

Review of Queensland's Anti-Discrimination Act

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James Cook University (JCU) welcomes the opportunity to provide comment to the Review of the *Anti-Discrimination Act 1991* (Qld). JCU will respond below directly to certain questions relevant to the University which have been raised in the Queensland Human Rights Commission 'Review of Queensland's Anti-Discrimination Act' Discussion Paper (November 2021).

Unjustifiable Hardship and Reasonable Accommodations

(Discussion Paper Question 5 and 6)

JCU submits that the exemption of unjustifiable hardship relating to the supply of special services or facilities should be retained as it currently is. If it were to become a positive duty on organisations to implement special services and facilities, then it would result in a significant and unreasonable burden on organisations and unjustifiable hardship. As is, JCU already receives a high volume of requests for assistance to cater for individuals needs. That is why JCU has dedicated team (within the Workplace Health and Safety unit for staff, and the AccessAbility unit for students) who assist with requests for special services. In most instances JCU is accommodating of their requests. However, there are instances where the requests are not feasible to implement and, if forced to implement, would place an unreasonable burden and unjustifiable hardship on any organisation, large or small, who is required to do so.

Onus and Standard of Proof

(Discussion Paper Question 8)

JCU submits that the current provisions for the onus of proof are sufficient, and the burden should remain with the complainant. If the onus were to shift to the respondent to prove that the complaint did not occur, then there is a high potential for it to result in unreasonably significant time and monetary burdens on organisations to defend all complaints, even those which are vexatious or misconceived. JCU submits that the standard of proof on a complainant, being balance of probabilities, is reasonable and sufficient and should not be decreased as it will result in the same burdens on organisations as previously mentioned.

Sexual Harassment

(Discussion Paper Question 9)

The *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* means that the Sex Discrimination Act now applies to state employees, and that harassment on the grounds of sex is now expressly prohibited, as well as Stop Sexual Harassment orders being available under the Fair Work Act.

JCU submits that it would be consistent for the Anti-Discrimination Act to also explicitly prohibit sex-based harassment. Creating an intimidating hostile, humiliating, or offensive environment on the basis of sex, should be introduced in alignment with any introduced Commonwealth provisions, in the same areas of activity, noting the Commonwealth is currently consulting on this provision.

Direct Right of Access to Courts and Tribunals

(Discussion Paper Question 10)

JCU submits that it is not appropriate to allow for a direct right of access to Courts and Tribunals. The compulsory conciliation conferences provide for an informal, affordable, and easier to access method of discussing and resolving complaints, which is beneficial to both the complainant and respondent. JCU is of the opinion that if there is direct access, the Courts and Tribunals will become overwhelmed with matters, including those that contain vexatious or misconceived claims, which may have otherwise been filtered out or resolved through the current 'two-stage enforcement model'. By removing the current model, JCU submits that the process would become increasingly and unnecessarily burdensome on all parties involved due to factors such as time, cost, stress and public exposure.

Non-Written Complaints

(Discussion Paper Question 12)

JCU submits that it would be supportive of a change to allow non-written complaints from complainants who are unable to place their complaint in writing, but that these audio or video recordings would need formal transcription. This option would be preferred over the option of allowing the Commission to assist complainants with putting their complaints in writing. If that were to occur, then limitations would need to be placed on the level or type of assistance that is provided by the Commission to give confidence to the respondents that the contents of the claim are accurate, come directly from the complainant and are not influenced by another party, creating a conflict of interest.

Complaints Process and Time Limitations

(Discussion Paper Question 13 & 14)

JCU submits that the current provisions with regards to timeframes should not be repealed. Whilst the timeframes may be strict, it ensures matters continue to progress and are not unnecessarily delayed or prolonged. Perhaps, if the Commission is of the opinion that resolution may be available through an informal discussion or shuttle negotiation, then it might be appropriate for them to intervene and suggest such a method, instead of the compulsory conciliation. JCU further submits that the current 1-year timeframe in which a complaint can be lodged is appropriate and reasonable and should not be increased for any complainant, noting that there is already a reasonable process available for out of time complainants.

Organisation complaints

(Discussion Paper Questions 16)

JCU submits that representative bodies and trade unions should not be able to make complaints on behalf of affected people as this circumvents existing processes.

Special Measures

(Discussion Paper Question 20)

Special measures are in place to enable positive action to address discrimination faced by particular groups, and the Anti-Discrimination Act frames these as exemptions (that is, instances when it is appropriate to discriminate against particular groups). JCU submits that the welfare and equal opportunity measures should be retained and that the current special measures provisions should continue to be an exemption to discrimination.

This is clearer than the Human Rights Act (Section 15.5) that says special measures are not actually discrimination. The language used in the Human Rights Act frames 'discrimination' as always negative. However, some people who are discriminated against are not disadvantaged by that discrimination. For example, discriminating against men by not allowing them to apply for a position that has been identified as needing to be filled by a woman (in order to address a disadvantage women face) is appropriate.

Positive Duty & Role for the Human Rights Commission

(Discussion Paper Question 21 & 22)

JCU submits that it does not support increasing the Queensland Human Rights Commission role in regulation and enforcement, rather the Commission should continue as it currently is. There are risks in further concentrating the promotion and protection of Human Rights at State level in a single body, rather Government departments and agencies needing to broadly enact existing Human Rights, Anti-Discrimination, Workplace Health and Safety, and Fair Work legislation, and ensure service delivery complies. Private, and non-government organisations are able to, and do, promote human rights and can work with Government, as well as peak and industry bodies to collectively meet obligations. Additionally, while it is useful to have sensible alignment between Commonwealth and State legislation, it is not helpful to have unnecessary duplication of regulation.

Definitions of Protected Attributes

(Discussion Paper Questions 26, 27 and 29)

JCU submits that it is important that legislation across Queensland (and Australia) moves towards consistent and coherent definitions of sex, gender identity, and sexuality/sexual orientation. The interchangeable way that the terms and concepts of 'gender' and 'sex' are used in legislation and practice conflates distinct categories. The protected attribute of 'sex' is important to meet obligations under Convention on the Elimination of All Forms of Discrimination Against Women. Protections based on 'gender identity' need to be in addition to, not instead of, 'sex'.

Gender

The term 'gender' is operationalised in multiple ways, and it would be difficult to define a meaning limited to one context without conceptual slippage. This limits any potential for 'gender' to be a coherent stand-alone protected attribute.

Gender Identity

The Anti-Discrimination Act defines 'gender identity' to mean, "that the person a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or b) is of indeterminate sex and seeks to live as a member of a particular sex". This definition covers trans and intersex people but does not address the way that some people now identify with various gender-related identities including 'non-binary'.

The definition of 'gender identity' in the amendments to the Public Health Act 2021 differs to the definition used in the Anti-Discrimination Act. The Public Health Act states that 'gender identity' includes a personal sense of body, modification of the body, name, dress, speech, and behaviour. It comprises personal beliefs and activities that can be held regardless of the sex of the person holding them.

If the 'gender identity' attribute in the Anti-Discrimination Act is changed to be more expansive, along the lines of its use in the Public Health Act, it would be more accurate to call the attribute "Gender beliefs and activities". It is likely that definitions used in both the Anti-Discrimination Act and the Public Health Act need to be adjusted, or other measures taken, to enable clear distinctions to be maintained between the protected attribute of 'sex' and the protected attribute of 'gender identity' to ensure that competing rights claims can be navigated.

Ensuring people are protected from discrimination based on their personal beliefs and expressions or activities (whether 'gender identity' is gender conforming or non-conforming) is important but may need to be qualified or precluded where the provision of single-sex services or programs are required for privacy, safety and equity reasons. Definitions of attributes need to support these distinctions.

Sexuality/Sexual Orientation

The current definition of sexuality as "heterosexuality, homosexuality or bisexuality" in the Anti-Discrimination Act acknowledges that sexuality is based on sex, not gender. Substituting the word 'gender' for 'sex' in the definition of sexual orientation, as occurred in the recent amendments to the Public Health Act, impacts negatively on lesbian women and gay men to define themselves, and be defined, as same-sex attracted.

Sex Characteristics

Intersex variations of sex characteristics are not 'gender identities' and should be a separately protected attribute specifically for people with differences or disorders of sexual development. The Yogyakarta definition of 'sex characteristics' is too general and fails to capture the specificity of the group of people who should be protected by this attribute.

Employment Activity

(Discussion Paper Questions 33)

JCU submits that an additional attribute of employment activity would create unnecessary duplication of the Fair Work Act Provisions (Adverse Actions).