relating to discrimination. The Queensland Human Rights Commission may intervene in proceedings under the Anti-Discrimination Act with leave of the court or tribunal for proceedings which involve 'human rights issues'.[226]

In contrast, under the *Human Rights Act 2019* (Qld), the Commissioner may intervene in proceedings without leave of the court where a question of law arises that relates to the application of that legislation.[227] The term 'human rights' under the *Anti-Discrimination Act 1991*

[225] The online 'wiki' publication *Victorian Discrimination Law* was first released in 2013 and aims to provide the community with clear and accessible information about anti-discrimination laws. See Victorian Equal Opportunity and Human Rights Commission, *Victorian Discrimination Law* (Web Page, 28 June 2019) <http://austlii.community/wiki/VicDiscrimLRes/VicDiscrimLaw>.
[226] *Anti-Discrimination Act 1991* (Qld) s 235(j).
[227] *Human Rights Act 2019* (Qld) s 51.

(Qld) is not defined as rights under the Human Rights Act, but rather by reference to section 3(1) of the *Australian Human Rights Commission Act 1986* (Cth).

The Review is seeking views about whether this power should be reflected in the Anti-Discrimination Act.

Discussion question 23:

- Should there be a specialist list for the tribunals?
- If so, what would the appropriate qualifications be for a tribunal decision-maker?
- Should a uniform set of procedural rules be developed to apply across both tribunals?
- Should the tribunals be required to publish all decisions/substantive decisions?
- Could data sharing be permitted and encouraged between Commission and tribunals to form a better overall picture?
- On what basis should the Commission be permitted to intervene in proceedings under the Anti-Discrimination Act. Should leave of the court or tribunal be required? Why or why not?
- What other issues relating to the functions, processes, power and outcomes of the Tribunals should be considered by the Review?

Non-legislative measures

In Part B, we identified a range of measures required to eliminate discrimination and other objectional conduct that would complement the law, but not require legislative change.

Some of these include:

- resourcing of the legal service sector to enhance access to the complaints process
- building greater awareness of the operation of the law
- enhancing individual and systemic advocacy to support people to connect with the system and legal services.

During the course of our initial consultations, we heard about the limited resourcing of the legal service sector and the advocacy and support sector to support people to develop an understanding of the Anti-Discrimination Act and to assert their rights through complaints.

It is beyond the scope of this Review to make recommendations about resourcing. However, the Terms of Reference include ways to improve the accessibility for bringing a complaint of discrimination, and how the process should be enhanced to improve access to justice for people who experience discrimination.

Discussion question 24:

- What non-legislative measures are required to ensure protections under the law are available to everyone?