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7 March 2022

The Queensland Human Rights Commission
Review of the *Anti-Discrimination Act 1991* (Qld)

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

Dear Colleagues

Review of the *Anti-Discrimination Act 1991* (Qld) - Responses to the QHRC Discussion Paper Questions

Thank you for the opportunity to provide a submission to the Review of the *Anti-Discrimination Act 1991* (Qld) (the ADA). Caxton Legal Centre has extensive experience and knowledge in the areas of law subject to this review including acting in important cases under the ADA including:

- *Woodforth v State of Queensland* [2018] 1 Qd R 289
- *Taniela v Australian Christian College Moreton Ltd and Anor* [2020] QCAT 249; *Australian Christian College Moreton Ltd and Anor v Taniela* APL229-20[1]
- *Tafao v State of Queensland* [2018] QCAT 409; *Tafao v State of Queensland* [2018] QCAT 425; *Tafao v State of Queensland* [2020] QCATA 76; *State of Queensland v Tafao; Serco Australia Pty Ltd v Tafao* [2021] QCA 056; *State of Queensland v Tafao & Ors; Serco Australia Pty Ltd & Anor v Tafao & Anor* [2021] QCA 74.
- *Thorne v Toowoomba Regional Council & Tytherleigh* [2017] QCATA 128; *Thorne v Toowoomba Regional Council & Tytherleigh (no 2)* [2018] QCATA 101
- *Rowan v Beck* [2021] QCATA 020
- *Menzies v Owen* [2014] QCAT 661; *Menzies v Owen* [2013] QCAT 527*; Owen v Menzies* [2013] 2 Qd R 327; *Owen v Menzies* [2011] QCA 241; *Owen v Menzies* (2010) 243 FLR 357; Owen v Menzies [2010] QCA 137.
- *Peng v Bak10cut Pty Ltd & Anor* [2022] ICQ 5; *Peng v Bak10cut Pty Ltd & Anor C/2020/11*[2]

We have also had carriage of test cases under similar federal law including *Hurst v State of Queensland* (2006) 151 FCR 562 and *Hurst and Devlin v State of Queensland* [2005] FCA 427 and are currently acting for Mrs Athwal in *Athwal v State of Queensland BS1362/21*[3]

We offer an employment law service for vulnerable workers who do not have access to a union. That program focuses on workplace mistreatment, primarily sexual harassment and discrimination. We also assist in relation to discrimination, sexual harassment and other conduct covered by the ADA that occurs in a wide variety of non-workplace environments including:

- at childcare, school and university
- when accessing goods and services
- access to premises including a person's own home
- in dealing with police, prisons and other punitive mechanisms of the state
- when using state services such as health care and housing, and

[1] This judgement in this appeal is currently reserved
[2] The substantive case in this matter is ongoing; we continue to act for Ms Peng
[3] The judgement in this case is currently reserved

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- in clubs, organisations and other parts of the community.

Our human rights practice is not limited to the use of human rights and anti-discrimination specific law and we have conducted cases with human rights and equality objectives under a wide variety of other laws including privacy, contract, consumer, retirement villages, guardianship, tort and others.

Several of our staff are recognised experts in anti-discrimination, human rights and sexual harassment law and we are often invited to speak on those subjects in a variety of environments. We are members of the Queensland Law Society's Human Rights and Public Law Committee and in 2020/21 we co-led a coalition of Australian Non-Government Organisations making representations to the United Nations' Universal Periodic Review of Australia's human rights record. We collaborate with Professor Tamara Walsh and a team of UQ law students on the UQ/Caxton human rights case note database and our staff have published on human rights and discrimination law matters including in peer reviewed journals.

We note that in addition to this written submission, we have participated in several direct consultation forums (more than eight hours in total) with the Queensland Human Rights Commission (the QHRC) over the course of this review. We are also part of a collaborative alliance of expert anti-discrimination lawyers[4] which, in late 2021, generated *A Ten Point Plan for a Fairer Queensland*, which is annexed to this submission.

We are not responding to all the questions in the discussion paper. In relation to a number of the question not expansively addressed, we support the submissions made by our peers in the specialist community legal centres and NGOs that work with the groups most directly affected. For example, we have not commented extensively on the questions around terminology when describing attributes because we feel that there are better placed organisations who we would support.

Underpinning principle for this submission - better alignment with a human rights framework

Anti-discrimination law is human rights law. It should seek to alleviate indignity, amplify voices which are otherwise ignored, empower the disempowered, and clear the way for those who have been historically and systemically oppressed to take their proper place. We believe that the protections should, wherever possible, reflect those which exist in the relevant human rights instruments from which the ADA derives. To the extent that there is sometimes a balancing of rights required in practice, clearer alignment with human rights principles will ensure that the balancing process is properly undertaken, and that the focus remains on human dignity, equality and freedom.

Key Concepts

1 Meaning of discrimination: Should the Act clarify that direct and indirect discrimination are not mutually exclusive?

This would be useful to clarify divergent jurisprudence.

2 Direct discrimination: 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?

[4] We wish to thank our colleagues and in particular law students Madina Mahmood, John Oh, Ella Viet-Prince, Ellie Conroy and Chloe de Almeida for their research support in the development of that plan. This submission draws on that work.

The challenge posed by the comparison exercise inherent in the concept of 'less favourable' treatment is a real and substantial barrier to equality and fairness in Queensland. There are frequently long and expensive disputes about the exact construction of the comparator and which features of the real situation experienced by the complainant would or would not also be present in the hypothetical situation experienced by the comparator.

We hold particular concerns about the comparison exercise in cases in which fair comparison is impossible. This is especially grievous in the comparisons applied to the treatment of First Nations Peoples. It is extraordinarily rare to see proper analysis of the circumstances beyond the moment in question, the relevant characteristics of ongoing colonisation, racism and dispossession never appear in the comparison analysis. An example of the failures of the ADA in this regard is the case of *Given v State of Queensland (Queensland Police Service)* [2019] QCAT 016.

A notably better approach can be seen in the case of *Wotton v State of Queensland (No 5) [2016] FCA 1457; 157 ALD 14*. That case was brought under the *Racial Discrimination Act 1975* (Cth) (the RDA). Under the RDA it is unlawful to do '*… any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'*. The RDA reminds us that a proper comparison in terms of mistreatment is not necessarily to a comparator, but rather to what should have happened. One reason the RDA protection is better, and has been able to survive vigorous efforts by some Respondents to read in a comparator, is that it uses the words of the Convention on the Elimination of Racial Discrimination (CERD) from which it is derived and thus constantly reminds decision makers of its purpose and context.

In workplace laws the test instead is *adverse action* which does not necessarily require comparison at all, let alone a comparator. In Victoria, under section 8 of the *Equal Opportunity Act 2010* (Vic), the test is *unfavourable treatment*. With both adverse action and unfavourable treatment, the required examination is whether the person was treated badly because of the protected feature (in this case an attribute). Although a complainant may choose to identify a comparator, and many do, it is not essential.

Our preferred option is text aligning with the protections in the RDA. This references one of the key international human rights instruments from which the ADA derives, and is proven to deliver some good jurisprudence in the Australian context. We are also of the view that *unfavourable treatment* would be satisfactory and it appears to be operating effectively in Victoria. Harmonising with Victorian law is desirable because it allows for more efficient jurisprudence and education (for all parties, including respondents) and may have the collateral benefit of encouraging other domestic jurisdictions to follow.

We are concerned that the focus on *action* in *adverse action* can cause some decision makers, at workplace and tribunal levels, to lose sight of the reality that treatment is more than action; it can also include words and failures to act.

> **<u>3 Indirect discrimination:</u> 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?**

Indirect discrimination provisions have the capacity to address more complex and insidious forms of discrimination such as discrimination arising from conscious and unconscious bias, and structural

disadvantage. The current drafting in terms of 'ability to comply' limits the potential of the ADA in this regard compared with the comparable protections in other Australian jurisdictions. We support the disadvantage test being adopted in Queensland.

It is important in terms of identifying disadvantage that the simplest framing of disadvantage is adopted. Many domestic anti-discrimination laws (eg, the *Sex Discrimination Act 1984* (cth) (the SDA) and the *Disability Discrimination Act* 1992 (cth) (the DDA)) ask a person to establish whether a particular term would disadvantage people with the relevant attribute. The *Discrimination Act 1991 (ACT)* however just asks whether the term would disadvantage the specific person affected because of their attribute (or combination of attributes). This simpler, more thorough, framework is the preferred option for the ADA.

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

We are not convinced this is necessary. The proposed benefits outlined in the discussion paper do not justify such substantial amendment. Better understanding for unrepresented parties can be delivered more proportionately in other ways.

5 Special services or facilities: 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?

AND

6 Reframing to a positive obligation: Should the Act adopt a positive duty to make 'reasonable adjustments' or 'reasonable accommodations'? If you consider that this approach should be adopted:

a. **Should this be a standalone duty?**
b. **What factors should be considered when assessing 'reasonableness' of accommodations?**
c. **Should it apply to disability discrimination, other specific attributes, or all attributes?**
d. **Should it apply to specific areas of activity or all areas? For example, should it apply to goods and services, work, education, and accommodation?**
e. **How would any amendments interact with exemptions involving unjustifiable hardship? Would there be a need to retain the concept of unjustifiable hardship at all?**

Reasonable adjustments widely available

It would be beneficial for the provision of reasonable adjustments to be better described by the ADA. They are of obvious import to people with disabilities and caring responsibilities, but they should also apply to all the protected attributes. One compelling argument in favour of this clarification is that there is widespread acceptance that 'reasonable adjustments' already exist by virtue of the existing provisions when read together and most people, particularly in workplaces, will comfortably use the phrase in connection with the full suite of protected attributes; it feels like common sense. *Special services and facilities* is not terminology in common use in the community.

Unless objectively justified

In theory *unjustifiable hardship* should be capable of an expansive reading but so often the concepts of both *unjustifiable* and *hardship* are lost in the practical application of the phrase.

In most cases focus falls on the cost or effort involved, with almost any level of either argued to constitute an unjustifiable hardship. There is no counterbalancing in the legislation or in practice with the real and tangible benefits of diversity and inclusion. Instead, what is more frequently balanced against are the, sometimes quite vaguely articulated, interests of others – often underpinned by structural prejudice (ableism, racism, ageism etc). For example, including some children with disabilities in mainstream classrooms is frequently, especially outside the state education system, viewed as an inherent hardship to the school, teacher and other students even when there is no financial cost or tangible loss. There is rarely proper examination of whether such *hardship* is justified by any sort of positive view of disability, diversity or community. The social risks of homogenising environments on the basis of ability are never examined. Children without disabilities are not required to similarly justify the labour and expense associated with their education. Their presence is assumed inherently beneficial to themselves, the school and society.

Our preferred option would be to require reasonable adjustments to be made to accommodate people with protected attributes unless a refusal to do so *'is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'* in line with protections in most European countries. This is consistent with the *Human Rights Act 2019 (Qld)* (the HRA) in terms of the limiting of human rights and, if correctly applied, ensures that decision makers are asking themselves the right questions about inclusion and substantive equality.

An alternative is to say that is possible to refuse an adjustment or special facility only when it is *strictly necessary*. The test of strict necessity has the appeal of being easy to understand, and will do the job in many situations. In our view, one risk with this test is that it does not offer sufficient nuance that would allow a decision maker to distinguish between the needs of vulnerable individuals relative to others. The further anti-discrimination legislation drifts from its human rights roots, the more the protections apply equally to everyone including those groups/individuals who have not experienced systemic and historical imbalances in opportunities and treatment. In our view this is not the purpose of the law and can undermine its proper intent.

Positive statements should be expressly included within the provision which covers adjustments to remind people that there are specific benefits to individuals, groups and the community more broadly that they need to consider when determining whether it is objectively justified to discriminate in this particular instance.

> **<u>7 Discrimination on combined grounds:</u> 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?**

Intersectionality and the list of protected attributes

The experience of people with a combination of attributes is not well handled under the ADA. This can mean that when access to opportunity and advancement is distributed unevenly within a protected group, the protection of the law better supports those who are already more comfortably advanced. This can easily be seen in the case of women. Under the ADA it is difficult to argue that this person is disadvantaged because she is a poor woman, or a woman of colour, or a woman with a disability and yet all those groups of women experience discrimination in a way that is quite distinct from the general disadvantage experienced by all women by virtue only of their sex/gender.

Other examples of clients we have seen in this situation include:

- Aboriginal people displaying behavioural manifestations of a disability who were assumed to be drunk or likely to be violent
- Single mothers who are treated worse in recruitment and employment on the basis that they are single mothers, or who are unable to rent properties on that basis, and
- Individuals from non-English speaking backgrounds with cognitive or psychosocial impairments who did not receive appropriate adjustments for both communication issues with a range of adverse impacts.

One of the difficulties in the ADA is that it requires an attribute to be a substantial reason for the treatment. The Commonwealth regime instead only requires that the attribute be one of the reasons for the treatment, it does not need to be the substantive operative reason. This is helpful but it is not a complete solution on its own.

Other jurisdictions, notably Canada and the United Kingdom, prohibit discrimination on the basis of a combination of attributes.

We strongly recommend the ADA be amended to make it unlawful to discriminate on the basis of a protected attribute or a *combination of protected attributes*. This amendment would ensure that the ADA is able to do the hard work demanded of it in advancing the interests of those most in need of its protection.

Intersectionality in consideration of outcomes

Intersectionality also features in the impact of discrimination; with people in those more vulnerable positions being disproportionately adversely affected when discrimination (or sexual harassment etc) occurs. Traditionally pre-existing vulnerability has been used to argue against higher awards of damages in discrimination cases, either on the basis that such a person's financial prospects were already likely restricted by other factors, or because other features of their life contributed to their overall diminished wellbeing. If their humiliations are many, the contribution of one more is often viewed as less impactful than if the person was otherwise thriving in the community.

But human rights law, including discrimination law, should not work in this way. It should be the case that mistreatment of more vulnerable people increases rather than reduces liability for the losses they sustain. More recently some courts and tribunals have been encouraged to award aggravated damages in cases where the complainant is more than ordinarily vulnerable but legislative reform is needed to ensure broader and more reliable access to this option. The ADA should provide specifically for aggravated awards of compensation when the person discriminated against, or otherwise mistreated, was in an already more vulnerable position.

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

Yes, a reverse onus would be appropriate and of great benefit in those situations in which people engaging in discriminatory treatment are aware that they gain an advantage by not disclosing their reasons for a decision or action at the time it occurs. Whilst we do still see disclosures made about reasons in the less prominently protected attributes such as pregnancy, breast feeding, family responsibilities, mental illness and lawful sexual activity, the refusals to provide reasons are a real issue

in relation to those more well-known areas of protection such as race, age and gender. In our experience whilst silence is common and widely regarded as legitimate, actual dishonesty when required to provide reasons is significantly less so.

Currently decision makers are able to *draw inferences* but this is a flawed process which relies heavily on the range of experience of the decision maker to identify what seems like the likely course of events. The case of *Davis v Metro North Hospital and Health Service* [2017] QCAT 056; [2018] QCAT 008 offers an interesting insight into the circumstances in which inferences will be drawn to substantially aid a party. That case featured two factors in favour of inferences; an unusual absence of intersectional complications; and an experienced, confident decision-maker in Member Endicott. There are also historical instances in which more vulnerable people have successfully relied on inferences but these have, in our experience, become rarer over time especially since the dismantling of the specialist tribunal.

One solution is to partially reverse the onus of proof. Under the *Fair Work Act 2004* (Cth), if a person can establish adverse action and the presence of a protected feature, then the onus of proof shifts to the employer who would generally produce evidence of the reasons for the adverse action.

We do not consider that a reverse onus is likely to lead to increased litigation, it simply requires the party with the relevant knowledge to provide information relied on and to disclose their reasons, and in doing so also improves decision making and record keeping.

A reverse onus would work particularly well with our proposed improvements to the test of direct discrimination, which is more rooted in reality and less in hypotheticals than the current test. The drawing of inferences together with the comparison to a hypothetical comparator make some current discrimination cases quite theoretical and remote from the reality of either party. Reforms that are targeted to improving transparency and truth finding will benefit everyone.

> **<u>9 Meaning of sexual harassment:</u> 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?**

Even with recent substantial improvements to laws in other jurisdictions, Queensland's sexual harassment laws still remain overall the best in Australia. In our view there are three key reasons why this is the case:

1. The test is very simple – almost all unwelcome conduct of a sexual nature is covered
2. It is only necessary for a reasonable person in the position of the respondent to have anticipated the possibility their conduct might distress the complainant, and
3. Sexual harassment is equally unlawful everywhere in Queensland.

The small number of complaints relative to the known prevalence of sexual harassment should not necessarily be assumed to represent a failure of the legislative protection. This protection, like others targeted to address gender issues, whether violence, power imbalance, abuse, the gender pay gap etc exist because of complex and longstanding social problems, and success cannot be measured only by the numbers of complaints. Barriers to success sexual complaints include:

- While there have been recent improvements, the historically low amounts in compensation mitigate against the benefits of complaining
- The stigma associated with complaining about sexual harassment can lead to retaliation; most complainants lose their jobs in workplace sexual harassment matters. This must be weighed against the potential benefit of a complaint
- Gender inequality more generally makes women less likely to complain in the sorts of workplaces in which sexual harassment is most prevalent, and
- Silencing of prior, successful complainants makes people experiencing sexual harassment feel as though they are the only one; leading to isolation and fear and making further complaints less likely.

Changing the definition of sexual harassment

It is essential that any reforms do not interfere with the key benefits of our sexual harassment protections. In particular it is our strongest recommendation that the coverage of sexual harassment retains its 'unlawful everywhere' character. Any variation in coverage for the workplace compared with other environments risks importing the complexity currently besetting other jurisdictions in terms of establishing a nexus with the workplace for conduct that tends to occur on the margins of a person's working life.

In the discussion paper the high prevalence of workplace related complaints is mentioned as though this might justify workplace-only reforms to the protection. It is worth noting that not all these 'workplace' cases would be covered in those jurisdictions that require the sexual harassment to have a relationship to the workplace. This is because sexual harassment rarely occurs while both parties are at work in the same workplace. For example, we have assisted in complaints for clients who experienced:

- Unexpected explicit Facebook messages late at night from the boss
- Unwelcome requests for sexual favours from a colleague at after work drinks (not a work organised event)
- Explicit text messages from an employee of one construction company to an employee of an adjacent worksite
- Sexualised comments about/to one particular member of a WhatsApp group created by a work team for social purposes and neither organised nor sanctioned by the employer
- Pornography received from a colleague late in the evening after both parties had been at a work function but had since returned to their homes
- Repeated deliveries of unwanted romantic gifts to a client's home by a colleague who had found her address through their common employer

These examples are all broadly capable of categorisation as workplace complaints. However, in other jurisdictions all would involve complex argument about the relationship to the workplace. In Queensland a complainant may still wish to engage the employer in relation to the issue of vicarious liability in appropriate cases but nexus to a workplace is only relevant to the question of who pays the compensation, not whether or not the conduct was unlawful.

From the starting position of a firm belief in the need to retain absolute consistency across all environments, we do not support any amendments to the definition of sexual harassment which would apply only to the workplace.

This is important because adding the words **in the presence of a person** without a raft of exceptions and exclusions does not reflect community expectations around conduct of a sexual nature in environments

outside of work. To make unlawful any conduct of a sexual nature occurring in the presence of another because someone in the crowd may find it unwelcome and offensive would be an excessive sanitisation of all those spaces in which people gather, and would operate to the detriment of young people and LGBTIQ+ people in particular. Notably these are the people most in need of the sexual harassment protections in the ADA.

The other important factor relevant to this question is that the jurisprudence more recently has better understood the impact of conduct occurring in an environment even if not directly to a person. For example, in our client's case of *Rowan v Beck* [2021] QCATA 020, both QCAT and the QCAT Appeals Tribunal both found that Mr Rowan had sexually harassed Ms Beck when he made comments about her to a third party in circumstances in which a reasonable person could have anticipated that Ms Beck would be informed and that it would distress her.

Harassment on the basis of sex and hostile environments to people of particular sex

The two other proposed reforms in this question do nothing to improve the coverage of sexual harassment specifically although they would be of value to the ADA in other ways. There is common confusion around the relationship between sexual harassment, harassment on the basis of sex, and sex discrimination. In **sexual harassment** 'sex' refers to sexual conduct, not gender status. In **harassment on the basis of sex,** it is gender status about which a person is being harassed. Currently that would be encompassed in Queensland by sex discrimination, not sexual harassment, because it is unfavourable treatment (harassment) because of an attribute (sex/gender/gender status).

It is desirable to clarify that harassment in its more general sense (sustained bothering or bullying) can be treatment of a person for the purposes of discrimination law, but that clarification should be to the definition of discrimination, not sexual harassment, and should apply to all attributes not only 'sex/gender'.

Likewise maintaining an environment hostile to any protected cohort is closer in nature to discrimination than sexual harassment. For example, workplaces in which people regularly refer to each other by derogatory terms suggestive of a disability and mock the characteristics of disabilities, are hostile environments for anyone with a corresponding actual disability. One of our First Nations clients experienced his colleagues singing racist songs nearly every day, another had colleagues who regularly made jokes and laughed about Aboriginal women being raped. Whilst this sort of conduct offends almost everyone, which is apparently its appeal to some of the people who engage in it, it is humiliating, distressing and unsafe for people with those attributes who are also being required to work productively in its presence. Currently most people consider these situations discriminatory because the experience of a person with an attribute in that environment is substantially adversely impacted by the conditions their employer cultivates or permits.

It would be helpful to clarify that discrimination can also include cultivating or tolerating environments that are hostile to people with particular protected attributes.

Dispute Resolution

<u>10 Two-stage enforcement model:</u> Should the Act include a direct right of access to the tribunals? Should a complaint or respondent be entitled to lodge their complaint directly with a tribunal? Should a person be entitled to apply directly to the Supreme Court where circumstances raise matters of significant public interest matters? If so:

a. Should it be confined to certain matters?

b. **What remedies should be available to the complainant?**
c. **Who would have standing to bring the complaint?**
d. **What are the risks and benefits of any direct rights of access?**
e. **What circumstances could these amendments apply to? Please provide examples that may justify this approach.**
f. **How could the process be structured to ensure that tribunals and the Supreme Court are not overwhelmed with vexatious or misconceived claims?**

AND

<u>18 Other dispute resolution issues:</u> 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?

It is important that we consider any procedural reforms from the starting position of encouraging complaints and cases. There is often a reluctance to acknowledge that increasing legal action is a desirable outcome of legislative reform, but if the ADA is to have a role in addressing systemic and structural inequalities then making it easier to bring cases is a logical step towards delivering on that goal.

It is also important to prioritise shining a light on discrimination and other mistreatment. Currently visibility is obscured by a variety of mechanisms. It can be uncomfortable to see and confront discrimination and other mistreatment but if we continue to encourage dealing with it by private, hidden mechanisms, widespread change will remain elusive.

Gatekeeping

Currently the QHRC performs a *gatekeeping* role that requires the parties to attempt to resolve the matter prior to proceedings to a tribunal. In practice this should be of similar benefit to parties as the directions to attend mediation commonly made in the early stages of many litigated matters across all jurisdictions; cheaper, faster, more suitable resolutions of disputes.

Unfortunately, however, this is often not the case because one or more of the following factors subverts the access to justice potential of the process:

- The parties may have already attended a privately organised mediation or engaged in extensive negotiations prior to lodging a complaint and so a further conference, especially one occurring prior to filing contentions and evidence, is unlikely to advance the matter
- In almost every case which is not resolved in the QHRC, the tribunals will order a 'compulsory conference' before or after the filing of contentions which is nearly identical to the 'conciliation conference' that the QHRC already conducted in the case. For some unfortunate individuals, this is the third conference they will attend
- If an injunction was necessary at the outset, the parties will rarely go on to agree at the conciliation so conducting one merely shifts the case from the tribunal to the QHRC and back again
- When the QHRC is struggling, as it has in the past two years including with delays of up to 12 months in processing of complaints, enduring the QHRC stage is overwhelming to many complainants and operates as a complete barrier to access to justice
- The conciliation format can give respondents who already have institutional or structural power, including individuals and organisations who have been abusive, increased opportunity to wield

that power or further traumatise vulnerable complainants in the hope that they will be scared off continuing. It can be difficult to control this in a conference format particularly if the parties are on the phone or if there are multiple consecutive conferences in a split complaint and so many complainants are, in fact, frightened out of continuing, or

- Parties are often placed under obligations of confidentiality and there is a general expectation that matters will be dealt with privately which can mean that the QHRC operates as an institutional barrier to structural change.

Any complainant who wishes to avail themselves of the conciliation process at the QHRC should be properly supported to do so. Conferences should occur promptly after complaints are filed with a focus on *early, cheap, quality* resolution of those matters that are most properly dealt with in that way. Complainants should have access to properly skilled legal representation to facilitate robust, appropriate outcomes.

Likewise, any complainant who wishes to dispense with the conciliation process at the QHRC should be similarly permitted to make their own decision about the progression of their matter. The tribunals retain the power to order a compulsory conference at the request of a party or on their own motion and have the flexibility to schedule it either before or after contentions, whichever appears most useful to the resolution of the case. Having multiple conferences, each with a different range of administrative steps in preparation and subsequent, is crushing to many complainants and, for those with private legal representation, extraordinarily expensive. In many cases the potential gains to the parties from having the additional facilitated opportunity to discuss the matter are not proportionate to the extra cost, stress and time.

The QHRC process also has a filtering role, deterring some cases from proceeding. We are concerned that the filtering does not always have a clear relationship to the relative quality of those cases. In fact, in our experience, the decision to give up at some point within the QHRC process is equally likely to be because the complainant is intimidated, exhausted, has moved on, or is unwell or overwhelmed, as it is to be because their case has limited merit. A better system for supporting people with unmeritorious discrimination cases to exit the system is to provide those people with quality legal advice at the outset. They would then be better placed to make informed decisions about the options that exist and whether any of them are likely to achieve the outcome desired.

Trust between the participants

Another unfortunate feature of the double level regulation and the complaint handling process as it is currently designed is that its structure embeds a lack of trust between the players in the legal process. Work is duplicated at the QHRC and in the tribunals. Conciliators, most of whom are not experienced advocates, can exclude lawyers and provide their own opinions to the parties including about the relative strengths and weaknesses of the case. These opinions are not always correct and may deter or encourage the wrong matters. Systemic and test cases are routinely assessed as ‘weak’ because they do not follow a clearly established precedent. Support people have traditionally been limited to one, and many are still forbidden from speaking. Some conciliators may overly value the rate of settlement, rather than the quality of the settlements they deliver, and many clients feel pressure to resolve the case on the day. Some conciliators refer to written settlement agreements as ‘standard’ and present them, including to self-represented parties, for immediate signing when they actually contain complex provisions about which legal advice is essential such as one-way releases, bars to other proceedings, non-disclosure agreements etc.

A better framework

It is very important that whatever dispute resolution process is developed is:

- Complainant-centred in a way that encourages informed choice
- Built in consultation with the groups who most need access to it. Women, people with disabilities, people from culturally and linguistically diverse backgrounds, First Nations people, and both older and younger people should be specifically considered
- Built with access to justice in mind rather than 'gatekeeping'
- Quick, and focused on early intervention and quality resolutions in matters in which that is appropriate
- Allows for systemic matters to be properly ventilated and addressed via publication of outcomes
- Encourages respectful divisions of work between the different layers in the process and is refined to support the efficient functioning of all participants
- Is supported by proper levels of resourcing including for legal support

Specific issue - injunctions

The injunction provision in section 144 needs to be expanded to allow for positive injunctions to protect a party's interests while the matter goes through the full complaint process. This is particularly important in the case of adjustments at work or school, where it may be years before a person can achieve an order that they be given access to a particular desk, or an interpreter, or training for example.

Injunctions should also be more readily available to suppress ongoing victimisation, and to protect a complainant from further victimisation occurring. The range of injunction options must include an effective mechanism by which a complainant can deflect a counter-attack in the form of defamation proceedings, and so may need to include the option of applying to a higher court than the current tribunal-only option.

Specific issue - non-disclosure agreements

The use of confidentiality clauses/non-disclosure agreements in the QHRC remains overly prevalent. They are so pervasive that many respondents believe the have a right to the option of a private resolution, provided they pay a sufficient sum in compensation. Some respondents raise the adverse costs risk to encourage acceptance of their offer, even when a blanket non-disclosure clause is included as a requirement of settlement, despite it not an outcome that would be contemplated by a tribunal.

Whilst non-disclosure agreements are no longer automatically inserted into all settlement documents drafted by the QHRC, they remain valued by conciliators in terms of encouraging respondents to settle. We find insistence on confidentiality particularly egregious when the beneficiary is the state and the effect of the clause is to cover up wrongdoing. Legislative reform is needed to generally prohibit the inclusion of confidentiality clauses in ADA matters unless:

(a) specifically requested by the complainant, or
(b) name and identifying material only at the request of a named respondent

Specific issue - name suppression

There are broader public benefits in cases being brought under the ADA that extend beyond individual outcomes. However, the individual risks can operate as a deterrent to those cases being brought. A key risk for some complainants is that their name will everlastingly be associated with the conduct about

which they are complaining if the matter proceeds to the tribunal. This is especially the case in discrimination proceedings which are frequently reported in the media either because there is a legitimate public interest in the outcome, or because the facts are exciting to media consumers.

Some complainants are not able to be, or do not wish to be, open about their connection to their protected attribute, sometimes for safety reasons. This includes sex workers, some LGBTIQ+ people (especially in some regional parts of Queensland), and victims of domestic and family violence etc. Others may be concerned about the impact on their work prospects if future employers can easily identify that they have brought legal proceedings against a former employer.

Currently the confidentiality interests of the parties are considered equally, so if a complainant is reluctant to have their private information made public, they are encouraged to settle early and to accept a non-disclosure agreement.

However, allowing complainants far more ready access to name suppression, if they feel that would benefit them, would reduce the personal risk of complaining without impeding the broader public interest in improving visibility of discrimination and similar mistreatment.

Embedding cultural safety in the process

It is important to expressly describe options for procedural variations to both conciliation and hearings of matters involving the treatment of First Nations peoples. Currently no structural consideration is given to cultural safety for Aboriginal and Torres Strait Islander applicants, and the level of cultural competency at all levels is mixed. In the past year, we have been able to use the HRA to negotiate directly with some respondents to engage a more suitable conciliation process outside of the process provided by the QHRC. There is some risk in doing this currently, because if the matter is not resolved at that bespoke conference, the complainant may be deterred from going on to the QHRC by the prospect of a second conference over which they have less control. It would be preferable to have some confidence that a culturally safe process would be delivered within the QHRC and the tribunals.

A program of proper consultation with Aboriginal and Torres Strait Islander communities should be undertaken in the design of appropriate procedural, as well as the necessary substantive reforms. There must be sufficient resources allocated not only for the consultation but for the implementation of reforms as desired by communities. Consideration should also be given to exploring options for outcomes that better reflect the values and expectations of Aboriginal and Torres Strait Islander complainants.

11 Terminology: Should the 'complaint-based' terminology be changed? If so, what should it be replaced with?

A party is commencing legal proceedings by lodging documents in the QHRC; that fact should not be masked by softened terminology. Expectations around 'complaint' are already not met in many cases – unrepresented people often feel that the responsibility for investigating a complaint lies with a complaint handler rather than understanding themselves to be in a plaintiff position and may fail to properly make their case as a result. We would not support an amendment that made the language any more passive.

12 Written complaints: 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?

Yes. All communication modes should be acceptable and assistance should be provided. The pre-conciliation process could include the QHRC reducing non-written complaints to writing, subject to approval by the complainant. We note that Respondents are not at any time required to provide written material until contentions in a tribunal so this change would simply level the burden as between the parties as well as improve accessibility for people who struggle with written English.

13 Efficiency and flexibility: 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?

In line with the recommendations above regarding reform to the complaint process there needs to be increased focus on timeliness. The complaint mechanism in the QHRC is often referred to as 'early resolution' but by combination of legislative time frames and other delays it can often take over 12 months from lodgement to conference.

In particular it is unclear why respondents need 28 days between receiving the complaint and the conference date, especially when a matter may already have been subject of much discussion and needs a quick resolution. Rarely do respondents produce any written material which might justify that time frame as standard. The time between notification and conference is a particular barrier when the person is seeking to address imminent or ongoing discrimination.

14 Time limits: 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?

The time to complain is far too short, especially for children. Often a person who has experienced discrimination, vilification, sexual harassment or victimisation is distressed and mental health impacts are very common. One year is often not enough to manage the personal impact of the experience to the extent that bringing legal action is possible. It is also not long enough to properly know the extent of the long-term impact on the complainant and many people (particularly unrepresented people) underestimate their ongoing psychological needs and ability to get back to work when assessing their compensation demands. The impact on a child may not be known at all until they are an adult.

The time to complain should be extended to at least two years, consistent with the time limit under the SDA. The time should not commence running for children until they turn 18, in line with other similar legal actions such as personal injury matters. Most organisations dealing with children retain records for at least six years beyond the child's 18th birthday in case of other legal actions, and so would not be particularly disadvantaged by the extension of time for ADA matters.

<u>15 Representative complaints:</u> 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?

The existing representative complaint provisions within the ADA have not achieved their objective; the way they are drafted makes them nearly impossible to use effectively. Without an appropriate vehicle for representative cases many people with perfectly valid complaints are unable or unwilling to risk challenging a large organisation or the State.

Such actions are an asset to the justice system, and the emerging and evolving jurisprudence in this area is reflected by the insertion in 2017 of Part 13A in the *Civil Proceedings Act 2011 (Qld)* which provides a framework for the commencement and management of proceedings undertaken by, and on behalf of more than seven claimants against the same defendant.

This relatively recent framework in Queensland is based on the *Federal Court of Australia Act 1976*(Cth) pt IVA which was successfully used in the case of *Wotton v Queensland [No 5]* (2016) FCA 1457). As the ABC reported this was the *first time an entire community has been represented in a class action against the state of Australia alleging racial discrimination and being vindicated in that cause*[5].

We need the same or similar class action regime to apply to cases under the ADA.

The factors that influence capacity for people to assert their rights as a representative complaint are convenience, costs/funding, location of parties and community awareness. It would be desirable in cases involving more than a threshold number of people in the class for applicants to be able to opt into a costs jurisdiction at the outset to facilitate no-win-no-fee legal representation and/or litigation funding.

<u>16 Organisation complaints:</u> 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?

Yes, representative bodies and unions should be able to make complaints on behalf of affected individuals affiliated with the organisation or union.

Representative bodies and unions should also be able to make complaints, including to the tribunals, about discriminatory policies and proposals <u>without the need for an affected individual</u> if the policy or proposal would have the effect of unlawfully discriminating should it ever be applied. For example, there are currently Queensland private schools with uniform policies that contain prohibitions on 'afro hair'. These policies, simply by existing, deter families of African descent from seeking to enrol their children in those schools. It should not be necessary for a child of African descent to attempt to attend the school and be refused or be reprimanded for their 'afro' hair before a complaint could be made. Instead a community organisation established for the benefit of African communities should be able to make a race discrimination complaint about those policies and thus clear the path to an enrolment process free from discrimination and distress.

[5] ABC News *Palm Island riots: Federal Court finds police acted with 'impunity' in racial discrimination lawsuit* (5 December 2016

<u>17 Complaints by prisoners</u>: 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?

AND

<u>48 State laws and programs – prisoners:</u> Should the Corrective Services Act modifications be retained, changed or repealed?

Due to the *Corrective Services Act 2006* (the CSA) *'*modifications'[6] it is widely believed that anti-discrimination law does not functionally apply to protect people in prison from discrimination, sexual harassment or vilification by Queensland Corrective Services or Corrective Services staff. This is because Part 12A of the CSA contains a number of legal and procedural barriers to people in prison bringing successful ADA complaints.

Sections 319E and 319F require the prisoner to make a complaint first to the Chief Executive and then to the Official Visitor before being able make a complain to the QHRC. Each of these sections also contain time frames which the prisoner must wait prior to advancing to the next step of the complaints process. From the perspective of our clients these administrative hurdles act as a significant deterrent to progressing valid complaints and complying with the process itself often takes longer than the 12-month statutory time limit to bring a complaint.

We acted in the most significant anti-discrimination case for a prisoner in Queensland since the 2008 reforms in *Tafao v State of Queensland.*[7] In that case it was found to be 'reasonable' under sections 319G and 319H of the CSA to (among other things) persistently refer to a transgender woman using male pronouns. This treatment falls far short of mainstream community expectations for how trans and gender diverse people should be treated and, in any other environment, would likely breach the protection against discrimination on the basis of gender identity.

In the unlikely event a prisoner could overcome the hurdles posed by sections 319G and 319H, section 319I has the effect of prohibiting the tribunal from making compensation orders in circumstances where similar conduct outside of the prison environment would see the tribunal award compensation as its primary remedy. This is because of the requirement for the tribunal to find that the contravention of the ADA happened because of an act or omission done in bad faith in order to make an award of compensation. This section further limits any benefit of the ADA for people in prison and ensures that there is no incentive for prisons and prison officers to avoid discrimination and build a culture that respects the human rights of prisoners.

People in prison are especially vulnerable to the attitudes, prejudices and changing favours of those who control those environments. A very large number of people in prison are First Nations people, have another cultural or linguistic diversity and/or a disability. It is very difficult to understand what might justify the ongoing refusal to afford prisoners the basic dignity of protection against unlawful discrimination, as is expected in all other environments.

[6] introduced by the *Corrective Services and Other Legislation Amendment Act 2008.*

[7] *Tafao v State of Queensland and Ors* [2018] QCAT 425; *Tafao v State of Queensland* [2020] QCATA 76; *State of Queensland v Tafao & Ors; Serco Australia Pty Ltd & Anor v Tafao & Anor* [2021] QCA 74.

It is our strong recommendation that Part 12A of the CSA be repealed. People in should have proper protections against unlawful discrimination reinstated.

Eliminating Discrimination

> **19 Objectives of the Act: 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?**

Directly aligning anti-discrimination protections with their human rights law underpinning supports anti-discrimination laws to respond with greater rigour to historical and systemic injustice rather than just situational difference in treatment.

Anti-discrimination law does not exist to protect the interests of groups who are systemically and historically privileged as against others. But unless it properly announces itself, it is capable of being read in a way that subverts its proper intention. For example, in 2021 in Queensland the Crime and Corruption Commission published a report into discrimination in police recruitment finding that the focus on recruiting more female officers discriminated against male potential recruits.[8] This narrow view of equality fails to consider both the historical under-recruitment of women into law enforcement and the structural underservicing of female victims of crime.

The objects of the ADA must go beyond formal equal treatment for all people; some acknowledgement must be made about substantive equality, historical and ongoing oppression, and systemic injustice.

It would be appropriate for the objects to make specific reference to First Nations communities and to be clear that the State intends for those communities to recover the wealth, self-determination and other rights taken by colonisation; and that the ambition of this legislation is to facilitate thriving, not merely survival.

> **20 Special measures: 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?**

There are substantial benefits to be gained by aligning with Victorian law in this regard and collapsing the existing protections into a single provision. It is also desirable to provide clarity around the circumstances in which an application does and does not need to be made to the tribunal before an entity can positively distinguish between different groups by engaging in special measures.

> **21 Positive duties: 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**

[8] Crime and Corruption Commission, *Investigation Arista - A report concerning an investigation into the Queensland Police Service's 50/50 gender equity recruitment strategy* (Report, May 2021).

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?

The ADA currently contains a 'de facto positive duty' in the vicarious liability provisions which hold employers responsible for the misbehaviour of employees unless they have acted appropriately to prevent the conduct occurring. However, this duty falls short in two important respects; it does nothing to require employers to respond in any particular way once inappropriate conduct is brought to their attention; and it cannot be enforced as an actual duty at any time other than in terms of the payment of compensation.

This means that employers can choose to manage risk in less helpful ways including by aggressively deterring complainants from raising or pursuing matters of concern. One increasing common strategy to make complaints go away, particularly about sexual harassment, is to only accept very detailed written complaints. Then, rather than investigating, the written complaint is passed directly to the named individuals who issue concerns notices under defamation law.

Positive duties could make a meaningful difference if they are carefully framed and designed to mandate both preventative and responsive minimum standards in workplaces and other controllable environments. They must independently enforceable, so that their absence can be addressed before a crisis occurs. It would be natural to include such enforcement mechanism within the toolkit of a regulator, but employees and unions should also be able to act directly to secure compliance, and financial remedies should be available in cases of persistent refusals to comply with the obligations under the law.

Positive duties should apply to all areas of improper treatment under the ADA, there is no special reason to confine them to just sexual harassment or to particular types of discrimination. Key duties could include:

- Maintaining policies to prevent breaches of the ADA and providing appropriate training on the content of those policies
- Maintaining a complaints process that includes actively protecting complainants from victimisation
- Monitoring for breaches of the ADA and acting to address breaches that become apparent though monitoring as well as complaints

A positive duty to make reasonable adjustments is also important and is dealt with in the response to questions 5 and 6 above.

Civil penalties

Failing to discharge the positive duties should be an aggravating feature when determining awards of damages in the event of a claim occurring. There should also be a stand-alone civil penalty remedy available in cases of breaches.

Civil penalty provisions incentivise representative bodies, such as unions, to bring actions to improve conditions generally. They also give the regulator (see below) a mechanism by which to both punish a recalcitrant company, and support the community-based organisations that help those most affected. ASIC regularly secures civil penalty payments in its actions against problematic lenders, as both court

ordered and negotiated outcomes, and the payments of those penalties have been directed to community services including community legal centres and financial counselling organisations.

Other sections of the ADA should also be considered in terms of a civil penalties' regime. The victimisation protection is particularly well suited to a civil penalty, currently it contains a criminal penalty and although breaches are common we are unaware of any prosecutions.

> **<u>22 Regulatory approach and the role of the commission:</u> 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?**

Discrimination and inequality are issues that affect how we all live as a community, but responsibility for fixing these deep systemic problems lies solely in the hands of individuals worst affected by mistreatment.

Currently the State plays no active role in directly regulating discrimination, equality, sexual harassment, hate speech and vilification, or any other matter protected by the ADA except in the rare instances the conduct also constitutes a criminal offence and is dealt with by the criminal justice system. This is quite different to how the State views other areas of general social importance such as unpaid wages, taxation, consumer protection, aged care, building disputes, superannuation etc. We need a properly resourced regulator with a combination of duties and powers that would enable it to have real impact. These might include:

- Responsibilities for investigating systemic discrimination and the power to access documents and enter places for the purpose of monitoring compliance
- The right to bring independent legal action in matters that meet a certain threshold for intervention
- Responsibilities to enforce orders in cases of non-compliance
- Responsibilities and powers to enforce breaches of positive duties (see answer to question 21 above)
- Specific power to intervene in cases of victimisation and to seek injunctive remedies on behalf of a complainant while a matter proceeds
- A power to endorse or withdraw endorsement of an anti-discrimination policy or training program
- Responsibilities to issue interpretive guidance about anti-discrimination laws, or to seek and publish court or tribunal opinions on matters of importance

Once the powers and responsibilities of the regulator are clear, the proper entity to deliver on those objectives will need to be considered. Currently the QHRC maintains a somewhat awkward position of neutrality which makes it hard to see it as a potentially effective regulator. It describes its purpose on its website as:

> *Our work includes:*

- *resolving discrimination and human rights complaints;*
- *delivering training to business, government and the community on discrimination and human rights; and*
- *promoting public discussion on human rights*[9]

A proper, human rights underpinning for a human rights institution is stronger than this. The United Nations, at least in respect of the National Human Rights Instruments (NHRI) it accredits, requires those NHRIs be given a broad mandate to protect and promote human rights. The QHRC does not mention protection at all in its objectives, and its stated role in terms of promotion is only to promote 'public discussion' on human rights, not the promotion of those rights themselves.

As the famous quote of Archbishop Desmond Tutu reminds us: *If you are neutral in situations of injustice, you have chosen the side of the oppressor.*

Although the AHRC performs the official function of Australia's NHRI on an international level, the practical everyday reality is that the state commissions touch the lives of far more individuals than the national body. Consideration should be given to articulating the role of the QHRC as 'the promotion and protection of human rights' in line with international expectations. Once this step is taken, the further step to giving the QHRC regulator powers is not a substantial one; they will comfortably flow from the mandate of protection.

> **<u>23 Role of the tribunals</u>: 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?**

The lack of a specialist list in QCAT in particular makes taking legal action under the ADA fraught with risks that do not arise in most legal matters. Even if a case is allocated to a capable decision maker at first instance, appeals are extremely common and it may be differently handled in the QCAT appeals tribunal. This is particularly the case when the argument is about a complex technical detail such as the construct of the comparator.

One major shortcoming of the non-specialist decision makers is that 'bigger picture' issues that underpin mistreatment of vulnerable people are rarely, if ever, well handled in QCAT. This means that there is excessive focus on the specific incident rather than the overall experience of the complainant, let alone the structural issues relating to the treatment of the groups of people who share the same protected attribute.

This is particularly acute in some parts of regional Queensland, where local sessional members might be handed a discrimination matter to determine with limited experience of either the ADA or the social context in which discrimination occurs. *Cassady v Hardings N.Q. Pty Ltd and Anor* [2021] QCAT 353 is a recent race discrimination case determined in Townsville. The local QCAT member hearing the matter considered a volume of 'character evidence' about whether the respondent was generally racist, provided by a number of his friends from diverse backgrounds who did not experience racism from him.

[9] https://www.qhrc.qld.gov.au/about-us

This evidence apparently carried some considerable weight. However, allegations made by the complainant regarding historical and ongoing treatment of Aboriginal and Torres Strait Islander people in Townsville received less sympathetic, indeed relatively patronising, treatment as though the complainant simply failed to convince the decision-maker any such problem exists. This demonstrates an unusual view of the operation of the ADA as a technical piece of law, as well as extraordinary position on the social context for First Nations people in that part of Queensland.

The range of expertise within QCAT also makes it very difficult to predict outcomes. When outcomes are predictable, early resolution is more likely, particularly if the parties have access to legal advice. Unpredictability encourages people to have a go, regardless of merit, including at appeals if they are unhappy with the outcome at first instance. The more complex and time-consuming litigation becomes, the fewer people are able to get access to the kind of quality legal help that might support proper and timely resolution. This can lead to more self-represented people and poorly argued cases, compounding the challenge of achieving quality decision making. Smooth efficient functioning of the legal process should aim to bring matters to finality as quickly as possible. For this, parties need a high degree of predictability in routine matters, quality legal help and properly considered decisions.

A specialist list would also encourage recruitment of diverse decision makers. Whilst there are plenty of women members handling discrimination matters, other groups appear underrepresented. In particular we do not believe that any of the decision makers we have appeared before identified as Aboriginal or Torres Strait Islander.

The situation is less acute in the QIRC because that tribunal already has a narrower focus. Most of the decision makers in that jurisdiction were employment lawyers (or similar) before their appointment which means that they will have encountered discrimination law in that context prior to being required to make decisions about it. A specialist list would still be highly desirable, in particular for sexual harassment matters which often deal with gendered power imbalance and which continue to be handled with some inconsistency through the QIRC.

In terms of the procedural questions:

1. Yes, standard processes across the two tribunals would assist but we acknowledge the substantial barriers to this. The impact to their other operations may make this unwieldy to deliver in practice.
2. Yes, the tribunals should publish their decisions. There are limited resources to bring cases to hearing and so most free legal services acting in discrimination matters chose to assist in cases that will test or expand the operation of the law, or which affect large groups of people. Not publishing the decisions unreasonably limits the impact of that work and is a further barrier to systemic change.
3. We would much prefer publication over internal data sharing so that people outside the system, especially academic researchers, could also better understand what is happening.
4. The QHRC should be able to intervene in matters of general importance, and should not need the consent of the parties, Court or Tribunal. It should be adequately resourced in particular to engage First Nations counsel to intervene in matters of importance to First Nations communities (including any cases which raise matters of systemic discrimination).

In addition to the QHRCs right to intervene we believe that appropriate community organisations established for the benefit of particular communities should also have a right to be heard, in an appropriately resource-efficent capacity for example by filing written submissions, in matters of

importance to their community. We also believe that this would be of great assistance to the decision makers in terms of understanding the broader social context from which a case arises.

Non-Legislative Measures

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

Urgent action is needed to address chronic underfunding of legal services in this area of law. For example, the grant of legal aid for the QHRC stage of the process is a total of four hours including advice, instructions, preparation, attendance on the day and negotiating settlement. An efficient, experienced lawyer could attend to these five steps in a minimum of 15 hours for a simple matter. The conferences themselves rarely run for less than three hours, many take a full day. There are only two Community Legal Centres with funding specifically for disability discrimination (we believe both roles are part time). Most of us who do this work, including Caxton, do so as an internal priority within our generalist programs and there is overwhelming competition for the small allocation of resources for 'generalist' law in Queensland.

Grounds of Discrimination

25 Current attribute - impairment: Should the attribute of impairment be replaced with disability? Should a separate attribute be created, or the definition amended to refer specifically to mental health or psychosocial disability? Should the law be clarified about whether it is intended to cover people who experience addiction? Should reliance on a guide, hearing or assistance dog be broadened to be reliance on an assistance animal? Should it only apply to animals accredited under law? How would this approach work with the Guide, *Hearing and Assistance Dogs Act 2009?*

We believe the term disability is acceptable to more people than impairment. It should of course include mental illness and psychosocial disabilities, including addiction disorders. Care also needs to be taken to use language inclusive of people with neuro-diversities such as being on the Autism spectrum which is often considered a difference rather than a 'disorder or malfunction'.

The coverage for guide hearing and assistance animals should be expanded. Currently there is better coverage under the DDA but the inconsistencies across the various legislative instruments cause confusion and distress. The restrictions in the Qld regime also make it hard to access the protections of the DDA in practice – many respondents struggle to understand how it all fits together, and there is common misunderstanding that the specifically named Guide Hearing and Assistance Dogs Act would take precedence over the more general DDA. It is not uncommon to have the Qld provisions quoted as a 'defence' to a direct complaint made under the DDA.

Companion animals and disability

Separate to the assistance animal provisions, there needs to be recognition that companion animals can meaningfully alleviate some functional challenges of some disabilities, specifically in the area of accommodation for vulnerable people who would otherwise live alone.

In recent years we have assisted a considerable number of clients with mental illnesses such as PTSD, depression and anxiety who had a deep emotional reliance on a companion animal and who were told that their animal is not allowed in their new rental, body corporate, retirement village or manufactured

home park because it is not relevantly trained and a by-law or rule says 'no pets'. In most cases the animal in question is a cat or an elderly dog, and is beyond the sort of training anticipated by the assistance animal provisions. It is not uncommon for clients to turn down stable accommodation rather than relinquish an animal to which they are emotionally attached.

We have assisted a number of clients in this position to secure an exemption to a standard by-law or rule because they needed a companion animal to feel safe, connected or loved when their illness otherwise made the feel unsafe, alone or worthless.

Some of these people had attempted to use the assistance animal provisions inappropriately prior to speaking to us, and in doing so inadvertently contributed to the increased conflict around those protections which harms genuine users of assistance animals. This is very unfortunate but rather than malign the owners of companion animals, we consider it important to understand the role pets play to people with disabilities, particularly mental illnesses. Keeping a pet may genuinely be a reasonable need, or an essential for thriving, for some people with disabilities.

It would benefit these clients if companion animals could be legislatively recognised as an appropriate adjustment in the area of accommodation (excluding holiday accommodation) for people with some disabilities. Dealing with these matters separately would also reduce the burden on users of assistance animals who find their needs are taken less seriously when so many pets are inappropriately asserted to be assistance animals.

<u>26 Current attribute – gender identity:</u> Should there be a new definition of gender identity, and if so, what definition should be included in the Act?

The decisions in Tafao v the State of Queensland demonstrate the difficulty with the current definition of gender identity, and understanding the difference between gender identity as defined, sex and gender.

In the decision at first instance the decision-maker found at [175] …*The submissions of the applicant make the claim that because the applicant identifies as female and seeks to live as a female, she is therefore a female. I reject that submission. I do not think an injunction against discrimination on the basis of the attribute of gender identity is a requirement to adopt the applicant's perception of reality for all purposes. The applicant has the male gender because of her biological sex…*

The confusion in that last sentence acutely highlights the challenges associated with the current drafting. Gender identity should be carefully drafted as expansively as possible without losing its meaning to ensure it provides proper protection to the transgender community, as well as people who are non-binary, gender fluid or have another gender. It is essential that guidance from within those communities drives the choice of language in that provision.

<u>27 Current attribute – sexuality:</u> Should there be a new definition of sexuality, and if so, what definition should be included in the Act?

Sexuality should be drafted as expansively as possible without losing its meaning to ensure it covers people with the broadest diversity of sexuality.

<u>28 Current attribute – lawful sexual activity:</u> Should there be a new definition of lawful sexual activity, and if so, what definition should be included in the Act? Should the name of the attribute be changed, and if so, what should it be?

We believe that the attribute protecting sex workers should use the language sex work and sex workers, and support and endorse the submission of Respect Inc in this regard.

Lawful sexual activity could be retained in addition to the provision protecting sex workers and be redefined to mean 'lawful sexual activity' in its more commonly understood sense. We have assisted clients for whom this would be helpful. For example:

- A woman dismissed from employment because it became known that she was having sex outside of marriage and others in the workplace objected morally to that
- Several women who were asked or forced to leave workplaces after ending consensual sexual relationships with male colleagues
- A man who was treated badly because he had sex with other men but who prefer not to identify as gay could only obtain the protection of the ADA if he identified with a relevant status covered by the sexuality provision

Although this type of treatment is less likely to be experienced by straight men it is difficult to capture it within the scope of sex or sexuality discrimination. In some workplaces, known sexual history can also make people more vulnerable to sexual harassment and other types of discrimination.

We are also concerned about the treatment some people receive in pre-employment and employment when there is sexual content, whether shared consensually or not, about them in the public domain.

Extending this protection in this way would be compatible with the right to privacy under the HRA.

The discussion paper frames this an either/or situation; either lawful sexual activity is defined to be about sex work or defined to be about all types of sexual activity. For the same reasons Respect Inc identifies, this is not appropriate. Sex work is a distinct activity from sex generally, and sex workers are a stigmatised workforce for whom separate protection is essential. We support two separate protections; one for sex workers and sex work, and another for sexual activity generally.

> **29 Specific attributes: Does the terminology used to describe any existing attributes need to be changed? For attributes that have a legislative definition in the Act, do those definitions need to change? For attributes that do not have a legislative definition, should a definition be introduced? Should the Act separately prohibit discrimination because a person with a disability requires adjustments for their care, assistance animal, or disability aid?**

It would be helpful to codify the coverage of race to explicitly include cultural practices and the physical features (hair, tattooing, height/size etc) associated with being of a particular race.

> **30 Additional attributes: Is there a need to cover discrimination on the grounds of irrelevant criminal record, spent criminal record, or expunged homosexual conviction? How should any further attribute(s) be framed? Should they apply to all areas? What are some examples of how people who have had interactions with law enforcement experience discrimination, including by whom and in what settings? How would the inclusion of these attributes interact with the working with children checks (Blue Cards)?**

At the outset we note that working with children checks in Queensland are a current human rights concern for us and many others. The methods of assessing risk allow for a range of irrelevant considerations to be relied on, including highly prejudicial moral judgments about conduct which bears

no actual risk to children such as a quite distant history of recreational (or even medicinal) cannabis consumption, or being too frightened to leave a domestic violence relationship because of the prospect of increased violence after separation. Because mainly women seek to work with children, the current operation of the working with children checks are a barrier to economic inclusion particularly for mothers. We note that most of the women adversely affected by prejudicial blue card assessments do not dispute the decisions in QCAT, often out of shame and to avoid their full life history being placed in the public domain.

It would be meaningful reform to include blue card assessments within the scope of the pre-work area within the ADA to protect against the worst of the discriminatory conduct within the assessment process.

Irrelevant criminal record, spent and expunged convictions should all be included as attributes to be protected. The protection must be on equal footing with other attributes, not a second-tier protection as exists currently in the AHRC. The is particularly important for First Nations people who are excessively criminalised, particularly in youth. In 2018/19 the Queensland Government reported that more than 6,500 First Nations young people between 15 and 24 were subject to some sort of police action in that one year alone;[10] around 1 in 5 of all First Nations people in those age brackets at that time. As an individual traverses the nine-year span of 15-24 the likelihood of a criminal history of some variety becomes extreme. Children in the care of the state almost inevitably have some adverse interaction with police.

It is no longer the case that recording or not recording a conviction at the point of sentence dictates the future use or treatment of information about criminal history or police interactions. Court reporting by media outlets permanently places material in the public domain. Police data sharing with other agencies such as blue card and child safety is, in practice, quite unrestrained. All manner of information about a person is retained indefinitely, easily accessible and interpreted from a variety of perspectives against the interests of the person, even if a Magistrate or Judge fairly weighing the relevant considerations decided no conviction should be recorded at the point of sentence. It is appropriate, indeed urgent, to properly legislate a framework in which criminal history should and should not be used to make decisions adverse to a person.

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

Yes, the ground of irrelevant medical record or irrelevant medical history is an important protection for people with stigmatised medical history that does not lead to a disability. This group includes people with HIV and other similar conditions. It would also include people who have had an abortion. Both groups can experience discrimination and are not covered by other protections. Working together with the protection against unnecessary questions, it would also serve a useful function in limiting the pre-employment medical checks and IMEs to relevant matters only.

34 Is there a need for the Act to cover discrimination on the grounds of physical features?

Yes. One persistent area of currently lawful discrimination is against people regarded by others as overweight. This is particularly a feature in the recruitment and pre-employment area but can also arise in other areas such as education and access to goods and services. Other physical features such as

[10] Queensland Government Statisticians Office, *Crime report, Queensland, 2018 – 29* (Report, 2020).

tattoos, grey or 'natural' hair, female facial hair, and having acne etc are also the basis of discrimination for some people.

In some cases, it is possible to argue that a particular physical feature relates to a protected attribute, sometimes race but most commonly impairment, and is therefore covered by the ADA but this is not a comfortable fit or always available. In particular there is a complicated relationship between weight/overall size and assumptions around disability or illness which are themselves driven by stigma unhelpful to both groups.

Discrimination on the basis of physical features is particularly prominent for women who continue to be held to arbitrary standards in many environments. Unless it is relevant for a particular role, it should be unlawful to discrimination on this basis.

> **<u>37 Subjection to domestic violence:</u> Should an additional attribute of subjection to domestic violence be introduced? Should it be defined, and if so, how?**

We have assisted a number of clients who have experienced discrimination on the basis of domestic and family violence. It is sometimes closely linked to discrimination on the basis of mental illness, family responsibilities and sex but is sufficiently distinct to need separate consideration. It most often arises in our employment law program.

Sometimes the perpetrator of violence (usually a recent ex-partner) has visited or repeatedly called a client's workplace in a hostile state, sometimes the victim is experiencing a deterioration in wellbeing and employers become concerned she is heading towards a mental health crisis, and sometimes she is dealing with the complex multifaceted process of leaving of violent relationship and does not have access to adequate leave entitlements or support. In these cases, the employer may feel they are taking care of their business interests by avoiding the complications of an employee in worsening crisis, or who 'brings their personal drama to work'. Sometimes employees are dismissed swiftly after an instance of domestic and family violence. In other cases, there is no immediate dismissal but as no adjustments or accommodations are made, work performance or attendance may suffer and a dismissal or other detriment occurs later.

The Senate Standing Committee on Legal and Constitutional Affairs, Australian Senate, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Majority Report)* (2013) recommended that 'domestic violence' be included as a protected attribute. New Zealand includes domestic violence as a ground of unlawful discrimination in its *Human Rights Act 1993*. The *Industrial Relations Act 2016* (Qld) already protects state employees in Queensland from discrimination on the basis of being a victim of domestic and family violence.

Extending that coverage into the ADA and to the other workplaces and areas of public life covered by that Act is a sensible, overdue reform that will be widely supported in the community.

> **<u>39 Other additional attributes:</u> Should any additional attributes, including those highlighted above, be included in the Act? If so, what evidence can you provide for why these attributes should be protected? How should they be defined? How would inclusion of the attribute promote the rights to equality and non-discrimination?**

The discussion paper asks about the attributes of accommodation status and employment activity. There are two common markers of poverty that do form the basis of discrimination and we support improved protections including of those two attributes. We would, however, be disappointed to see

them alone without recognition of the fact that both are more properly understood as features of a broader attribute; social origin, also called socio-economic status, or more bluntly, class.

Talking about class is often regarded as distasteful in Australia, even offensive. Acknowledging its existence and impact exposes a fragility in our national mythology; who are we as a nation if not egalitarian? But socio-economic status is real and tangible for people who live in poverty, who are homeless or live in social housing, or who struggle to change to their circumstances because they cannot muster the resources to overcome the structural inequities that hold them back. As the gig economy deepens its impact on the labour market, and pandemic conditions widen the gap between rich and poor, social origin and socio-economic status are set to further cement their role as the single biggest determinant of opportunity and advantage.

Social origin/class

Even though socio-economic status is the commonest underpinning of inequality, human rights laws generally, including the ADA and other anti-discrimination instruments, often ignore and thus reinforce the impact of socio-economic status on people's lives. An under-utilised exception under Australian law exists in the FWA which protects the attribute of 'social origin', reflecting the international law position on the impact of class in the workforce, and the desirability of promoting class mobility.

It would be appropriate to protect social origin in Queensland too; it would be of particular benefit when combined with a change to include better coverage for intersectionality. This would reflect the real gaps that develop within a group of people with another shared attribute as some of that group gain improved access to opportunities and advantages while others are left behind.

Although discrimination on the basis of social origin is recognised in employment and pre-employment it often goes under the radar in education, especially as a basis for indirect discrimination. Children from low socio-economic backgrounds are frequently disadvantaged by requirements more readily complied with by children from more privileged homes, notably around access to domestic resources such as tech and internet connection which are needed to properly complete school work. In the ongoing pandemic context, many children from poorer homes struggled to find a quiet place to work let alone access support from a parent with the time and capacity to take on the role of a home-teacher.

Socio-economic status is also dangerously under-recognised in policing in terms of both over-policing people with low socio-economic status for particular offences such as street offences and nuisance; and under-policing when those same people are victims of other offences including domestic and family violence, and sexual violence.

Including social origin and low socio-economic status, expansively defined to encompass housing status, employment status and other common features, as protected attributes would also encourage consideration of poverty and privilege in the provision of state laws and programs more generally including access to public transport, funding for schools, and in decisions about the targeting of health resources.

Aboriginal and Torres Strait Islander peoples

While we recognise that the ADA can only do so much in the absence of a treaty developed via a proper treaty making process, we believe there is more it could do to support substantive justice for Aboriginal and Torres Strait Islander peoples in Queensland.

Currently Aboriginal and Torres Strait Islander people are protected in the ADA only by virtue of the broader protections for race. There are a range of barriers in the existing law to properly recognising the distinct historical and ongoing circumstances of First Nations peoples. One of these is the challenge of the comparator, which we recommend be removed, and the difficulty it has grappling with history, trauma, racism and colonisation.

The ADA should follow the example of the HRA and provide additional, more thoroughly articulated, protections for Aboriginal and Torres Strait Islander peoples as a separate attribute, on top of the protections that exist for people of all races. Such protections must explicitly recognise the unique history, as well as rights and ambitions of First Nations individuals and communities.

Other attributes as may emerge in the future

If the ADA is more grounded in a human rights framework, it would be possible to include a provision by which a decision maker could find discrimination on the basis of an emerging attribute not anticipated at the time the law is written. Building in a mechanism for evolution would ensure that the new ADA stays current well into the future and can respond to social fault lines and movements that we do not presently anticipate. There would need to be a robust framework for establishing systemic or historical disadvantage before an attribute gained acceptance, so that the evolution of the law responds only to the demands of equality, not privilege.

> **<u>40 General exemptions – sport:</u> Should the sport exemption be retained, amended, or repealed? Should competitive sporting activity be more clearly defined? Is strength, stamina or physique the appropriate consideration when restricting access to competitive sporting activity based on sex, gender identity, and sex characteristics? If not, what would be an alternative test to ensure fairness and inclusion in sporting activities?**

The sports exemption is a real source of difficulty for people in the community even at the social level where it does not technically apply. It is out of date and needs substantial reform. It serves to curtail perceived advantage in an area of life in which gender diverse people can sometimes thrive; and conversely 'protects' other women by excluding them against their wishes from activities they love and are good at. If we aim to achieve substantive equality we should not cap the heights to which an individual might rise. The law should encourage the fullest expression of potential including accessing and exercising what individual advantages and passions a person may possess. Restraining this is especially odd when one considers how sport works. Sporting competition seeks out, cultivates and elevates talent. Removing people from the talent pool on discriminatory grounds simply serves to elevate those whose advantages in life go unquestioned.

In any event, rarely is there reliable evidence produced to identity an actual advantage or fragility that might objectively justify the discrimination; usually the discrimination occurs because of underlying prejudice and stigma, or because of mere perception of advantage or fragility based on appearance (usually size).

We believe the sports exemption should be repealed. If it is retained, it should be substantially narrowed. It should require those proposing to use it to produce real evidence and should only be accessible upon application to the tribunal. We note that we do continue to support special measures in the area of sport to advance the interests of athletes from protected groups such as athletes with disabilities and women.

<u>41 General exemptions – religious bodies:</u> Should the scope of the religious bodies' exemption be retained or changed? In what areas should exemptions for religious bodies apply, and in relation to which attributes?

AND

42 Should religious bodies be permitted to discriminate when providing services on behalf of the state such as aged care, child and adoption services, social services, accommodation and health services?

AND

43 Should religious bodies be permitted to discriminate when providing accommodation on a commercial basis including holiday, residential and business premises

AND

<u>44 Work exemptions – religious education institutions:</u> Should the religious educational institutions and other bodies exemption be retained, changed, or repealed? If retained, how should the exemption be framed, and should further attributes be removed from the scope (currently it does not apply to age, race, or impairment)?

As a matter of principle, we support and respect the need to engage people of faith in important spiritual roles within a religious institution. We also recognise that, like many NGOs, when faith-based institutions do the work of government they often do so at a lower cost, drawing on the altruistic motivations of lower paid staff and volunteers who contribute to the mission of the institution through the work that it does. If government wishes to continue to access the cost-efficient service provision these charities provide, some recognition of this in terms of the recruitment process for employees is reasonable and justified. We also understand that faith communities are communities, and some of their activities are targeted internally in a way that is supportive and appropriate to the faith needs of community members. Religious exemptions confined to these core needs are appropriate.

More troubling however is that some religious institutions seek to consider discriminatory criteria other than faith in recruitment, impose discriminatory standards on ongoing employees, or use the essential services they deliver to impose discriminatory requirements on those people who use or access the services.

We believe it is reasonable to seek to recruit staff who have a common or compatible faith with the institutional employer. Attributes other than faith should still be irrelevant in recruitment, including gender, sexuality, race, age, disability etc. Consideration of faith is only appropriate in the pre-work area. If a candidate of a different or no religion is selected for a role, they must be treated with the same respect afforded other employees once they are engaged. We are particularly concerned about the treatment of employees on the basis of their sexuality, sexual activity or gender diversity. The current exemption that contributes to the way they are treated within their workplaces must be repealed.

No unlawful discrimination is appropriate in the delivery of non-faith services, especially those delivered:

1. on behalf of the government or with government funding
2. to the general public
3. in an emergency or crisis situation

4. when it is the most appropriate service for a person and they have limited choice to access other comparable services
5. to people for whom which the decision about enrolment, attendance or residence etc is made by a third party on behalf of the person, or
6. commercially.

These include all disability services, aged care, medical services, community transport, education, emergency services during or after a natural disaster etc. Any access criteria for services of these types must reflect a defensible policy ground for a public entity providing that particular type of service. This is consistent with a human rights approach. It is also consistent with community expectations around equal access to services, especially when those services are funded, even partly, by state money.

45 Work exemptions – working with children: Are there reasons why the work with children exemption should not be repealed?

AND

46 Goods and services exemption – assisted reproductive technology: Are there reasons why the Act should not apply to provision of assisted reproductive technology services?

None, these exemptions are based entirely on prejudice and stigma and should be repealed.

47 Accommodation exemption – sex workers: Should the sex worker accommodation exemption be retained, changed or repealed?

Repealed. It reinforces the stigma of sex work and forces sex workers into unsafe practices and circumstances. We support and endorse the submission of Respect Inc in this regard.

50 Superannuation and insurance: Should the insurance and superannuation exemptions be retained or changed?

A large number of people who experience mental illness fear and avoid diagnosis because of the potential impact on their access to insurance in the future. While diagnosis is not always essential to access treatment, it is necessary to access Medicare subsidies to reduce the cost of that treatment. In practice this means that some people pay for care they could otherwise receive for free. Others avoid care altogether. Fear of diagnosis also fuels the secrecy and stigma that continue to plague people with mental illness in many other areas of their lives.

Perversely a person who has never sought help for their mental illness is more insurable and will receive a cheaper premium than someone whose illness is treated and managed.

Insurers also appear to treat all mental illnesses as a single risk factor, with no distinction made between minor and major functional impact. It is also unclear whether insurers ever consider a person recovered which means that a period of illness may affect access to insurance well beyond the likelihood of actual relapse. We say ‘appear’ because actuarial data, while required, is rarely disclosed. This is significant particularly with rising rates of anxiety and record levels of prescribing of anti-depressant medication.

We understand from the submission of Respect Inc that the same sorts of issues affect sex workers, where stigma associated with their attribute affects insurance availability and cost without any rational basis in actuarial evidence.

If any exemption should remain for insurance, it should be by application to the tribunal only. Within the application for an exemption, insurers should be required to publicly disclose their risk assessment process for people with the relevant attribute, and the evidence that supports their process. A collateral benefit of requiring exemptions to be formally sought in this instance would be that people would then be better placed to know which insurers they can trust with their personal information, and any relevant regulator would be able to quickly identify problematic companies.

Areas of Activity

> **52 Goods and services: Should the definition of goods and services that excludes non-profit goods and service providers be retained or changed? Should any goods and services providers be exempt from discrimination, and if so, what should the appropriate threshold be?**

Non-profit goods and service providers are part of day to day life for many people. Included in this category are most community sport organisations and many social clubs and pubs. Engaging with community organisations is a key way in which social inclusion can be achieved for people from a variety of backgrounds. In practice we have seen high levels of discrimination occurring in not for profits (including race, age and sex discrimination) and it is difficult to justify the ongoing exclusion that protects them from the consequences of that conduct.

> **53 Club memberships and affairs: How should the Act define a 'club'? How would this interact with a potential further 'sport' area of activity?**
>
> **AND**
>
> **54 Sport: Should a separate area of activity for sport be created? What are examples of where the sport area would cover situations not already covered in other areas? What exemptions should apply (if any) to sport if, it were to become a new protected area of activity?**

Community clubs established as a special measure to advance the interests of protected groups are an important part of the equity landscape and ought to continue to have their special role protected.

Other community clubs established for the benefit of the community generally, including sports clubs, should be required to comply with the ADA just as they are required to deal with many other regulatory and governance frameworks. Determining inclusion or otherwise in a community club, including sports clubs, should only be on a defensible policy basis considering the proper human rights framework for limiting rights where that is objectively justified. For example, sports clubs which filter by ability must have a non-discriminatory framework by which ability is assessed so that those who wish to participate but do not achieve the objective standard can be excluded only on that justifiable basis.

Human Rights Analysis

> **56 Are any provisions in the Anti-Discrimination Act incompatible with human rights? Are there any restrictions on rights that cannot be justified because they are unreasonable, unnecessary or disproportionate? Where rights are being limited to meet a legitimate purpose, are there any less restrictive and reasonably available ways to achieve that purpose?**

Yes, a number of the provisions that we recommend be repealed in the answers above are not compatible with human rights because they are unreasonable, unnecessary and limit rights for no, or

insufficient, legitimate purpose. These include most of the exemptions we have addressed at length in this submission, as well as the provisions within Corrective Services Act.

In our view many of the structural features of the ADA are also not compatible with human rights because they limit rights over and above what is proportionate and justified. This includes the definitions of both direct and indirect discrimination which import rights-limiting mechanisms such as the comparator and the concept of unjustifiable hardship which do not exist in a fully realised human rights framework.

Authors and thanks

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Thank you for considering our submission and we continue to welcome any opportunity to provide further input in the review process.

Yours faithfully

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