Review of Queensland's *Anti-Discrimination Act 1991*

Submission by Legal Aid Queensland

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Introduction

Legal Aid Queensland (**LAQ**) welcomes the opportunity to make this submission to the Queensland Human Rights Commission's (**QHRC**'s) Review of the *Anti-Discrimination Act 1991* (Qld) (the **Act**).

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997* (Qld), LAQ is established for the purpose of 'giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way' and is required to give this 'legal assistance at a reasonable cost to the community and on an equitable basis throughout the state'. Consistent with these statutory objectives, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and based on the extensive experience of LAQ in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Civil Justice Services lawyers have extensive experience providing specialist advice and representation to complainants in discrimination and sexual harassment matters under both State and Commonwealth legislation.

LAQ's Civil Justice Services are available for complainants only. LAQ does not provide advice, assistance or representation to respondents in these types of matters.

Accordingly, this submission is informed by our knowledge and experience working with complainants in discrimination and sexual harassment matters, and is intended to address those matters being considered by the Review that are relevant to our practice.

Executive Summary

LAQ recommends:

1. Amending the Act to:
    a. update the preamble to reflect current international human rights instruments;
    b. confirm that direct and indirect discrimination are not mutually exclusive;
    c. remove the comparator from the definition of direct discrimination under s 10;
    d. adopt the 'disadvantage' approach from the Australian Capital Territory (ACT) in the definition of indirect discrimination under s 11;

e. shift the onus of proof to the respondent once the complainant has demonstrated a prima facie complaint of discrimination, and remove the *Briginshaw* test;

f. introduce a questionnaire/response process at the QHRC complaint stage;

g. recognise intersectionality under s 8 'Meaning of discrimination';

h. add the words 'in the presence of a person' to the definition of sexual harassment;

i. introduce a further contravention of gender-based harassment;

j. introduce positive duties;

k. update the definition of the following attributes:

    i. impairment (including aligning the protections for assistance animals with the *Disability Discrimination Act 1992* (Cth));

    ii. gender identity and sexuality; and

    iii. 'lawful sexual activity',

l. add the following protected attributes:

    i. criminal history;

    ii. irrelevant medical record;

    iii. immigration status (and also remove the citizenship/visa status exemption);

    iv. employment activity;

    v. physical features (including sex characteristics);

    vi. subjection to domestic or family violence;

    vii. accommodation status; and

    viii. low socio-economic status,

m. remove the exemptions/exclusions for:

    i. work with children;

    ii. assisted reproductive technology services;

    iii. sex worker accommodation;

    iv. publicly funded religious bodies/employers;

    v. non-profit service providers; and

    vi. non-profit clubs and associations,

n. clarify other exemptions/exclusions as follows:

i. collapse the welfare measures/equal opportunity measures into a single special measures provision;

ii. narrow the scope of the sport exemption;

iii. remove the exemption under s 75 for insurance/superannuation (where no actuarial or statistical data is available); and

iv. clarify that the "acts authorised under another law" exemption under s 106 only applies to the extent that there were no non-discriminatory options that were reasonably available,

o. change the 'complaint-based' terminology to a more appropriate term such as 'dispute';

p. increase the time limit for making complaints to the QHRC to 2 years, and allow additional time for children or persons with impaired decision-making capacity;

q. allow representative bodies/organisations to bring complaints about contraventions of the Act on behalf of affected persons;

r. remove the requirement for the QHRC to accept complaints and arrange conciliation within 28 days;

s. allow for complaints to be escalated by the QHRC in exceptional circumstances;

t. extend the timeframe for referral of unconciliable complaints to a Tribunal to 60 days;

u. include a direct right of access to a Tribunal in special circumstances;

v. remove the ability for out-of-time complaints to be subject to further scrutiny by a Tribunal under s 175 once accepted by the QHRC;

w. allow representative complaints to be commenced in either the Supreme Court or a Tribunal, and provide a clear framework for commencing and managing representative actions brought under the Act; and

x. broaden the types of orders that can be made by a Tribunal under s 144.

2. Amending other legislation, specifically:

a. updating equivalent provisions in the *Industrial Relations Act 2016* (Qld) to provide the QIRC with the same powers as QCAT in relation to complaints commenced under the Act;

b. removing additional requirements for prisoner complaints under the *Corrective Services Act 2006* (Qld) and redesign the complaint process/independent monitoring role in line with the Optional Protocol to the Convention against Torture (OPCAT);

c. in proceedings brought under the Act, remove the capacity for the public trustee to charge fees to sanction payments made for persons under a legal disability under the *Public Trustee Act 1978* (Qld) and also the administration of victim trust funds for prisoners under the *Corrective Services Act 2006* (Qld).

3. Redesign the functions of the QHRC, in particular:

    a. reconsider the 'gatekeeper' role and whether current approaches are aligned with human rights considerations and administrative law best practice;

    b. accept complaints for assessment by way of telephone, statements made in person, and exploring other options for receiving complaints (e.g. utillising chatbot technology, training community groups to compile complaints);

    c. where parties are legally represented:

        i. remove the pre-conciliation telephone call; and

        ii. remove a conciliator's ongoing involvement in post-conciliation negotiations,

    d. adopt a triage process to provide short form conciliations or interventions for less serious complaints;

    e. use the QHRC's existing investigative powers and ability to bring proceedings to enhance efficiency and adopt a more regulatory role (including whether additional powers or restructuring of the entity is needed for this purpose); and

    f. mandate data collection and sharing across the QHRC, QPS and Tribunal,

4. Create an independent specialist Tribunal list within QCAT to hear and decide discrimination and sexual harassment cases and mandate publication of all decisions; and

5. Provide additional funding to LAQ, Community Legal Centres (**CLCs**) and community groups/representative bodies/organisations to assist complainants to bring complaints under the Act.

Key Concepts

Meaning of Discrimination

Discussion question 1:

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

Recommendations:

- **Yes, the Act should clarify that direct and indirect discrimination are not mutually exclusive**

- **We support the creation of a specialist Tribunal list with members who are trained to recognise systemic discrimination**

As is noted in the Discussion paper, the distinction between direct and indirect discrimination can be conceptually challenging, and requires complaints to be framed in a manner that fit neatly into one of those categories.

Not only is this difficult for self-represented persons to understand and articulate[1], but legal representatives will disagree on how conduct should be characterised (and often this ends up being the subject of protracted debate before the Tribunal). At present, there is even a divergence in the approach taken by the High Court and the Tribunal on this point.[2]

This distinction is artificial and adds another unnecessary layer of complexity to the already difficult task of proving discrimination. The reality is that instances of discrimination are often multi-faceted. Complaints will not always fit into one category exclusively. In practice, we see many circumstances where the facts of a complaint could be characterised as both direct and indirect discrimination.

CASE STUDY[3]

In January 2022, Citipointe Christian College in Brisbane sent a "Contract of Enrolment" to the parents of students, which included a 'Declaration of Faith'.

The 'Declaration of Faith' contained the following statements:

- *'We hold that the biblical and church's historical belief that a family begins with the covenantal institution and holy estate of marriage as ordained by God between a biological man (husband) and a biological woman (wife)'*
- *'We believe that God intends sexual intimacy to occur only between a man and a woman who are married to each other. We believe that God has commanded that no sexual activity be engaged in outside such marriage'*
- *'We believe that any form of sexual immorality (including but not limited to: adultery, fornication, homosexual acts, bisexual acts, bestiality, incest, paedophilia, and pornography) is sinful and offensive to God and is destructive to human relationships and society'*
- *'We believe that God created human beings as male or female'*
- *'The Bible ties gender identity to biological sex and does not make a distinction between male or female. By creating each person, God, in His divine love and wisdom, gifted them their gender, as male or female. God's good design and purpose is that each individual should live in the fullness of that which He created them to be, in obedience to Him as an*

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[1] For example, in *Paris v Cairns Bed & Bar Pty Limited* [2021] QCAT 147 where the complainant was self-represented, the Member noted: 'Earlier in the course of the proceeding, the tribunal had directed Mr Paris to identify in a statement of contentions whether his complaint is of direct or indirect discrimination, and if it is of indirect discrimination, the relevant term. Mr Paris did not do so, but I am satisfied that this was because he did not understand what was expected.' In *State of Queensland v Mahommed* [2007] QSC 018, the State unsuccessfully attempted to argue that the failure of an unrepresented prisoner to precisely characterise their complaint was a breach of procedural fairness (see discussion at [19]-[38]).
[2] *Waters v Public Transport Corporation* (1992) 173 CLR 349; [1991] HCA 49; *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249 (under appeal).
[3] See 'Brisbane's Citipointe Christian College principal gives parents two-week extension to sign enrolment contract', *ABC News* (Web Page, 2 February 2022) <https://www.abc.net.au/news/2022-02-02/qld-citipointe-college-contract-principal-parent-extension/100798304>; Ben Smee, 'Queensland school requires families to denounce homosexuality during enrolment', *The Guardian* (online, 31 January 2022) <https://www.theguardian.com/australia-news/2022/jan/31/offensive-to-god-queensland-school-requires-families-to-denounce-homosexuality-during-enrolment>.

act of worship. Living in this fullness includes identifying with the gender that God bestowed upon each person in all aspects of their life'

This is an example of conduct that amounts to both direct and indirect discrimination, on the basis of sexuality, gender identity and sex.

This should be obvious on the face of the complaint and should not require detailed arguments to be made about how best to 'characterise' the type of discrimination.

Recognising that some conduct has the capacity to be both directly and indirectly discriminatory would also provide the Tribunal with a better opportunity to identify where there has been wrongdoing on both the individual and systemic level, and grant remedies that are capable of providing some level of individual redress while also addressing problems that exist on a broader scale. This would improve the ability for the Act to recognise and respond to discrimination in all of its forms.

We recommend that the Act be amended to clarify that direct and indirect discrimination are not mutually exclusive. We also suggest that this approach would be supported by the creation of a specialist Tribunal list with members who have expertise in recognising systemic discrimination.

Direct Discrimination

Discussion question 2:

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

Recommendation:

- **The test for direct discrimination should be changed by removing the comparator and adopting the 'unfavourable treatment' approach from the *Equal Opportunity Act 2010* (Vic)**

Section 10 of the Act requires the complainant to show that they have been treated "less favourably" by drawing a comparison with the treatment of a person without their attribute, in circumstances that are the same or not materially different.

The person who is identified for the purpose of making this comparison is known as the "comparator".

A comparator can be a real person if the facts of the case permit. Otherwise the complainant may construct a hypothetical person as the 'comparator' and discuss how that person would have been treated in the same or similar circumstances.

The process of identifying a comparator is often a helpful tool that can be used to illustrate direct discrimination. In some cases though, due to intersectionality or complicated factual circumstances, it may

be practically impossible to identify or construct an appropriate comparator - particularly as there is no clear guidance on how to identify a comparator for this purpose.[4]

At present, the comparator must be identified as one of the elements of proving direct discrimination under s 10 of the Act. In our view, this need to discuss a comparator can become an artificial exercise that distracts from the real task of recognising when discrimination has occurred.

In addition, we note that the concept of the 'comparator' may be difficult for self-represented complainants to grapple with.[5] When legal representatives are involved, the issue of identifying the appropriate comparator usually becomes a point of contention.

In particular, it can be difficult to disentangle the 'characteristics' of the complainant's attribute from the surrounding context in which the treatment occurs. This means that disputes may arise about the extent to which the comparator can be viewed in the 'same or not materially different' circumstances as the complainant.[6] In this respect, the Tribunal has adopted a different approach under the Act[7] to the narrower approach taken by the High Court under the *Disability Discrimination Act 1992* (Cth).[8] Despite *Woodforth v State of Queensland*[9] confirming that the characteristics of a person's attribute do not form part of the same or similar circumstances in which the comparator is viewed, the point continues to be laboured in proceedings before the Tribunal.[10]

The current wording of the Act replicates the old definition of direct discrimination in Victoria under s 8 of the *Equal Opportunity Act 1995*. After the High Court's decision in *Purvis v State of New South Wales (Department of Education and Training)*,[11] the Victorian legislation was amended to change the definition from 'less favourable' to 'unfavourable' treatment with the express intention of removing the comparator requirement.[12] This adopted the wording that was already in use in the ACT *Discrimination Act 1991 (ACT)*.[13] As Allen has noted, feedback from stakeholders in Victoria is that the removal of the comparator requirement under the Victorian legislation has resulted in a 'clearer test' and a 'more accessible definition', simplified the process for both complainants and respondents, and improved the ability for complainants to prove direct discrimination.[14]

We recommend that Queensland follow those other jurisdictions and amend s 10 by removing the term 'less favourable' and substituting 'unfavourable' (i.e. removing the comparator as an element of direct discrimination).

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[4] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773, 779.
[5] See, for example, *Isles v State of Queensland* [2021] QCAT 135, [10]-[15].
[6] See, for example, *Given v State of Queensland (Queensland Police Service)* [2019] QCAT 16, [48], [59]-[65].
[7] *Woodforth v State of Queensland* [2018] 1 Qd R 289; [2017] QCA 100.
[8] *Purvis v State of New South Wales (Department of Education and Training)* (2003) 217 CLR 92.
[9] [2018] 1 Qd R 289; [2017] QCA 100.
[10] See, for example, *BB v State of Queensland & Ors* [2020] QCAT 496; *Vale v State of Queensland & Ors* [2019] QCAT 290, [43]-[54]; *Jackson v Ocean Blue Queensland Pty Ltd & Ors* [2020] QCAT 23, [44].
[11] (2003) 217 CLR 92.
[12] See *Equal Opportunity Act 2010* (Vic) s 8.
[13] *Discrimination Act 1991* (ACT) s 8(2).
[14] Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the Equal Opportunity Act 2010 (Vic)' (2021) 44(2) *Melbourne University Law Review* 459.

Indirect Discrimination

Discussion question 3:

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

Recommendation:

- **The 'disadvantage' approach be adopted in accordance with the *Discrimination Act 1991* (ACT)**
- **'Failure to make reasonable adjustments' should also be provided as an example of indirect discrimination**

Section 11 of the Act requires the complainant to establish two of the three elements of indirect discrimination. The requirement to prove the second element 'with which a higher proportion of people without the attribute comply or are unable to comply' involves a proportionality test.

In practice we find that it is difficult for complainants to meet the evidentiary requirements of the proportionality test, as they simply may not have access to this information, and/or be unable to establish that a higher proportion of people comply or would be able to comply with a term.

For example, this commonly occurs where a person who is returning to work after parental leave or after an injury and their employer has placed a term that all employees are required to work 8am – 5pm and in the office. Complainants usually do not have evidence to support how others are able to comply with the term, for example due to differences in workload, capacities and duties. This affects the ability of persons with the attributes of parental status, family responsibilities and/or impairment to establish an indirect discrimination complaint.

The proportionality test can be also difficult for complainants to establish as statistical evidence may be necessary to show that one group of people would be able to comply with a term, which complainants may find difficult to access, and becomes a barrier to proving indirect discrimination.[15] For example, where a person has unique cultural practices that are connected to their race, it may be difficult to articulate how difficult it would be for them to comply with terms which go against those cultural practices without obtaining the evidence of elders, anthropologists or other experts.[16] Understandably it will be harder for persons from minority backgrounds to explain those concepts to respondents or decision-makers at the QHRC and Tribunal level who do not have that cultural understanding.

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[15] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 153-154 [3.8.34].
[16] *Taniela v Australian Christian College Moreton Ltd* [2020] WCAT 249 (under appeal). See also Lillian Burgess, Suvradip Maitra and Giulia Marrama, 'Towards Movement Lawyering: An Old Ethos for Modern Indigenous Sovereignty' (Annual Essay Prize Winner, Australian Academy of Law, 2021) which discusses the decision in *Northern Territory v Griffiths* (2019) 93 ALJR 327 (the 'Timber Creek' Native Title case) as demonstrating 'the innate difficulty in "quantifying" the "gut wrenching" pain associated with cultural and spiritual loss'; Case Study on pp 30-32 of these submissions.

The proportionality test has been removed under the *Equal Opportunity Act 2010* (Vic) and *Sex Discrimination 1984* (Cth) when it was amended in 1995. The removal of the proportionality test would align Queensland with equivalent legislation in ACT, Tasmania, Victoria and the *Sex Discrimination Act 1984* (Cth) and *Age Discrimination Act 2004* (Cth).

LAQ recommends that the 'disadvantage' approach be adopted as it simplifies the test for indirect discrimination which removes a complex and prohibitive barrier that is the proportionality test.

'Disadvantage' should be given a broad meaning in line with the Act's preamble, any 'objects' clause (should one be introduced) and also the interpretation provision under s 48 of the *Human Rights Act 2019* (Qld).

While the 'disadvantage' approach is favoured, LAQ prefers the wording in the *Discrimination Act 1991* (ACT) rather than the *Equal Opportunity Act 2010* (Vic) because the ACT legislation does not require a class of persons to be disadvantaged by the requirement.[17] This is necessary to recognise that two persons with the same attribute may not suffer the same disadvantage.

Unified Test

Discussion question 4:

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

Recommendation:

- **LAQ does not support a unified test**

We are not aware of compelling reasons in support of a unified test.

In addition, adopting a unified test would create confusion by breaking with the approach in all other Australian jurisdictions.

We suggest that amending the Act to confirm that discrimination can be both direct and indirect (not mutually exclusive) and removing the comparator will provide similar coverage to a unified test, while maintaining uniformity with the legislation in other Australian jurisdictions.

[17] Under section 9 of the *Equal Opportunity Act 2010* (Vic) 'indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging persons with an attribute; and that is not reasonable.' Due to 'persons' being plural, this has had the effect of requiring that a class of persons is disadvantaged by the requirement, not just an individual. In practice, this has had the effect of complainants needing to prove that the requirement disadvantaged persons with their disability. In *Petrou v Bupa Aged Care Australia Ltd* [2017] VCAT 1706 [102]-[103], Harbison J considered if the *Equal Opportunity Act 2010* (Vic) required the complainant to also consider whether the requirement generally disadvantaged persons with the same attribute, being multi sclerosis, as her. She found: '*Although the comparator principle is no longer part of the definition of indirect discrimination in Victoria, I take the view that it is still necessary for any complainant to prove that the requirement has, or is likely to have, the effect of disadvantaging persons with an attribute…This is because the Act says so. That use of the plural 'persons' is important. The form of words is 'the effect of disadvantaging persons with an attribute' … I take the fact that this section is not cast in individual terms but is instead cast in terms of identifying a group of persons with an attribute who are or are likely to be disadvantaged by the requirement, to be an essential feature of the claim of indirect discrimination.*' Accordingly, the complainant was required to prove that bed poles disadvantaged persons with multiple sclerosis, not just her as an individual. This decision does not reflect that a person who has a disability may experience their disability differently to another person who has the same disability.

Unjustifiable hardship and reasonable accommodations

Special Services or Facilities/ Reframing to a Positive Obligation & Reasonable Accommodations Beyond Disability

Discussion question 5:

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

Recommendation:

- **The unjustifiable hardship exemption should be retained as a general exemption to discrimination**
- **The factors relevant to determining unjustifiable hardship should place less emphasis on financial cost, and have regard to broader public interest considerations as in the Victorian legislation**
- **The 'unjustifiable hardship' exemption should operate in conjunction with a positive duty to make reasonable adjustments – this involves balancing relevant factors on a case by case basis which will allow for appropriate consideration of compliance costs for businesses and organisations**
- **If a respondent is seeking to rely on the 'unjustifiable hardship' exemption or argue that adjustments were not reasonable, the Act should compel disclosure by the respondent of financial documentation regarding the proposed cost of special services and facilities/adjustments or other relevant information *prior* to QHRC conciliation**

Discussion question 6:

- *Should the Act adopt a positive duty to make 'reasonable adjustments' or 'reasonable accommodations'?*
- *If you consider that this approach should be adopted:*
    - *Should this be a standalone duty?*
    - *What factors should be considered when assessing 'reasonableness' of accommodations?*
    - *Should it apply to disability discrimination, other specific attributes, or all attributes?*
    - *Should it apply to specific areas of activity or all areas? For example, should it apply to goods and services, work, education, and accommodation?*

- *How would any amendments interact with exemptions involving unjustifiable hardship? Would there be a need to retain the concept of unjustifiable hardship at all?*

Recommendation:

- **In addition to the 'unjustifiable hardship' exemption, the Act should create a positive duty to make reasonable adjustments – as a stand-alone duty but also recognising that failing to make reasonable adjustments is an example of indirect discrimination**
- **This positive duty should apply to all attributes, in all areas that are protected from discrimination**

There is no stand-alone obligation to provide reasonable adjustments under the Act. Instead, in the areas of work and work-related areas,[18] education,[19] goods and services,[20] accommodation[21] and club membership and affairs[22] it falls under an exemption to direct or indirect discrimination if a person requires 'special services or facilities' and the supply of that causes unjustifiable hardship.

'Special services or facilities' is not defined in the Act. In practice we commonly use the term 'reasonable adjustments' rather than 'special services or facilities' when providing advice as clients are usually familiar with that term, particularly in impairment discrimination information and matters.

Arguably, employers, educational institutions and accommodation and service providers impliedly are expected to make reasonable adjustments for persons with impairments. However, these businesses and organisations may not be aware that by not making reasonable adjustments for a person could expose them to a direct and/or indirect discrimination complaint. Accordingly, LAQ submits that a positive separate, stand-alone provision should be introduced.

The benefit of having a stand-alone provision to provide reasonable adjustments include:

- Providing specific examples of what 'reasonable adjustments' are, which will assist duty holders to comply with their obligations;
- Demonstrating that there has been a failure to provide reasonable adjustments will assist complainants in establishing their direct and/or indirect discrimination complaints; and
- Legal practitioners will be able to give clear advice to individuals and duty holders about their rights and obligations.

Practitioners in Victoria have noted that the introduction of positive duties in the *Equal Opportunity Act 2010* (Vic) was one of that act's strengths.[23] Further, this assisted in providing advice about choice of jurisdiction where practitioners preferred lodging a claim under the *Equal Opportunity Act 2010* (Vic) instead of a general protections complaint involving discrimination under the *Fair Work Act 2009* (Cth) or the *Disability*

[18] *Anti-Discrimination Act 1991* (Qld) ss 34-35.
[19] *Anti-Discrimination Act 1991* (Qld) s 44.
[20] *Anti-Discrimination Act 1991* (Qld) s 51.
[21] *Anti-Discrimination Act 1991* (Qld) s 92.
[22] *Anti-Discrimination Act 1991* (Qld) s 100.
[23] Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the Equal Opportunity Act 2010 (Vic)' (2021) 44(2) *Melbourne University Law Review* 459, 488.

Discrimination Act 1992 (Cth) as most disability discrimination claims involve the failure to provide reasonable adjustments.[24]

Under the *Equal Opportunity Act 2010* (Vic) the reasonableness of an adjustment is decided having regard to 'all relevant facts and circumstances', including factors such as the person's circumstances and the nature of their disability, the nature of the required adjustment, the financial circumstances of the employer or service provider, the effects on the service provider of making the adjustment, the number of people who would benefit from or be disadvantaged by the adjustment, and the consequences of making the adjustment for the employer/service provider and the person affected.

Additional considerations in addressing reasonableness can also include focusing on access barriers and required adjustments (rather than the person's specific disability), and considering the consequences of *not* making the adjustment (vs the consequences of doing so).[25]

Accordingly, LAQ recommends that reasonable adjustments should be assessed having regard to an inclusive list of considerations such as those set out in the *Equal Opportunity Act 2010* (Vic).

LAQ further submits that a stand-alone positive duty should apply to all attributes and areas of life that are protected under the Act.[26] This would represent a significant move towards achieving substantive equality by recognising that differential treatment may be required to achieve inclusive outcomes.[27]

If this recommendation is not adopted, at a minimum the obligation to make reasonable adjustments should apply to the following attributes:

- impairment;
- pregnancy;
- parental status; and
- family responsibility.

The above attributes have been identified as common issues in the employment context, where persons have faced difficulty in obtaining or maintaining employment after requesting adjustments to accommodate their attribute/s (i.e. being expected to work on a full time basis with full duties and no accommodations).

At minimum the stand-alone obligations should apply to the areas of: work and work-related areas, education, accommodation, goods and services and club membership and affairs, because 'special services or facilities' are specifically recognised in these areas at present.

LAQ recommends that as a result of adopting a stand-alone positive duty to make reasonable adjustments, the defence of unjustifiable hardship should be retained as a general exemption to discrimination, rather than a specific exemption in those areas. However we acknowledge this may not be strictly necessary given that

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[24] Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the Equal Opportunity Act 2010 (Vic)' (2021) 44(2) *Melbourne University Law Review* 459, 488.
[25] People With Disabilities ACT, Submission to the ACT Law Reform Advisory Council, Parliament of the Australian Capital Territory, *Inquiry into the Discrimination Act 1991* (June 2014) 2, cited in ACT Law Reform Advisory Council, *Review of the* Discrimination Act 1991 *(ACT)* (Final Report, March 2015) 38.
[26] See, for example, *Anti-Discrimination Act 1992* (NT) s 24. See also *Canadian Human Rights Act*, RSC 1985, c. H-6, s 15(2).
[27] Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *UNSW Law Journal* 188, 199.

the assessment of 'reasonableness' under the positive duty will invoke consideration of the same or similar factors.

Discrimination on Combined Grounds

Discussion question 7:

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

Recommendation:

- **Yes, there is a need for the Act to recognise intersectionality and protect people from discrimination on the basis of a combination of attributes.**
- **This can be achieved by:**
    - **Amending s 8 "Meaning of discrimination on the basis of an attribute" to recognise that attributes can overlap, intersect and compound the effect of discrimination - this could draw from the "relevant circumstances" approach to sexual harassment under s 120 but would need to be worded differently to recognise the complexity of intersectionality**
    - **Removing the comparator test for direct discrimination**
    - **Shifting the burden of proof**
    - **Creating a specialist Tribunal list**
    - **Recognising proposed additional attributes (discussed further below**

Under the Act, discrimination is protected in relation to certain attributes.[28] This formulation of discrimination does not recognise that a person's experience of discrimination is impacted upon by its historical and social context, [29] gender inequality,[30] systems of power,[31] class and race-based disadvantage.[32]

LAQ recognises that a person's experience of discrimination does not always neatly fit into one attribute that they identify with; it can overlap, intersect, and be compounded by having more than one protected attribute.[33] Intersectional discrimination means a situation where a person experiences discrimination because of the cumulative effect of having more than one protected attribute.

For example, a woman with a young family from a Non-English-speaking background may experience barriers to education and work due to their race, immigration status, sex, class and family responsibilities. A male with a similar background may not experience the same forms of discrimination or experience it to varying degrees. It is the intersection of the woman's attributes which must be considered to understand how an experience of discrimination can be compounded.

It is necessary to recognise this complexity to understand that 'protected characteristics interact to produce disadvantage which is unique and distinct from discrimination based on any one individual ground.'[34]

At present, the Act and caselaw has limited regard to intersectionality and fails to appropriately recognise how these attributes interact, relate and compound to a person's experience of discrimination.[35]

CASE STUDY

Jasmine recently arrived in Australia to work on a farm.

While working at the farm she was injured at work and had to take time off to recover from her injury. When Jasmine had her injury, a co-worker drove her home and asked her for a sexual favour. She was quiet as she did not know what to say and was fearful of saying anything that might impact upon her work.

After Jasmine had recovered from her injury, she was told that she could no longer work there as she was allegedly bringing in food from her home country which was not allowed on site. Jasmine felt that she did not do anything wrong and was left without a job.

[28] See *Anti-Discrimination Act 1991* (Qld) s 7.
[29] Timo Makkonen, 'Multiple, Compound And Intersectional Discrimination: Bringing The Experiences Of The Most Marginalized To The Fore' (Institute For Human Rights, Åbo Akademi University, April 2002) 5.
[30] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 29 January 2020) 152.
[31] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 29 January 2020) 152.
[32] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773, 776.
[33] Timo Makkonen, 'Multiple, Compound And Intersectional Discrimination: Bringing The Experiences Of The Most Marginalized To The Fore' (Institute For Human Rights, Åbo Akademi University, April 2002) 11; Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773, 778-779.
[34] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773.
[35] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773; Timo Makkonen, 'Multiple, Compound And Intersectional Discrimination: Bringing The Experiences Of The Most Marginalized To The Fore' (Institute For Human Rights, Åbo Akademi University, April 2002) 13.

As a recently arrived migrant and woman who had a temporary impairment, our client was in an insecure position at work with little support available. This example illustrates how Jasmine's intersecting and overlapping identities compounded her experience of discrimination.

In addition, studies have found that persons who experience intersectional discrimination are less likely to engage with the legal system.[36] For those that do engage with the system, there are barriers relating to how a claim is understood and accepted, as a complainant may lodge a complaint identifying several attributes that relate to their experience of discrimination, however, in practice, each allegation of discrimination is dealt with separately in accordance with the attribute identified.

Often complainants who experience intersectional discrimination may not be able to pinpoint exactly why they experienced the conduct. If the Act were to take an intersectional approach to discrimination, this would benefit complainants like Jasmine as it would allow for a deeper understanding of discrimination that cannot be easily expressed by reference to a single attribute.

Incorporating an intersectional approach in the legislation will also have a flow on effect that could lead to effective policy changes across sectors and governments, with the recognition that designing policies with an intersectional approach will lead to improved outcomes for those who may be impacted upon by those policies.[37]

Approaches in recognising intersectional discrimination

Legislation

The Federal, State and Territory acts do not expressly recognise intersectional discrimination. There is, however, some provision for multiple discrimination as found:

- in the Exposure Draft of the Commonwealth's Human Rights and Anti-Discrimination Bill 2012 where discrimination was defined to cover 'a particular protected attribute, or a particular combination of 2 or more protected attributes';
- under section 16 of the *Age Discrimination Act 2004* (Cth) where for direct and indirect discrimination an act can be 'done for 2 or more reasons' and one of the reasons is the age of the person, or a characteristic that applies or is imputed generally to persons of the age of a person. While this allows for the possibility of an intersectional discrimination claim, this is constrained by the comparator test; and
- following a similar review of the *Discrimination Act 1991* (ACT), multiple discrimination is now protected under s 8 which recognises the meaning of direct and indirect discrimination includes where a person discriminates against another person because of '1 or more protected attributes.'

Overseas jurisdictions have also been more readily prepared to recognise multiple discrimination rather than intersectional discrimination. To provide a few examples of the varied approaches taken:

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[36] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773.
[37] Timo Makkonen, 'Multiple, Compound And Intersectional Discrimination: Bringing The Experiences Of The Most Marginalized To The Fore' (Institute For Human Rights, Åbo Akademi University, April 2002) 36-37.

- section 14 of the *Equality Act 2010* (UK) recognises combined discrimination on the basis that a person discriminates another 'because of a combination of two relevant protected characteristics.' In effect the provision confines the section to protecting on the basis of two protected characteristics and that it may be difficult to prove discrimination on the basis of individual characteristics.[38] Further, it does not extend to an understanding of intersectional discrimination; and

- the Canadian Human Rights Act takes a broader approach than *the Equality Act 2010* (UK) which includes conduct 'based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.'[39]

Cases

Despite there being no express requirement to consider intersectional discrimination, Member Clifford in *Till and Others v Sunshine Coast Regional Council*[40] recognised the complainant's argument of intersectional discrimination:

> *Mr Till presents his claim with the intersecting attributes of parental status, family responsibilities and association with persons of a young age. The Tribunal broadly accepts that accompanying children or very young children is a characteristic that a parent generally has, or is imputed to have, and that taking children out as either part of a parent's exercise regime or the children's exposure to the outdoors, is part of Mr Till's family responsibilities as he cares for and supports two dependant children. The attribute of family responsibilities under State anti-discrimination law is not confined to the area of employment as it is under the Commonwealth Sex Discrimination Act. The State law clearly intends a broader application. The Tribunal is therefore satisfied Mr Till is unable to comply with the terms imposed because of a characteristic of a parent (accompanying young children) and because of his family responsibilities to care for and support two dependant children, based on his concerns about safety.*[41]

This is a rare example of a Tribunal considering intersectional discrimination in the context of a broad application of the Act. Without an express provision in the Act, detailed submissions from legal representatives or a specialist Tribunal list, it is unlikely that Members and/or parties to proceedings will be prepared to recognise the intersectional factors that are relevant in a discrimination claim. This is important because decision makers may not be able to readily draw upon their own experience of discrimination and/or may never have had to interrogate how intersecting attributes can compound to impact upon a person's experience of discrimination.

By looking to examples of sexual harassment cases, we can see how express legislative provision allows for a more nuanced understanding of intersectionality. Under the sexual harassment provisions in s 120 of the Act, there is recognition of the need to consider 'relevant circumstances' including individual attributes (sex, age, race, impairment and relationship between the persons) when determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct that amounts to sexual harassment.

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[38] Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) *UNSW Law Journal* 773, 782.
[39] *Canadian Human Rights Act*, RSC 1985, c H-6, s 3.1.
[40] [2016] QCAT 530.
[41] *Till and Others v Sunshine Coast Regional Council* [2016] QCAT 530 [20] (Member Clifford).

This is illustrated in the successful sexual harassment and sex discrimination decision of *Golding v Sippel and The Laundry Chute Pty Ltd*,[42] where McLennan IC found that:

> *With respect to the relevant circumstances, it was submitted that the power imbalance between Mr Sippel and Ms Golding went beyond "…the ordinary power imbalance of employer and employee…"*
>
> *Ms Golding speaks English as a second language and is significantly younger than Mr Sippel. Ms Golding was previously subjected to domestic violence and suffered psychological harm as a result. Coupled with being the sole financial provider for her four young children she was forced to subsist on insecure and low paid work at the laundromat. The combination of these factors in Ms Golding's particular circumstances check every measure encapsulated under s 120.*[43]

The "relevant circumstances" approach under s 120 allowed for Ms Golding's experience of sexual harassment to be considered with an intersectional lens which illustrated the broader picture of how sexual harassment can be impacted upon by power dynamics, race, sex, domestic violence, impairment and class.

Accordingly, these Queensland cases support the incorporation of an intersectional approach to discrimination in the Act.

Burden of Proof

Discussion question 8:

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

Recommendation:

- **Yes, the onus of proof should be shifted**
- **Once the complainant is able to establish a prima facie complaint of discrimination, the onus should shift to the respondent to disprove the complaint**
- **This approach would also be assisted by:**
    - **Clarifying in the legislation where inferences can be drawn in the complainant's favour, including removal of the *Briginshaw* test**
    - **Removal of the comparator**
    - **Introducing a questionnaire/response process at the QHRC complaint stage which may be strengthened by mandating data collection regarding diversity measures and requiring the provision of written reasons for decision-making**
    - **Creating a specialist Tribunal list**

[42] [2021] QIRC 074.
[43] *Golding v Sippel and the Laundry Chute Pty Ltd* [2021] QIRC 074, [28]-[29] (Industrial Commissioner McLennan).

The Act provides that the onus of proving a complaint of direct or indirect discrimination is borne by the complainant,[44] except for where the respondent must prove reasonableness (for indirect discrimination complaints)[45] or that an exemption applies.[46] Every element of a discrimination complaint must be proven on the balance of probabilities.[47]

The current approach gives rise to complexities where a complainant is expected to explain the reasons for the respondent's conduct. The issues are two-fold:

> *'the evidence required to prove discrimination is usually in the respondent's possession, so the complainant must rely on circumstantial evidence and ask the court to draw an inference of discrimination, which the courts are reluctant to do; and courts regularly subject evidence to the higher standard required by Briginshaw…'*[48]

Discrimination is often unconscious, and reasons for the alleged discriminatory conduct are frequently unknown.[49] This leaves complainants drawing inferences of why they have been treated less favourably. Likewise, discrimination often occurs within the realm of some form of power imbalance.[50] These imbalances are compounded by the expectation of a complainant to provide reasons for their treatment based on information that only the respondent can be reasonably expected to hold.[51]

To this end, respondents have been viewed as holding a 'monopoly of knowledge' which facilitates and exacerbates power imbalances as the respondent controls most of the information required by a complainant to discharge their burden of proof.[52]

The application of the *Briginshaw*[53] standard of proof in discrimination matters is of further disadvantage to complainants in these circumstances. *Briginshaw* affirms that the standard of proof in civil litigation is to be on the balance of probabilities, however clear or cogent evidence is required where the allegations are more serious in nature.[54] *Briginshaw*'s wide application to discrimination jurisdictions means courts are reluctant to infer discrimination[55] because the evidentiary burden is the same as what is required to prove the most serious allegations.[56] This may be appropriate in sexual harassment cases where the alleged conduct may also

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[44] *Anti-Discrimination Act 1991* (Qld) s 204.
[45] *Anti-Discrimination Act 1991* (Qld) s 205.
[46] *Anti-Discrimination Act 1991* (Qld) s 206.
[47] *Anti-Discrimination Act 1991* (Qld) s 204. Any arguments raised by the respondent under ss 205 and 206 are subject to the same standard of proof.
[48] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 581.
[49] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 583.
[50] Such as, for example, in employment discrimination matters whereby a prospective employee is rejected from a job opportunity by the employer for reasons unbeknownst to the prospective employee.
[51] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 583.
[52] Laurence Lustgarten, 'Problems of Proof in Employment Discrimination Cases' (1977) 6 *Industrial Law Journal* 212, 213.
[53] *Briginshaw v Briginshaw* (1938) 60 CLR 336 ('*Briginshaw*').
[54] Loretta de Plavitz, 'The *Briginshaw* 'Standard of Proof' in Anti-Discrimination Law: 'Pointing with a Wavering Finger' (2003) *Melbourne University Law Review* 308, citing *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 110 ALR 449, 49-50 (Mason CJ, Brennan, Deane and Gaudron JJ) ('*Neat Holdings*'); *Briginshaw* (1938) 60 CLR 336, 362 (Dixon J); *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691, 701 (Starke J); *Hocking v Bell* [1944] NSWStRp 31; (1944) 44 SR (NSW) 468, 477 (Davidson J); aff'd [1945] HCA 16; (1945) 71 CLR 430, 464 (Latham CJ), 500 (Dixon J); *Rejfek v McElroy* [1965] HCA 46; (1965) 112 CLR 517, 521; *Wentworth v Rogers [No 5]* (1986) 6 NSWLR 534, 539 (Kirby P).
[55] See *Department of Health v Arumugam* [1988] VR 319, 331. See also Jonathon Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25 *Sydney Law Review* 535, 535.
[56] In *Sharma v Legal Aid (Qld)* (2002) 115 IR 91, 98 the Full Federal Court confirmed that 'the standard of proof for breaches of the [*Racial Discrimination Act 1975* (Cth)] is the higher standard referred to in *Briginshaw*'.

amount to a criminal offence, but should not extend to all contraventions of the Act.[57] Australian discrimination jurisdictions[58] have subsequently been criticised for wrongfully applying *Briginshaw* as a blanket rule.[59]

LAQ considers that the requirement for stronger evidence combined with the inability to obtain such evidence creates disadvantages for complainants in anti-discrimination matters, which is a deterrent to making a complaint at all.

Other approaches

The UK position

We note that international jurisdictions have faced similar problems to Australia in relation to the burden of proof in discrimination cases. In the United Kingdom, three mechanisms were introduced to aid in combatting such issues: the questionnaire procedure, drawing inferences of discrimination, and shifting the onus.[60]

Fair Work

We note that the *Fair Work Act*[61] contains a rebuttable presumption in adverse action claims whereby, once an employee has established that they possess a relevant attribute, an employer is presumed to have taken adverse action against them because of that attribute unless the employer can prove otherwise.[62] The presumption acts as a shifting onus of proof.[63]

Australian industrial law has utilised a reversed onus of proof since as far back as 1904.[64] The provisions in today's *Fair Work Act* have been described as affording 'attribute-based protection' as opposed to protection from discrimination typically speaking.[65] Nonetheless, the reversed onus has been praised as a 'logical complement to the absence of a comparator test, and makes proving attribute-based adverse action under the *FW Act* a clearly preferable alternative to proving unlawful conduct under anti-discrimination law.'[66]

Likewise, where there are multiple reasons for an adverse action being taken, the *Fair Work Act* applies a lower threshold of 'if the reasons for the [adverse] action include that reason' as opposed to the 'substantial

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[57] Loretta de Plavitz, 'The *Briginshaw* 'Standard of Proof' in Anti-Discrimination Law: 'Pointing with a Wavering Finger' (2003) *Melbourne University Law Review* 308, citing *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691; *M v M* (1988) 166 CLR 69.
[58] The ACT is the only Australian jurisdiction which has legislated a shift of the burden of proof: *Human Rights Commission Act 2005* (ACT) s 53CA(2).
[59] Loretta de Plavitz, 'The *Briginshaw* 'Standard of Proof' in Anti-Discrimination Law: 'Pointing with a Wavering Finger' (2003) *Melbourne University Law Review* 308, citing *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691; *M v M* (1988) 166 CLR 69. See also *Four Sons Pty Ltd v Sakchai Limsiripothong* [2000] NSWIRComm 38; (2000) 98 IR 1, 8 where the Full Bench of the NSW Industrial Relations Commission considered it 'a fundamental misconception' to apply *Briginshaw* indiscriminately; *Qantas Airways v Gama* (2008) 167 FCR 537, [139] where Branson J considered that viewing racial discrimination as something not to be lightly inferred has 'a tendency to lead a trier of facts into error.'
[60] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31 *Sydney Law Review* 579, 588.
[61] *Fair Work Act 2009* (Cth).
[62] *Fair Work Act 2009* (Cth) s 361(1); *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647; [2012] HCA 32.
[63] Dominique Allen, 'Wielding the Big Stick: Lessons for Enforcing Anti-discrimination Law from the Fair Work Ombudsman' (2015) 21(1) *Australian Journal of Human Rights* 119, 128.
[64] *Conciliation and Arbitration Act 1904* (Cth) s 5(4); see also *Heidt v Chrysler Australia Ltd* (1976) 13 ALR 365, 373 where Northrop J said that '[t]he provisions of s 5(4) of the Act case an onus of disproving facts, namely, that the reason for the defendant's action was not actuated by the reason alleged in the charge.'
[65] Simon Rice and Cameron Roles, 'It's a Discrimination Law Julia, But Not As We Know It: Part 3-1 of the *Fair Work Act*' (2010) 21(1) *The Economic and Labour Relations Review* 13, 14.
[66] Simon Rice and Cameron Roles, 'It's a Discrimination Law Julia, But Not As We Know It: Part 3-1 of the *Fair Work Act*' (2010) 21(1) *The Economic and Labour Relations Review* 13, 20.

reason' requirements under the Act.[67] As a whole, the *Fair Work* regime is considered an 'attractive' alternative to anti-discrimination law, 'principally because of the direct causation coupled with a reverse onus.'[68]

Meaning of Sexual Harassment

Discussion question 9:

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

Recommendations:

- **Yes, the additional words 'in the presence of a person' should be added to the legal meaning of sexual harassment in the Act, however it should also be clarified that that is not a requirement of sexual harassment**
- **Yes, a further contravention of gender-based harassment should be introduced which should apply in all areas of life, in the same manner as sexual harassment**
- **Yes, the Act should explicitly prohibit creating an intimidating, hostile, humiliating or offensive environment on the basis of sex and gender in relation to the areas of employment, education, access to premises, the provision of goods and services, accommodation and clubs**

'In the presence of a person'

The Act currently prescribes that sexual harassment involves conduct[69] directed at, or in relation to, another person which is intended to (or could be reasonably perceived to) offend, humiliate, or intimidate the other person.[70]

[67] *Fair Work Act 2009* (Cth) s 360. Cf *Anti-Discrimination Act 1991* (Qld) s 10(4).
[68] Simon Rice and Cameron Roles, 'It's a Discrimination Law Julia, But Not As We Know It: Part 3-1 of the *Fair Work Act*' (2010) 21(1) *The Economic and Labour Relations Review* 13, 31.
[69] Section 119 contains an exhaustive, yet broad, list of conduct that is to be perceived as sexual harassment. See, for example, s 119(d) which criminalises 'any other unwelcome conduct of a sexual nature in relation to the other person.'
[70] *Anti-Discrimination Act 1991* (Qld) s 119.

The requirement generally is that the conduct must be done either with that person in mind or in connection with that person,[71] however issues arise with establishing a connection where a complainant works in a highly sexualised environment.[72]

The ACT has aimed to remedy this by adding that sexual harassment may be directed 'to, or in the presence of', the person'.[73] In practice, however, the additions have proven to be more restrictive than intended.

In *De Domenico v Marshall*,[74] Miles CJ interpreted the provision as meaning that a statement of a sexual nature cannot amount to sexual harassment unless the person the statement is about is present at the time.[75]

We consider this restrictive for two reasons.

First, it allows conduct to occur if the employee who is the subject of that conduct is not present at the time. Second, it creates an inference that for a person to be sexually harassed at work, the sexual comments must be made about them *and* while they are present.

We consider that both inferences facilitate workplace sexual harassment culture and perpetuate an environment that fosters sexual harassment and hostility, which almost guarantees that the employee will be affected at some point in time.

In particular, it restricts the possibility of a person bringing a complaint based on sexual harassment in circumstances where sexually hostile comments are made that are not directly aimed at that person, but are intended to offend, humiliate or intimidate them. This is inextricably linked to the considerations below about an explicit prohibition of creating an intimidating, hostile, humiliating, or offensive environment based on sex.

The provision has also created trouble in determining illegality of sexual harassment in the context of technology and social media. Women's Legal Centre ACT has recommended an extension of the provisions which clarifies that sexual harassment is prohibited regardless of whether it occurs in the presence of the person.[76]

In the NSW context, the Anti-Discrimination Tribunal found it necessary to explore the requirement of the term *'in relation to' the person harassed* in the case of *Carter v Linuki Pty Ltd t/as Aussie Hire & Anor*[77] in stating:

> "*The term 'in relation to' is intended to identify a nexus between the conduct of a sexual nature and the person who complaints of harassment. Its effect is to exclude from the definition of sexual harassment conduct which occurs independently of the person who complains of harassment."*[78]

This 2004 case involved consideration of a work party where the employer had hired a topless waitress which caused offence to the female complainant. It was found that the conduct did not amount to sexual harassment

[71] *Streeter v Telstra Corporation Limited* [2007] AIRC 679.
[72] Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act* (Discussion Paper, November 2021) 48. See, for example, *Carter v Linuki Pty Ltd trading as Aussie Hire & Fitzgerald* (EOD) [2005] NSWADTAP 40; *Perry v State of Queensland & Ors* [2006] QADT 46.
[73] *Discrimination Act 1991* (ACT) s 58(2).
[74] (1999) 142 ACTR 1.
[75] *De Domenico v Marshall* (1999) 142 ACTR 1, [14], [35].
[76] ACT Law Reform Advisory Council, *Review of the* Discrimination Act 1991 *(ACT)* (Final Report, March 2015) 86.
[77] [2004] NSWADT 287.
[78] *Carter v Linuki Pty Ltd t/as Aussie Hire & Anor* [2004] NSWADT 287, [24].

as the conduct was not particularly 'in relation to' the complainant. This highlights the limitation of the phrase 'in relation to'.

Further, it is noted during the National Inquiry into Sexual Harassment in Australian Workplaces, the Australian Discrimination Law Experts Group ("ADLEG") recommended that the definition of sexual harassment in the *Sex Discrimination Act 1984* (Cth) ("SDA") ought to include *"creating an intimidating, hostile, humiliating or offensive environment".* [79] It was accepted by the Australian Human Rights Commission that sexual harassment may occur in a work environment, even if particular conduct is not directed at one particular person.[80]

As a result, the meaning to of sexual harassment under the SDA was amended to define harassment on the grounds of sex, and to prohibit engaging in any unwelcome conduct of a seriously demeaning nature.[81]

In 2015, the ACT Law Reform Advisory Council recommended that consideration should be given to prohibiting conduct that does not occur in the presence of the person.[82] The recommendations also included extending sexual harassment prohibitions to all areas of life to reflect the coverage afforded to harassment based on other attributes, provide further protection to victims, and to remove complexity about when sexually harassing conduct is unlawful.[83]

LAQ supports the introduction of the words 'in the presence of a person' to the legal meaning of sexual harassment in the *Anti-Discrimination Act 1991* (Qld). We acknowledge the importance of implementing provisions which prevent the possibility of hostile work environments founded on sexual harassment culture and consider the addition of 'in the presence of a person' to aid in combatting this.

We note the difficulties faced in the ACT in relation to their equivalent provision[84] and consider it prudent for measures to be taken to ensure that provisions are drafted to avoid the same complications in Queensland (namely that sexual harassment can occur, but is not *required* to occur, in the presence of the person).

For example, specific provisions should be introduced to clarify that sexual harassment in the presence of a person does not have to be *about* that person for it to be harassment (i.e. creating sexually hostile environments is one sub-category of sexual harassment).

While sexual harassment is increasingly prevalent in workplaces, it is not exclusive to the workplace.[85] The ACT currently extends its sexual harassment provisions to areas of employment, education, access to premises, the provision of goods and services, accommodation and clubs.[86] We support protections in the same areas as adopted in the ACT and in the SDA. We have concerns that broader prohibitions on conduct done 'in the presence of a person' may impose unnecessary restrictions on public life and interfere with rights of freedom of expression and freedom of thought, conscience, religion and belief. There is a risk that legislation

[79] Australian Discrimination Law Experts Group (ADLEG), Submission to the Australian Human Rights Commission, Parliament of Australia, *National Inquiry into Sexual harassment in Australian Workplaces* (4 March 2019).
[80] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 29 January 2020) 458.
[81] *Sex Discrimination Act 1984* (Cth) s 28AA.
[82] ACT Law Reform Advisory Council, *Review of the* Discrimination Act 1991 *(ACT)* (Final Report, March 2015) 15.
[83] ACT Law Reform Advisory Council, *Review of the* Discrimination Act 1991 *(ACT)* (Final Report, March 2015) 15, 86.
[84] *Discrimination Act 1991* (ACT) s 58(2).
[85] See, for example, Louise F. Fitzgerald and Lilia M. Cortina, 'Sexual harassment in work organizations: A view from the twenty-first century' in J.W. White and C. Travis (eds) *Handbook on the Psychology of Women* (Washington DC: American Psychological Association, 2018); Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (Report, August 2018) 8.
[86] See *Discrimination Act 1991* (ACT) ss 59-64.

that broadly restricts conduct done in public will have a disproportionate impact on persons who have specific vulnerabilities, such as people experiencing homelessness.

Sex-based harassment

Sex-based harassment broadly refers to behaviour which 'derogates, demeans or humiliates an individual based on that individual's sex.'[87] It is a term which encompasses a range of behaviours, including gender harassment, unwanted sexual attention and sexual coercion.[88]

Sex-based harassment has been differentiated from sexual harassment as the former is not sexually motivated but is experienced by a victim because of their sex.[89] The assumption is that sex-based harassment is perpetrated as a means of maintaining traditional gender structures,[90] such as where men are harassed for possessing traditionally feminine characteristics and vice versa.[91]

We note that protections based on sex are susceptible to misinterpretation which could exclude individuals who identify outside of the gender binary – that is, anyone who does not identify as male or female. On this basis, we propose the introduction of a gender-based harassment contravention under the Act which will protect individuals from harassment based on their gender identity, ensuring that gender nonconforming people are similarly protected from harassment.

Likewise, the contravention should extend to all areas of activity as gender-based harassment is not exclusive to any one area.

Sex-based vs gender-based

Sex and gender are continually used interchangeably notwithstanding that they are distinct concepts.[92] While sex refers to 'the anatomical and physiological distinctions between men and women', gender refers to the 'cultural overlay on those… distinctions'.[93] Gender identity reflects a person's 'socially constructed roles, behaviours, expressions and identity'[94] and is not adequately reflected by a categorisation based on physical sexual anatomy.

[87] Jennifer Berdahl, 'Harassment based on sex: Protecting social status in the context of gender hierarchy' (2007) 32(2) *Academy of Management Review* 641, 641.
[88] Emily A Leskinen, Lilia M Cortina and Dana B Kabat, 'Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work' (2011) 35(1) *Law and Human Behavior* 25, 25; Julie Konik and Lilia M Cortina, 'Policing Gender at Work: Intersections of Harassment Based on Sex and Sexuality' (2008) 21(3) *Social Justice Research* 313, 314.
[89] Jennifer Berdahl, 'Harassment based on sex: Protecting social status in the context of gender hierarchy' (2007) 32(2) *Academy of Management Review* 641.
[90] See, for example, Jennifer L Berdahl, Vicky Magley and Craig R Waldo, 'The Sexual Harassment of Men? Exploring the Concept with Theory and Data' (1996) 20(4) *Psychology of Women Quarterly* 527; Margaret S Stockdale, Michelle Visio and Leena Batra, 'The sexual harassment of men: Evidence for a broader theory of sexual harassment and sex discrimination' (1999) 5(3) *Psychology, Public Policy and Law* 630; Shawn Meghan Burn, 'The Psychology of Sexual Harassment' (2019) 46(1) *Teaching of Psychology* 96.
[91] Amanda M Main, 'Measuring Workplace Harassment Based on Gender Nonconformity' (2021) 9(1) *International Journal of Business and Management Research* 11, 12.
[92] Jonathan Rekstad, 'Replacing Sex with Gender' (Law School Student Scholarship, Seton Hall University, 2021); Mary Anne Case, 'Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence' (1995) 105 *Yale Law Journal* 1.
[93] Mary Anne Case, 'Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence' (1995) 105 *Yale Law Journal* 1, 10.
[94] Canadian Institute of Health Research, 'What is gender? What is sex?' *Gender and Health* (Web Page, 28 April 2020) <https://cihr-irsc.gc.ca/e/48642.html>.

The implications of this are that courts uphold historic notions of sex and gender identity which are not contemporary and gender diverse individuals who fall outside of the gender binary are denied legal protection.[95] We note that the ACT Law Reform Advisory Council has previously touched on these issues.[96]

A focus on sex facilitates an 'arbitrary binary system [which] impermissibly denies individuals who do not fit into the binary – for whatever reason – the equal protection of the laws.'[97] Those who identify as, for example, transgender or gender non-binary, may likely fall outside the scope of sex-based harassment provisions. On these grounds, we strongly recommend the nuanced implementation of a gender-based harassment contravention which will extend the scope of protection to gender diverse individuals.

Gender-based harassment vs gender discrimination

We note that the introduction of a gender-based harassment provision as distinct from gender/sex discrimination may lead to complex statutory interpretation or confusion for complainants about which provisions best apply to, and assist with, their complaints. To that end, we consider whether a gender-based harassment provision would be appropriate in light of the circumstances in which it would be applied.

The difference between harassment and discrimination is that the former tends to manifest micro-behaviours that harm an individual, whereas the latter refers to the broader context in which the harm occurs.[98] Harassment in employment, for example, is negative behaviour based on a person's ascribed characteristics, whereas discrimination would be unequal treatment or opportunities because of the same characteristics as opposed to job qualifications or performance.[99] In any event, we note the probability of an overlap between the two.

Waldo et al, explaining gender harassment in the context of men being victimised for their effeminacy, created three subdimensions: lewd comments, negative remarks about men, and the enforcement of the heterosexual male gender role.[100] These subdimensions could be adopted in utilising a gender-based harassment framework, whereby the focus merely shifts from men to gender broadly (i.e. negative remarks about gender, or harassment based on a departure from traditional gender structures/masculinity/femininity).

In those circumstances, the distinction becomes clearer. For example, if a transgender man was harassed for 'not being a real man' or slandered for their departure from traditional femininity, gender-based harassment provisions would provide protection in circumstances where the threshold for proving direct discrimination may be more difficult to meet.

[95] Jonathan Rekstad, 'Replacing Sex with Gender' (Law School Student Scholarship, Seton Hall University, 2021) 5.
[96] ACT Law Reform Advisory Council, *Review of the* Discrimination Act 1991 *(ACT)* (Final Report, March 2015) 25.
[97] Jonathan Rekstad, 'Replacing Sex with Gender' (Law School Student Scholarship, Seton Hall University, 2021) 29.
[98] Kathleen M Rospenda and Judith A Richman, 'Harassment and Discrimination' in Julian Barling, E. Kevin Kelloway and Michael R. Frone (eds), *Handbook of Work Stress* (SAGE Publications, 2005) 149, 151; Rosa Ehrenreich, 'Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment' (1999) 88 *Georgetown Law Journal* 1.
[99] Kathleen M Rospenda and Judith A Richman, 'Harassment and Discrimination' in Julian Barling, E. Kevin Kelloway and Michael R. Frone (eds), *Handbook of Work Stress* (SAGE Publications, 2005) 149, 151.
[100] Craig R Waldo, Jennifer L Berdahl and Louise Fitzgerald, 'Are Men Sexually Harassed? If So, by Whom?' (1998) 22(1) *Law and Human Behavior* 59.

Intimidating, hostile, humiliating, or offensive environment

Gender-based harassment is an expression of control that upholds patriarchal power structures and promotes the tolerance of violence.[101] It is well documented in academia that gender harassment and discrimination inherently perpetuate a hostile environment for any person who falls victim to such conduct.[102]

Subsequently, gender harassment has been appropriately considered 'a form of hostile environment harassment'.[103] In the United States, 'hostile work environment actions' can be brought to remedy gender discrimination which is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'[104]

We support the introduction of similar provisions in the Act to afford protections in circumstances including where harassment may not be directly related to the victim but negatively affect the victim nonetheless.

As previously mentioned, sexual and gender harassment give rise to hostile working environments where, for example, a female employee overhears two colleagues making sexist and misogynistic remarks. Although the employee herself was not being harassed, the environment becomes intimidating or hostile given her awareness that her colleagues' attitudes towards women are unsavoury and offensive.

Likewise, hostile and offensive attitudes can be conveyed about sexual-minority identities which are offensive regardless of whether a person actually ascribes to such an identity.[105] For example, a person who is a transgender rights activist may feel intimidated or offended by overhearing colleagues slander transgender people regardless of the fact that they do not themselves identify as transgender.

There is a need for provisions to exist to combat such circumstances. While employment is the most necessary area for such provisions, we consider it appropriate to extend these protections to all areas of activity to which they may apply. For example, sporting clubs or accommodation providers may create intimidating or hostile environments in circumstances like the example given above.

We note the interplay between the three issues covered by these submissions and suggest that implementing provisions covering each individual aspect will complement the overarching delivery of justice in terms of protection from gender-based and sexual harassment.

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[101] Jocelyn Finniear et al, 'Gender-based harassment in tourism academia: organizational collusion, coercion and compliance' (2020) in Paola Vizcaino-Suárez, Heather Jeffrey and Claudia Eger (eds), *Tourism and Gender-based Violence: Challenging Inequalities* (CABI, 2020) 4.
[102] See, for example, Emily A Leskinen, Lilia M Cortina and Dana B Kabat, 'Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work' (2011) 35(1) *Law and Human Behavior* 25, 25; Joshua Thorpe, 'Gender-Based Harassment and the Hostile Work Environment' (1990) 39(6) *Duke Law Journal* 1361, 1361; ocelyn Finniear et al, 'Gender-based harassment in tourism academia: organizational collusion, coercion and compliance' (2020) in Paola Vizcaino-Suárez, Heather Jeffrey and Claudia Eger (eds), *Tourism and Gender-based Violence: Challenging Inequalities* (CABI, 2020).
[103] Emily A Leskinen, Lilia M Cortina and Dana B Kabat, 'Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work' (2011) 35(1) *Law and Human Behavior* 25, 25.
[104] Joshua Thorpe, 'Gender-Based Harassment and the Hostile Work Environment' (1990) 39(6) *Duke Law Journal* 1361, 1361 Emily A Leskinen, Lilia M Cortina and Dana B Kabat, 'Gender Harassment: Broadening Our Understanding of Sex-Based Harassment at Work' (2011) 35(1) *Law and Human Behavior* 25, 25.
[105] Julie Konik and Lilia M Cortina, 'Policing Gender at Work: Intersections of Harassment Based on Sex and Sexuality' (2008) 21(3) *Social Justice Research* 313, 319.

Dispute Resolution

Two-stage enforcement model

Discussion question 10:

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

Recommendations:

- **The types of orders that can be made by the Tribunal under s 144 should be broadened in nature**
- **The Act should include a direct right of access to a Tribunal but only in special circumstances**
- **The Act should also allow for the QHRC to refer accepted complaints directly to a Tribunal, without requiring them to participate in a QHRC conciliation conference, if the QHRC considers it is justified in the circumstances – for example because of urgency or where the parties have made prior attempts at informal dispute resolution outside of the QHRC process (this may require consent from both parties or submissions to be considered)**
- **A person should be entitled to apply directly to the Supreme Court in representative complaints only**
- **The "Gatekeeper" role of the QHRC should be reconsidered, including putting measures in place to ensure that individuals are aware of their rights of review**

In our view, the most significant benefit of the two-stage dispute resolution process is that the QHRC conciliation process is compulsory. This is beneficial because it forces the respondent to attend the

conciliation process and listen to the complainant speak, providing an opportunity for the complainant to hold the respondent accountable (albeit in a confidential forum) and be heard.

That said, at present all QHRC conciliation conferences are held over the telephone rather than in-person due to COVID-19 safety precautions. While we acknowledge that COVID-19 continues to present practical difficulties in returning to the face-to-face conciliation model, we note that the use of telephone conferencing does diminish the value of this process because the respondents may not actually be listening or engaged in the process, in the same way as they would be if they were present in the same room as the complainant. Also, a face-to-face conciliation process assists complainants in being able to process and deal with the alleged discrimination that they have faced, and is an important step in their healing and/or truth telling process. It is our anecdotal observation that telephone conciliations are less likely to result in a positive outcomes for complainants as there is no 'buy in' (i.e. the parties do not have to physically face each other and witness their reactions to the alleged conduct, which assists in facilitating a resolution).

Another issue that we have identified in the "Burden of Proof" discussion above is that early resolution at the QHRC conciliation stage usually involves a compromise on the part of the complainant, as they may reach a settlement without being fully appraised of all relevant information that supports their case. We note that complaints typically resolve at this stage on a confidential basis (which is partly facilitated by the standard-form QHRC agreements that include confidentiality clauses). We also share concerns about the lack of transparency and public exposure of complaints which are resolved at the QHRC stage, which is acknowledged in the Discussion Paper.[106]

At present, the most serious disadvantage of the QHRC process is the 6 months delay in processing of complaints. In particular, these delays create a real barrier for complainants who are experiencing ongoing discrimination and/or where the matter needs to be resolved urgently to prevent further harm. For example, this is often the case in educational disputes involving schools, where a student may be threatened with expulsion, suspension, or some other treatment that could seriously compromise their rights. Please refer to the "Efficiency and Flexibility" section below for general comments regarding the QHRC conciliation process. We note that one of the recommendations under that section is to permit the QHRC to refer complaints directly to QCAT where it is justified in the circumstances, including where delays are significant. LAQ has not been provided with any information to suggest that the 6 months delay is going to be reduced at any point in the near future, which suggests that reform may be needed to allow the process to be more flexible and responsive to large-scale events.[107]

In some cases, s 144 provides an option for the complainant to apply directly to the Tribunal and seek urgent orders that protect their position while the matter goes through the two-stage dispute resolution process. This was utilised successfully in *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249 to prevent a young boy from being unenrolled while his race discrimination complaint against the school was being determined. In many cases though the facts will not be so straightforward and orders may not be available under s 144, because s 144 only contemplates that orders can be made *prohibiting* a person from doing an act that might prejudice the outcome of the hearing – and cannot provide an adequate response in circumstances where the discrimination has already happened. Further, complainants are not always aware

[106] Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act: Discussion Paper* (Discussion Paper, November 2021) 51.

[107] For example, we know that climate change and its impacts, such as extreme weather events (e.g. flooding, bushfires), will increasingly present threats to human security in a similar manner to our recent experience of the COVID-19 pandemic, and we expect to see more discrimination and human rights complaints arising out of those scenarios. It is realistic to expect that this will place additional pressures on the functions of the QHRC. Accordingly, the QHRC should take proactive steps to adapt its processes so that it can flexibly and effectively respond to disaster situations. See, for example, Office of the Human Rights High Commissioner, 'Understanding Human Rights and Climate Change', Submission to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change (November-December 2015).

of the s 144 option and this is not often utilised as complainants, may find it burdensome and intimidating to establish a prima facie case as is required.

We submit that, in cases such as these, it may be necessary for:

a) the scope of orders available under s 144 to be broadened so that it is not limited to "prohibitive" orders; and/or

b) for complainants to have a direct right of access to the Tribunal.

We do have concerns that if the direct right of access was granted in similar terms to s 122 of the *Equal Opportunity Act 2010* (Vic), this could result in many people choosing to "skip" the QHRC conciliation process for convenience and subsequently overwhelming the Tribunal with complaints that may have been able to be resolved or refined through conciliation. This could also contribute to a negative perception of the QHRC conciliation process as being an avenue for complainants to pursue disingenuous complaints and procure a quick settlement payment, as respondents may expect a complainant to file directly in QCAT if the complaint is substantiated with evidence. We acknowledge it is important that a direct right of access does not undermine the efficacy of the QHRC conciliation process or overwhelm the already limited capacity of the Tribunal.

We suggest that the direct right of access would not need to be as broad as s 122 of the *Equal Opportunity Act 2010* (Vic) but rather could be limited to circumstances where:

a) s 144 orders are not available;

b) the matter involves ongoing discrimination that is capable of being rectified by Tribunal orders; and/or

c) the QHRC agrees to refer it directly to the Tribunal because they acknowledge the matter is unsuitable for conciliation, or conciliation cannot be facilitated in a timely manner.

We do not see a practical benefit for our clients in having a similar direct right of access to a costs jurisdiction such as the Supreme Court, as the risk of costs will be a deterrent for many complainants (and their legal representatives) from proceeding in that jurisdiction. Please see the discussion of "Representative complaints" below where we have discussed the benefit of making the Supreme Court accessible for those matters only.

We also note concerns about the vesting of "gatekeeper" powers exclusively in the QHRC, particularly where it is not clear if the QHRC has implemented a human rights framework around the exercise of those powers, and at present the QHRC has limited resources and decision-making may be affected by pressure on QHRC staff to deal with complaints as quickly as possible. It appears that, at present, the QHRC does not offer triage or scaled levels of support to complainants but rather endeavours to provide the same level of service for all complaints – we note this approach is not always consistent with human rights obligations and have concerns that vulnerable people who lack skills to navigate or self-advocate in the system may be further disadvantaged by this process. We also note that the QHRC does not have easily available guidelines on how to seek written reasons or internal reviews, nor is such information provided in decision notices that are typically issued upon the acceptance or rejection of a complaint. All of these circumstances contribute to the risk that the QHRC may not respond appropriately to a complaint, and if the complaint is rejected a person may be deprived of their right to a fair hearing because they do not have the ability to progress their complaint to the Tribunal, or apply directly to the Tribunal separately from the QHRC complaint process. Providing the option for a direct right of access may mitigate that risk and also distribute work between the QHRC and the Tribunal.

CASE STUDY

An Aboriginal man was diagnosed with potentially life-threatening cancer while in custody. He required surgery and ongoing treatment which would be difficult to provide in a custodial setting.

He is from a remote Aboriginal community.

He received letters from multiple health practitioners recommending that he be granted exceptional circumstances parole to allow him to return to country to recover after having surgery. They recognised the benefit to him of being home on country, and confirmed that the local medical service had capacity to provide necessary follow up for his recovery.

Despite this, his application for special circumstances parole was rejected.

He filed a discrimination and human rights complaint regarding the decision of the parole board, citing, amongst other things, a breach of his cultural rights as an Aboriginal person and consequently, indirect race discrimination.

His discrimination and human rights complaint was rejected by the QHRC at first instance, approximately 6 months after it was first lodged with the QHRC.

LAQ assisted him to seek reasons for the decision to reject his discrimination and human rights complaint. The reasons for the decision were provided by someone other than the original decision-maker. The reasons for the decision included that the decision-maker considered judicial review of the Parole Board's decision would be a more appropriate avenue to pursue the complaint, notwithstanding that the timeframe for judicial review had well expired by the stage the QHRC decision was received, and also that the remedies available under the judicial review process were not the same as those available under the Act.

LAQ then assisted him to seek an internal review (which was only requested after QHRC staff directed LAQ to the complaints policy, which is difficult to find on the website but does contain information about the right to request an internal review).

After seeking an internal review, in December 2021 the QHRC made a new decision that the human rights complaint was accepted but the discrimination complaint was not accepted.

The fact that the discrimination complaint was not accepted is critical, because it means that he now does not have any right to progress his complaint to the Tribunal.

He since applied for judicial review of the QHRC decision, which requires him to make an application to the Supreme Court. To date this process has taken approximately 4 months. If he is successful, the decision will be remitted to the QHRC for reconsideration. It is unclear how much longer that process will take.

Since his application for exceptional circumstances parole was rejected, the client has become eligible for parole. He has applied for parole but it is well publicised that the Parole Board is also experiencing significant delays at present, which undoubtedly will affect his circumstances.[108]

At present, our client remains in custody and says about this experience:

> *It's been hard… I try not to let any of it get in the way. I just want to let it get over and done with.*
>
> *In here I eat a lot of junk food – out there I don't have the chance to eat junk food, I just eat basic stuff, fishing, hunting stuff like that. I just get some money just to put some food in the cupboard.*
>
> *Life is pretty simple up that way, everybody goes out for their feed… That's our tradition, that's an ongoing thing for us*
>
> *I grew up with all that stuff, being in here it's a big change.*
>
> *I want to teach my kids that stuff but I have to get out of here first, I can't teach them anything if I can't get out from here.*

In this case, our client was fortunate that he was successful in obtaining a special grant of aid to pursue judicial review. However this option is not usually available for LAQ clients.

In this case, a person with intersecting attributes has faced numerous administrative obstacles in bringing a complaint under the Act. This case demonstrates the difficulties for complainants when they are faced with barriers at multiple levels. In particular, many self-represented persons may not be aware of their rights to request reasons or internal review, and they are unlikely to have the resources to proceed with a judicial review application in the Supreme Court (a costs jurisdiction). These problems are exacerbated for persons in custody, particularly those with low or no literacy, English as a second language, or intellectual disabilities that affect their ability to understand the complaints process and seek advice.

This case also illustrates the problems that result from delays in processing and resolving complaints. In this case the complainant has a potentially life-threatening diagnosis and there was a real risk that he could die in custody before getting an opportunity to progress his discrimination and human rights complaint, be released on parole, and return to country to heal.

We are concerned that other persons with similar vulnerabilities are likely to have faced the same barriers in accessing the complaints process.

Terminology

Discussion question 11:

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

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[108] Julius Dennis, 'Queensland Parole Board applications backlog forcing prisoners to wait up to a year for decision', *ABC News* (Web Page, 23 November 2021) <https://www.abc.net.au/news/2021-11-23/parole-board-backlog-prison-prisoners-debbie-kilroy/100627440#:~:text=The%20current%20average%20wait%20for,help%20fight%20the%20administrative%20backlog>.

Recommendations:

- **The 'complaint-based' terminology should be changed**
- **The word 'complaint' should be changed to 'dispute' or another term that is culturally appropriate**

The Discussion Paper notes that the 'complaint-based' terminology under the Act may have negative connotations and may be culturally inappropriate for people from diverse cultural backgrounds.

We are aware that in some First Nations communities there is a stigmatisation of reporting whereby if one person speaks out, there is a concern that the entire community 'will be labelled as troublemakers'.[109] In addition, there are risks of the individual complainant being stigmatised by the surrounding community[110] or subject to significant criticism in media/social media.[111]

Similar issues are also prevalent within immigrant and refugee populations who, for example, experience pre-migratory trauma (which minimises experiences of discrimination in Australia compared to previous experiences), are fearful of losing their visas, or employ a 'politeness principle' in which they prioritise gratitude for being in Australia over reporting discriminatory conduct.[112] We confirm that we have received feedback from African community groups who have indicated that people from their communities may be unwilling to file a discrimination 'complaint' because of the stigma attached to that term, and fears around how 'making a complaint' may affect their citizenship status. We have also received feedback from First Nations people that the word 'dispute' may have negative associations with family dispute resolution processes and may not be suitable for this reason.

We believe that there are likely to be many individuals who have experienced discrimination in Queensland but do not proceed with making a complaint under the Act because of this cultural barrier. We support the proposal to change the 'complaint-based' terminology to another, more culturally appropriate term such as the 'dispute-based' terminology used in Victoria. The exact choice of terminology will be better informed by submissions made by community groups who can speak to those cultural considerations. However we also note that a change in the terminology alone may not be sufficient to overcome this barrier and refer to our broader recommendations regarding resourcing of community groups, expanding the scope for organisations to bring representative complaints, and redesigning the role of the QHRC.

Written complaints

Discussion question 12:

- *Should non-written requests for complaints be permitted, for example by video or audio?*

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[109] Fiona Allison, 'A limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens' (2013) 17(2) *Australian Indigenous Law Review* 3, 12.
[110] For example, if an Aboriginal person living in a remote community were to bring a discrimination complaint against their employer who is an Aboriginal-controlled community organisation, they may face significant social repercussions which could outweigh the benefit of any outcomes available through the complaint process.
[111] Josh Robertson, 'Rape threats and racist hate followed discrimination case but police not investigating', *ABC News* (Web Page, 30 March 2019) <https://www.abc.net.au/news/2019-03-30/cindy-prior-rape-threats-and-hate-mail-followed-court-case/10954822>.
[112] Anna Ziersch, Clemence Due and Moira Walsh, 'Discrimination: a health hazard for people from refugee and asylum-seeing backgrounds resettled in Australia' 20 *BMC Public Health* 108; Farida Fozdar and Silvia Torezani, 'Discrimination and Well-Being: Perceptions of Refugees in Western Australia' (2008) 42(1) *International Migration Review* 30, 56-57.

- *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?*

Recommendations:

- **The QHRC should accept complaints for assessment by way of telephone and statements made in person**
- **The QHRC should explore options for other means of receiving complaints e.g. chatbot technology, training trusted community groups to receive complaints and forward them to the QHRC**
- **When receiving complaints over the telephone or in person, the QHRC could collate the details of the complaint into a brief form (similar to the current complaint form) where the basic allegations are stated and relevant boxes ticked to indicate the basis of the complaint (discrimination, sexual harassment etc), with that document to be provided to respondents.**

Currently, all complaints to the QHRC must be in writing.

LAQ notes there are several barriers which prevent vulnerable people from making written complaints, including language, age, homelessness, and impairments. Particularly pertinent for First Nations communities is that written records are often not kept and that individuals may not maintain a residential address for long enough to receive correspondence.[113] LAQ submits this process has an unfair impact on those who may not be able to submit a written form. For these reasons the QHRC should consult with relevant communities and stakeholders to explore options for other means of communicating complaints.[114]

The QHRC should also provide reasonable help to those who require assistance to put their complaint in writing. This could be conducted by an information officer who is tasked with collating the details of the complaint into a brief form. The complaint form should reflect that an information officer took down the details of a complaint and identified the basis of the complaint, which would make it clear for the respondent/s that the complainant may have barriers which affected their ability to provide a written complaint and/or did not receive legal advice in framing their complaint.

The ability for complainants to have alternative means to submit their complaint would comply with the QHRC's obligation to act in accordance with the human right to recognition and equality before the law.

We acknowledge current strains on the QHRC's resources and there may be a need for additioning funding to implement these changes.

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[113] Fiona Allison, 'A limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens' (2013) 17(2) *Australian Indigenous Law Review* 3, 14.
[114] See, for example, 'Could AI help make the law more accessible for disabled people?', *The Law Report* (ABC Radio National, 30 November 2021) <https://www.abc.net.au/radionational/programs/lawreport/disability-law-technology/13655382>.

Efficiency and flexibility

Discussion question 13:

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

Recommendation:

- **The Act should be amended so that the QHRC can adopt a triage process to escalate exceptional circumstances complaints and provide short form conciliations or interventions for less serious complaints**
- **The Act should be amended to remove the requirement for the QHRC to receive complaints and arrange conciliation within 28 days**
- **The Act should be amended to extend the timeframe for referring unconciliable complaints to the Tribunal to 60 days**
- **The Act should provide a direct right of referral to the Tribunal if the QHRC cannot facilitate a conciliation conference within 3 months of a complaint being filed**
- **Other non-legislative measures we suggest are:**
    - **using the QHRC's existing powers to obtain information from the respondent and disclose this to the complainant prior to conciliation;**
    - **removing the pre-conciliation telephone call for matters where complainants are legally represented (unless it is specifically requested);**
    - **removing a conciliator's ongoing involvement in post-conciliation negotiations where both parties are represented,**

We recognise that the QHRC conciliation conference process can provide the parties with a helpful opportunity to resolve disputes at an early stage. At the same time, we note that conciliation conferences are time-consuming and resource intensive.

At present the conciliation process involves a pre-conference call (usually 10-30 minutes) to discuss the conciliation process with the conciliator in the week prior to the conciliation, and then the conciliation itself which typically occurs over a period of 3-4 hours. If negotiations are not finalised at the end of the conciliation, the parties may continue into post-conference negotiations (usually via communications through the conciliator) until an agreement is reached or it becomes apparent this is not possible, at which point it will be declared unconciliable by the QHRC.

We make the following observations based on our experience participating in QHRC conciliation conferences:

- QHRC conciliators have specialist knowledge and skills which ensure that the conciliation process is generally conducted in a more sensitive and appropriate manner than in other forums (e.g. when compared to further conciliations that occur at the QCAT stage). These specialist skills are valued and appreciated, particularly in cases where complainants have been traumatised or have other barriers which would make it difficult to engage in a more generalised mediation process;

- however, as we note above in the 'Burden of proof' discussion, at the point of conciliation complainants are at a unique disadvantage as they usually have not been provided with a written response or any information from the respondent, and this significantly limits their ability to resolve their complaint on fair terms;

- for some individuals who are traumatised by their experience of discrimination, they may not wish to participate in a conciliation conference which may be re-traumatising and unlikely to achieve the outcomes they are seeking;

- the ongoing involvement of QHRC conciliatiors in post-conference negotiations, where both parties are represented, can hinder the timely resolution of a matter because:

    - rather than the parties being able to communicate directly, the conciliator assumes the role of the messenger between parties – this creates additional work for the conciliator, causes delay and increases potential for miscommunication; and

    - complainants may contact the conciliator directly for advice or to follow up their matter, rather than speaking to their legal representative. For some complainants (e.g. if English is not their first language, if they have intellectual disabilities, etc) they may become confused about the role of the conciliator and believe the conciliator is acting on their behalf or is able to give them legal advice (especially where the conciliator has expressed opinions about the strength of their case in 'reality-testing' during conciliation),

- if matters do resolve at conciliation or in post-conference negotiations, the standard form QHRC agreement contains general confidentiality and release clauses which may not be appropriate because:

    - they encourage the settlement of these disputes on a confidential basis, which removes the likelihood that there will be public accountability for wrongdoing; and

    - in many cases complainants will have other potential legal avenues (e.g. tort claims or employment/industrial disputes) which may be compromised by general release/waiver/indemnity clauses.

In addition, we note that the requirement that a complaint must be allocated for conciliation within 28 days of being received by the QHRC has created significant practical difficulties for legal services in providing timely and useful legal advice to assist complainants. At LAQ, a grant of aid for representation at a conciliation conference is not able to be issued until a complaint has been 'accepted' by the QHRC (it would not be efficient and cost effective to approve grants of aid prior to acceptance of the complaint by the QHRC). This process means that:

- complainants will not be referred by the QHRC to LAQ to obtain legal advice until the complaint is accepted and the matter is listed for conciliation within the next 28 days;

- the complainant must then arrange a legal advice appointment which may involve a further wait of 1-2 weeks, depending on appointment availability;

- during advice appointments LAQ can provide preliminary advice but cannot commit to representing the complainant until they have applied for a grant of aid and that application has been assessed and approved. LAQ can provide an application form during the advice appointment but it must then be returned and processed by LAQ's Grants Division;

- there is a processing time of 2-3 weeks between the LAQ Grants Division receiving the application form and confirming if a grant has been approved;

- often, there may be further back and forth involved if the client has not provided sufficient supporting documentation with their LAQ application form. Typically this means that the process will take longer if the person is experiencing some disadvantage (e.g. if they are homeless or in custody, English is not their first language, they are unable to send documents using a computer or internet, have difficulty accessing financial information, etc needed for the application process, or are reliant on a support worker); and

- once the grant of aid is approved, this may leave only a very short time for the LAQ lawyer to prepare for the conciliation (less than a week). This may mean that LAQ's in-house practitioners do not have capacity to represent the client at conciliation and the matter may need to be referred to a preferred supplier. This is not ideal as typically the LAQ in-house lawyer has given preliminary advice to the client and it would be preferable and more efficient for the same LAQ in-house lawyer to represent them at conciliation. This problem could easily be overcome if more notice was provided of the conciliation date.

In practice this means that it is very difficult for individual complainants to obtain meaningful pre-conciliation advice and then secure a grant of aid for representation at the conciliation conference within the 28 day timeframe. Those who experience added disadvantage are likely to encounter more practical barriers which make it harder for them to secure representation in time.

In addition, we note that the requirement to refer an unconciliable complaint to the Tribunal within 28 days is too short, and often complainants are not able to obtain comprehensive legal advice before that timeframe expires. We suggest the timeframe be extended to 60 days (in line with similar timeframes when progressing complaints from the AHRC to the Federal Court or Federal Circuit and Family Court of Australia). This will reduce the number of cases where complainants are proceeding to a Tribunal without first obtaining comprehensive legal advice about prospects.

Another concern which we note above is that the QHRC is currently experiencing significant delays of more than 6 months between the filing and acceptance of complaints. This means that, once a complaint is lodged, the complainant will be waiting at least 6 months before hearing back from the QHRC with an indication of whether their complaint has been accepted and, if so, forwarded to the respondent and set down for conciliation. For many complainants, this means that they feel they are not being heard at the time they are most prepared to complain about their experience, and then they are forced to confront the issue again 6 months later when they may not be psychologically ready to do so and find the experience re-traumatising. We are aware of cases where complainants have withdrawn their complaint upon finally being notified of acceptance by the QHRC because they are not mentally prepared to revisit their trauma after waiting for so long.

In addition, the delays raise real concerns about the capacity for the Act and the QHRC complaints process to prevent discrimination and sexual harassment. If serious complaints are not accepted in a timely manner, and respondents are not put on notice of complaints that have been made against them, respondents may continue to engage in discrimination or harassment because they are oblivious to the allegations that have been made against them and their potential contravention of the law. This is a failing of the current

complaints system reflecting the maxim "justice delayed is justice denied", as it results in outcomes that are unjust for both complainants and respondents (who, in principle, should be made aware of the allegations against them as soon as possible). There is a need to reconsider the current use of QHRC resources and develop measures to properly respond to the increased demand for these services in a way that allows the QHRC to respond proactively where there is a risk of ongoing discrimination or sexual harassment. We suggest implementing powers for the QHRC to streamline complaints in 'exceptional circumstances' where an expeditious resolution is warranted and in the best interests of the parties. We note that the *Human Rights Act 2019* (Qld) s 65 contains an exceptional circumstances provision and suggest that any provision under the Act could be modelled similarly.

In addition to the non-legislative measures we have suggested above, we also recommend that complainants have the option to proceed to a Tribunal without participating in the QHRC conciliation process where that is appropriate.

We acknowledge current strains on the QHRC's resources and there may be a need for additioning funding to implement these changes.

CASE STUDY

Anna was sexually harassed by her doctor over the course of multiple medical consultations.*

From her discussions with staff at the medical practice, Anna became aware that other women had also been subjected to similar treatment by the same doctor.

As a result of the harassment she experienced severe anxiety and depression, and underwent counselling with a psychologist to help overcome this trauma.

Anna lodged a QHRC complaint regarding the sexual harassment in July 2021. Her primary reason for lodging the complaint was that she did not want to see other women go through the same experience, and she wanted the doctor to be held accountable for their inappropriate conduct and abuse of power.

Around the same time, Anna also made a complaint to AHPRA about the doctor.

In January 2022, Anna followed up with some former staff from the medical practice. She was upset to hear that the doctor had continued to harass female staff at the practice over the past 6 months. Some had quit because of the behaviour.

By February 2022, she had still not heard back from the QHRC to confirm if her complaint had been accepted, and this means that the doctor has not been provided with a copy of the complaint.

She is also not aware of what steps AHPRA has taken to address the conduct.

Anna believes that the doctor may not have continued sexually harassing those other women if he had been aware of the complaint that was filed back in July 2021.

**Anna's name has been changed for confidentiality reasons.*

Time Limits

Discussion question 14:

- *Is 1 year the appropriate timeframe within which to lodge a complaint? Should it be increased, and if so, by how long?*
- *Should there be special provisions that apply to children or people with impaired decision-making capacity?*
- *Should out of time complaints that have been accepted at the Commission as showing 'good cause' be subjected to the further requirement of proving 'on the balance of fairness between the parties, it would be reasonable to do so' before being dealt with by the tribunal?*
- *Should the Tribunal review the Commission's decisions to decline complaints instead of the Supreme Court?*

Recommendations

- **The 1 year time limit is too short. The time limit should be increased to 2 years**
- **Yes, there should be additional special provisions that apply to children or persons with impaired decision-making capacity. The time limit should be extended to 3 years from the date the legal disability ceases, or if the legal disability is permanent, provision for special consideration and extensions of time**
- **Out-of-time complaints should not be subject to further scrutiny by the Tribunal if they have been accepted by the QHRC despite being made out-of-time**
- **Members of the specialist Tribunal listshould be given the power to review administrative decisions of the QHRC to reject a complaint, however we do not recommend those powers be granted to the Tribunal in its present form due to concerns about delays**

LAQ submits that the current time limitation is not long enough to allow for complaints to be raised by way of complaint to the QHRC. This is particularly important in cases where victims of discrimination are also suffering from associated trauma, who are then required to revisit this trauma in the process, in such a short period of time. LAQ submits there are several factors associated with the need to extend the current time limitation, which are explored further below.

Extending the time limit generally

The need to heal

LAQ submits there is good reason to allow for persons to be provided with time to heal from associated trauma before entering into a formal complaints process. By increasing the time limit to bring a complaint to the QHRC, complainants are able to seek justice when they are ready to do so without exacerbating their prevalent trauma.

Complainants in some instances may also have related criminal proceedings in the matter where it is difficult to have both the criminal proceedings and civil complaint dealt with at the same time which may compound a person's trauma.

Workplace environments

LAQ notes in some instances where the discrimination has occurred in the workplace, the person may still be employed within the same environment where the discrimination has taken place. LAQ notes that it is

very common for victims to be reluctant to make a formal complaint to the QHRC while still employed for fear for their own safety, victimisation, and/or of any repercussions or future mistreatment in the workplace.

LAQ submits that by extending the time frame would provide greater opportunity for those persons to bring discrimination complaints once they have been able to move on from that workplace or after any internal investigations have been conducted in relation to the matter. The AHRC Respect@Work report recently recommended that the *Sex Discrimination Act 1984* (Cth) (**SDA**) time limitation be extended to 24 months, in recognition of the factors identified above in the context of sexual harassment complaints.

LAQ submits that the time limit to bring a complaint of discrimination to the QHRC ought to be extended to 24 months to allow for access to a fair, effective, and efficient complaints process.

People with impaired decision-making capacity

The practical capacity of a child or a person under a legal disability to bring a civil legal action is limited. This limited capacity is recognised in other legislation, including Part 3 of the *Limitation of Actions Act 1974* (Qld) (**LAA**) which states that children are under a legal disability. Section 29 of the LAA extends limitation periods for:

- matters prescribed by the LAA for a further six years from the date on which the child turns 18 years old.
- an action to recover damages in respect of personal injury or damages in respect of injury resulting from the death of any person shall not be brought by a person after the expiration of 3 years from the date on which that person ceased to be under a disability or died, whichever event first occurs.

Such provisions recognise the difficulties that a child has in identifying civil legal issues and accessing advice and remedies.

The ADA presently does not provide equivalent provisions to Part 3 of the LAA, but it does recognise legal incapacity for children in other ways, such as the exemption in section 112 of the ADA.

For our clients who are or who were children at the time of the alleged discriminatory conduct, they are subject to the same 12-month time-limitation period as other complainants. This means that they will need to file out of time submissions to explain why there has been a delay in bringing their complaint. A child or a person deemed to have a legal disability should not have to explain through an out of time submission process that due to their legal disability that they were unable to bring a complaint within the time limitation, this should already be recognised in the ADA.

In practice we see that there are a few factors which make it difficult for people with a legal incapacity to bring a complaint within the timeframe:

- ability to understand that their treatment may amount to a discrimination complaint;
- may have pursued separate complaints in the meantime such as raising concerns directly with a school or Government department and experienced delays through that internal process;

- they may not be aware of the time limitation until receiving advice after they are 18 years old; and

- they may not have a litigation guardian to assist to bring a complaint, particularly if they are under the long-term guardianship of Child Safety.

A human rights perspective requires consideration of the reduced capacity of a child or a person with a disability to bring a civil legal action. This engages a number of human rights such as the right to recognition and equality before the law[115], protection of families and children[116] and the right of every child, without discrimination to the protection that is needed by the child, and is in the child's best interests, because of being a child.[117] The imposition of a strict time limit is a condition with which a child and/or person with a disability will find it substantially more difficult to comply.

Representative Complaints

Discussion question 15:

- *Are there any changes that would improve the accessibility and utility of representative complaints?*

- *What factors influence the capacity for affected people to assert their rights as a representative complaint?*

Recommendations:

- **The Act should permit the QHRC to identify where multiple complaints are being made about the same or similar facts and legal issues and treat those complaints as a representative action, with capacity for the QHRC to intervene and/or seek the opinion of the Tribunal to clarify the issue on behalf of the group**

- **The Act should clarify that representative complaints can proceed through the Supreme Court under Part 13A of the *Civil Proceedings Act 2011* (Qld)**

- **A specialist Tribunal list should be created with a clear framework for commencing and managing representative actions commenced under the Act**

- **The Act should be amended to allow representative bodies to bring complaints about any contravention of the Act, on behalf of affected persons or as a representative complaint where there is a class of affected persons**

- **Additional funding should be allocated to LAQ and Community Legal Centres to assist complainants who wish to bring representative proceedings under the Act**

It is well-established that representative proceedings 'facilitate the administration of justice by enabling parties who have the same interest to secure a determination in one action rather than in separate actions'.[118] In circumstances where the QHRC and Tribunal are experiencing significant delays in

[115] *Human Rights Act 2019* (Qld) s 15(2).
[116] *Human Rights Act 2019* (Qld) s 26(1).
[117] *Human Rights Act 2019* (Qld) s 26(2).
[118] *Carnie & Anor v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 404 (Dawson J).

processing and resolving complaints brought under the Act, there is a clear interest in promoting the use of representative actions to improve the efficiency and accessibility of the complaint process.[119]

In addition, there are specific reasons why representative proceedings are appropriate in discrimination cases. In particular, we know that representative complaints provide an important mechanism by which a group of affected individuals can take action against systemic discrimination.[120]

Where systemic discrimination happens in Queensland and there are grounds for bringing a representative complaint, the preferred avenue will typically be under the Federal anti-discrimination legislation and Federal Court class action regime, rather than at a State level under the Act.[121] Although there are provisions to commence representative complaints under ss 146-152 of the Act, in practice this is rarely used.

In our view the reluctance of complainants to make use of these provisions can be attributed to the following factors:

1) The representative complaint provisions under the Act are significantly different to those in the Federal Court under Part IVA of the *Federal Court of Australia Act 1976* (Cth) and the Supreme Court of Queensland under Part 13A of the *Civil Proceedings Act 2011* (Qld). This means that developed caselaw from those jurisdictions does not offer much guidance for complaints brought under the Act.

2) There is little guidance around the procedural framework for commencement and management of representative proceedings under the Act and later before the Tribunal (including whether there is scope to bring representative complaints in the Supreme Court under Part 13A of the *Civil Proceedings Act 2011* (Qld)). This contributes to uncertainty about the capacity or willingness of the Tribunal to manage complex representative proceedings, potential costs implications, and other practical considerations that may arise.[122]

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[119] For example, we are aware at present that the QHRC has received a significant amount of similar complaints relating to directions made by the Chief Health Officer under the *Public Health Act 2005* (Qld) in response to the COVID-19 pandemic. We are not aware of any of those complaints being dealt with by the QHRC under the representative complaint mechanism. Nor is it clear if there are any processes available to the QHRC allowing them to refuse to deal with complaints if other representative complaints have already been filed in relation to the same legal and factual issues. It is envisaged that the representative complaint mechanism could be used in these circumstances to alleviate pressure on the QHRC where there has been an influx of similar complaints. In addition, if representative complaints of this nature were able to proceed to the Tribunal in a timely manner, this may generate precedent which could clarify the law and potentially assist to resolve other similar complaints at an earlier stage. At present, because of ongoing delays there is limited caselaw emerging from the Tribunal in relation to the various discrimination issues that have arisen over the course of the pandemic, which means that complainants have little guidance around their prospects of success and may feel compelled to continue to the Tribunal in the absence of any helpful authorities.

[120] For example, this mechanism was used successfully in *Cocks v State of Queensland* [1994] QADT 3 to obtain orders requiring the construction of disability access to the front entrance of the Brisbane Convention and Exhibition Centre. However, in that proceeding there was consent by both the complainant and the respondent to the matter being dealt with as a representative complaint. In *Harris v Transit Australia Pty Ltd* [2006] QADT 6 (a complaint regarding wheelchair accessibility of a planned bus service in the Cairns area), the suitability of the representative complaint mechanism was disputed by the respondent, and the Tribunal declined to deal with the matter as a representative complaint because it found that the class of complainants could not be ascertained with sufficient particularity - despite the complaint being brought by two persons with disabilities who were reliant on wheelchairs and also the 'Assessment Northern Access Group', and where data was provided which confirmed there were approximately 350 wheelchair dependent persons living in the Cairns area at the time.

[121] As in *Wotton v State of Queensland (No 5)* [2016] FCA 1457 and *Pearson v State of Queensland (No 2)* [2020] FCA 619, although it is noted that there may be other strategic reasons for commencing race discrimination complaints in the Federal jurisdiction given the broader protection offered by the *Racial Discrimination Act 1975* (Cth). See also SBS News, 'Why these Torres Strait Islanders are filing a class action against the Australian government', *SBS News* (online, 26 October 2021) <https://www.sbs.com.au/news/why-these-torres-strait-islanders-are-filing-a-class-action-against-the-australian-government/4d420d1a-2752-4f7c-bb2f-bbb898aae764>.

[122] Prior cases that have been brought as representative complaints have been complicated by this uncertainty, sometimes to the detriment of the complainant. See footnote above for discussion of *Harris v Transit Australia Pty Ltd* [2006] QADT 6. In *Martin and Anderson as representative complainants* [2002] QADT 20, a representative proceeding that was brought by employees against their employer (a State government owned energy corporation) was initially plagued by technical disputes regarding the form of pleadings, costs orders were made against the individual

3) Class action litigation is costly. Parties may choose to proceed in the Federal jurisdiction so that they have the prospect of recovering their legal costs if their case is successful, which is less likely in the Tribunal which is predominantly a no-costs jurisdiction. Litigation funders may prefer to fund actions in the Federal jurisdiction for this reason, but might reconsider that stance if there is scope to proceed under the State law in a costs jurisdiction.

4) Individual complainants may wish to complain about issues that are systemic in nature, but are concerned about the procedural complexity and potential costs risk involved in bringing a representative complaint. They may also struggle to obtain legal representation for the representative complaint as LAQ and CLCs are not adequately resourced to assist complainants in representative proceedings, whereas grants of aid may be available if the matter is pursued as an individual complaint or CLCs may be more willing to run the matter as a 'test case'; and

5) Representative bodies may wish to bring complaints on behalf of the community/persons they represent but do not have standing to bring representative complaints except in cases involving vilification under s 134(3) and (4).[123]

To overcome these barriers we suggest that:

- The Act should permit the QHRC to identify where multiple complaints are being made about the same or similar facts and legal issues and allow the QHRC to join those complaints as a representative action, with capacity to intervene in those proceedings.[124]

- The Act should clarify that representative complaints can proceed through the Supreme Court under Part 13A of the *Civil Proceedings Act 2011* (Qld) or alternatively through the Tribunal, to address any confusion about the potential overlap of the Supreme Court and Tribunal jurisdiction for representative actions of this nature. The ability to commence proceedings in a costs jurisdiction should provide scope for litigation funding of large class action proceedings brought under the Act, addressing some access to justice concerns.

- In addition to clarifying that these matters can proceed through the Supreme Court, a specialist Tribunal list should be created with a clear framework for commencing and managing representative actions commenced under the Act. This should remain a no-costs jurisdiction to ensure there is an alternative accessible avenue for pursuing representative proceedings in cases that cannot attract litigation funding. This is necessary because remedies in discrimination cases typically do not involve significant awards of damages (or may be non-monetary in nature) and litigation funders are unlikely to be involved in these types of cases.

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complainants, and the complaint was ultimately dismissed some two years later in *Martin and Anderson as representative complainants v Powerlink Qld* [2004] QADT 36.

[123] In *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, an organisation comprised mainly of members with a disability was found not to have standing to pursue Federal Court disability discrimination proceedings – see Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (The Federation Press, 5th ed, 2019) 170.

[124] For example, this type of function could be utilised where many similar complaints are being made about COVID-19 restrictions, and other complaints could be stayed pending the resolution of that representative complaint. Allowing the QHRC to take this sort of approach could potentially relieve some of the pressure placed on the complaint processing functions when they are inundated with similar complaints, as has occurred throughout the COVID-19 pandemic.

- Additional funding should be allocated to LAQ and CLCs to assist complainants who wish to bring representative proceedings under the Act, to bridge the gap where litigation funding is not available but a representative proceeding would be in the public interest.

- The Act should be amended to allow representative bodies to bring complaints about any contravention of the Act, on behalf of affected persons or as a representative complaint where there is a class of affected persons (see discussion of Organisation Complaints below).

Organisation Complaints

Discussion question 16:

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

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

Recommendations:

- **Yes, representative bodies should be able to make individual or representative complaints on behalf of affected persons who they represent**

- **The capacity for 'relevant entities' to make complaints should be expanded to all types of complaints that can be brought under the Act, not just vilification matters**

- **Representative complaints should not be confined to the conciliation process**

In LAQ's recent submission to the Queensland Parliament Inquiry into Serious Vilification and Hate Crimes, we noted that one of the issues with the complaints mechanism under the Act is that it places the onus on the individual complainant to initiate that process.[125] This is an issue not only for vilification complaints but for all types of complaints that can be brought under the Act. This approach creates significant barriers for people who may not have the skills or confidence to bring a complaint in an individual capacity, particularly where they may be experiencing trauma or other psychological conditions as a direct consequence of the experience. Those barriers are discussed further below under 'Other Issues'.

In addition, the individualised complaint model contributes to the perception that discrimination is a problem that occurs on an individual, interpersonal level – rather than recognising that discrimination is often systemic and there should be broader societal responsibility for taking a proactive stance against discrimination. For this reason it is necessary to engage in a re-thinking of the current approach, and re-design the complaints process to better address systemic discrimination.

[125] Legal Aid Queensland, Submission No 55 to the Legal Affairs and Safety Committee, Parliament of Queensland, *Inquiry into Serious Vilification and Hate Crimes* (12 July 2021) 3, 14.

CASE STUDY

I am a male in my 50s with a Bachelor's degree in Business and Economics.

I applied for a business administration job that was advertised. The advertisement did not make any reference to requiring a "junior" or "trainee" staff member.

I was contacted for a job interview. When I attended the business I noticed that all of the other employees appeared to be young women in their 20s or 30s. Despite that, I interviewed well and was told that I was likely to be offered the job and could expect to hear back in a few days. I was not asked if I would be willing to do any training or further study for the job.

A few days later I was contacted by the business who told me that the job had been offered to a young woman who during the interview had confirmed she was willing to study a Cert 3 in Business Administration, and the business was able to get government benefits if they took her on as a trainee.

During my interview I was not asked if I was willing to undertake that course of study. If I had been asked in the interview I would have said that I was willing to do the training, although I also have Bachelor's level qualifications well above that.

I believe that the younger woman was chosen for the job because the business considered that she was similar in age and sex to the other staff there and would be a better "cultural fit" (i.e. discrimination on the basis of my age and/or sex), rather than on any merit basis.

Around this time I was struggling to find work while also dealing with some serious health conditions. In addition to physical health issues I had recently overcome an episode of severe depression involving a suicide attempt a few years ago.

Losing this opportunity was a significant blow to my mental health. I struggled to find other work and ended up doing casual warehouse work for the remainder of the year, even though this was difficult given my physical health issues. As a consequence I have had issues maintaining my mortgage payments and had to make a withdrawal from my superannuation to pay the mortgage.

I made my complaint to the QHRC because I did not think the business should get away with treating people like this. I thought that maybe once I made the complaint the QHRC would investigate it and do something. I did not realise it meant that I would have to go to a conciliation conference and represent myself. If I had known this I would never have made the complaint in the first place. Over 6 months have passed since I first made the complaint and going through the conciliation process is too stressful for me at present, as I feel that going through the process alone would only cause further damage to my mental health. For this reason I decided to withdraw my QHRC complaint. I have found the whole process to be frustrating and unhelpful.

The case study above demonstrates the issues with the current complaint model.

Again, as we noted in our previous submission to the Queensland Parliament's Hate Crimes and Serious Vilification Inquiry[126], LAQ recognises that many community groups (such as those who form the Cohesive

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[126] Legal Aid Queensland, Submission No 55 to the Legal Affairs and Safety Committee, Parliament of Queensland, *Inquiry into Serious Vilification and Hate Crimes* (12 July 2021).

Communities Coalition) have a grassroots-level understanding of the types of discrimination that affect their communities and are often the first point of contact for people who experience discrimination. We also note that some communities may be disempowered in their relationships with government and distrustful of public entities generally (which may present another barrier to their engagement with either the QHRC or LAQ, particularly where the complaint is about the conduct of public entities such as the police).[127]

If funding was granted to community groups to make representative complaints to the QHRC (as occurred with the LGBTI Legal Service's "Like Love" project), this type of justice reinvestment may help to overcome some of these institutional and cultural barriers that currently prevent individuals from pursuing complaints.

Complaints by Prisoners

Discussion question 17:

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

Recommendations:

- **The additional requirements for prisoner complaints under the *Corrective Services Act 2006* (Qld) should be removed**
- **There is a need for an overhaul of the existing internal complaint mechanism in the prison context, in particular by redesigning the "Official Visitor" role in line with OPCAT**

LAQ echoes the concerns raised by the Review as to the significant practical challenges imposed on prisoners wishing to make discrimination complaints. We note that part 12A of the *Corrective Services Act 2006* (Qld) in conjunction with the Act is fundamentally inadequate in protecting the rights of prisoners for a number of reasons.

Legislative intent

We view part 12A as having been implemented with no proper consideration for prisoners' human rights. The bill's second reading speech cites a desire to strike a balance between the constraints of correctional facilities and the need to respect offenders' dignities.[128] However, it is clear that this did not involve a genuine consideration of anti-discrimination principles or the proportionality analysis that would now be required under the *Human Rights Act 2019* (Qld).

[127] Fiona Allison, 'A limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens' (2013) 17(2) *Australian Indigenous Law Review* 3, 12.
[128] Queensland, *Parliamentary Debates,* Legislative Assembly, 1 May 2008, 1430 (Judith Spence, Minister for Police, Corrective Services and Sport).

In particular, the bill was formulated in response to *State of Queensland v Mahommed,*[129] in which failure to provide fresh halal meat in prison was found to be unlawful religious discrimination. In that case, the prisoner's difficulty with obtaining a halal diet caused him to lose a substantial amount of weight. However the second reading speech makes particular references to 'special treatment', a 'wants vs needs' evaluation, and a 'specialised diet that caters for… personal tastes' in response to the request for fresh halal meat.[130] We consider it inappropriate to refer to strict religious dietary requirements as any of these things.

Subsequently, we submit that part 12A was introduced based on a misunderstanding – and subsequent disregard – of religious and cultural rights. Indeed, cultural rights are now protected under the *Human Rights Act 2019* (Qld)[131] and we note that halal diets are generally available in Queensland correctional centres.[132] Nonetheless, we are concerned by the correlation between alleged 'special treatment' and genuine requests to accommodate for attribute-related needs, and the implications part 12A has on the latter.

We likewise note that the bill's second reading speech refers to Mahommed's conviction and to not commit a crime if you want 'the best product… or the most comprehensive service to meet your need.'[133] We consider it inappropriate to infer that a person is not entitled to human rights because they have committed a crime. We note further that not every prisoner is convicted of the same crime as Mahommed – some will be held on remand or will later have their convictions overturned - however every prisoner is affected by part 12A of the *Corrective Services Act 2006* (Qld) in the same way.

We also note with concern the practical effect of these provisions is that the Tribunal and courts tend to accept general references to the 'security and good order of the facility' as justification for discriminatory treatment, and will accept evidence of prison staff on that point without exploring whether that reason is actually substantiated.[134] In practice we know that this reason is provided as a justification for almost all decisions that are made in the correctional context, though it is not always substantiated by evidence or may be affected by stereotypical assumptions or unconscious bias. That reason is also elevated above other relevant factors which should be balanced under s 319G(3). This creates a significant barrier for prisoners seeking to prove discrimination in the prison context.

International mechanisms

The leading international document on prisoners' rights[135] is the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002) (**OPCAT**).[136] It was ratified by Australia on 21 December 2017.[137]

[129] *State of Queensland v Mahommed* [2007] QS 18.
[130] Queensland, *Parliamentary Debates,* Legislative Assembly, 1 May 2008, 1430-1431 (Judith Spence, Minister for Police, Corrective Services and Sport).
[131] See *Human Rights Act 2019* (Qld) s 27.
[132] *Ali v State of Queensland* [2013] QCAT 319.
[133] Queensland, *Parliamentary Debates,* Legislative Assembly, 1 May 2008, 1431 (Judith Spence, Minister for Police, Corrective Services and Sport).
[134] *State of Queensland v Tafao* [2021] QCA 56, [21]-[22].
[135] We note that while OPCAT addresses places where people are deprived of their liberty generally, prisons and detention settings inherently fall within the umbrella of OPCAT's Articles. As such, it is considered the leading international authority on the issue of prisoners' rights.
[136] *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006) ("OPCAT").
[137] United Nations Human Rights Treaty Bodies, 'Ratification Status for CAT-OP – Optional Protocol of the Convention against Torture', *UN Treaty Body Database* (Web Page) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CAT-OP&Lang=en>.

We note that Queensland is currently non-compliant with OPCAT.[138] Most notably, OPCAT places an obligation on States to implement monitoring bodies, known as national preventive mechanisms (**NPMs**), to assess whether that State is compliant with their obligations under the Convention against Torture.[139]

NPMs are to be functionally independent, appropriately funded by the States, and have access to detention settings to conduct interviews at any time and in whatever manner they please.[140]

In Queensland, the Inspector of Detention Services Bill 2021 was introduced in October 2021. The Bill does not mention OPCAT or NPMs and, as of January 2022, Queensland has yet to nominate any NPMs.[141]

As such, the *Corrective Services Act 2006* (Qld) official visitor regime remains the closest external monitoring mechanism available to prisoners in Queensland. LAQ submits that this mechanism is insufficient for a number of reasons, drawing particularly on OPCAT's articles.

LAQ's biggest concern with the official visitor regime as it currently stands is that it lacks independence, which may allow discrimination to go unaddressed or even facilitate victimisation. With specific reference to the obligations under OPCAT, the current regime is devoid of functional independence and has limited capacity to generate meaningful action in response to a prisoner complaint.

Likewise, prisoners are currently required to fill in a form to request a visit by the official visitor. We note the implications of mandating written requests/complaints below.

In one particular study, it was noted that the chief executive is not bound by an official visitor's recommendations,[142] an official visitor's reports are not made publicly available, recommendations often do not change anything, and that the regime has been criticised for 'reinforc[ing] Corrective Services' views' and being 'completely ineffective' in promoting accountability and transparency.[143] The report made specific reference to an official visitor's recommendations to release prisoners from solitary confinement where extended confinement may negatively impact mental or physical health. Such recommendations were ignored on more than one occasion.[144]

Similar concerns have been raised previously by the Crime and Corruption Commission's Taskforce Flaxton[145] and Queensland Parole System Review.[146] Recommendations made by both reports are similar:

- the establishment of a properly resourced, appropriately qualified Independent Inspectorate of Prisons/Correctional Services;
- collaboration between the Inspectorate and the Queensland Ombudsman;

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[138] While OPCAT was ratified on a federal level, it is being implemented on a state-by-state basis. As a result, some jurisdictions' frameworks remain fragmented and piecemeal, if existent at all. Conversations about an Intergovernmental Agreement have occurred, but no such agreement has come to fruition. See Laura Grenfell and Steven Caruana, 'Are we OPCAT ready? So far, bare bones' (2022) 0(0) *Alternative Law Journal* 1.
[139] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
[140] OPCAT, arts 18-20.
[141] Laura Grenfell and Steven Caruana, 'Are we OPCAT ready? So far, bare bones' (2022) 0(0) *Alternative Law Journal* 1, 4.
[142] *Corrective Services Act 2006* (Qld) ss 56, 63(9) and 63(10).
[143] Tamara Walsh et al, *Legal Perspectives on Solitary Confinement in Queensland* (Report, 2020) 17-18, 47-48.
[144] See, for example, Tamara Walsh et al, *Legal Perspectives on Solitary Confinement in Queensland* (Report, 2020) 29.
[145] Queensland Crime and Corruption Commission, *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland prisons* (Report, December 2018) 49-53.
[146] Walter Sofronoff QC, *Queensland Parole System Review* (Final Report, November 2016) 236-237, 247.

- the retention of an internal reporting mechanism that operates in conjunction with the independent inspectorate;
- extension of the independent inspectorate's functions to prisons, probation and parole, as well as adult corrections, youth detention and supervision and police detention in watchhouses;
- the development of nationally consistent inspection and reporting standards; and
- public accessibility to inspection reports.[147]

We largely agree with these recommendations. In the event that it is inappropriate to entirely replace the official visitor regime, we submit that official visitor provisions operate under the guise of a broader independent mechanism whereby official visitors' operations are not intrinsically linked to the chief executive.

Finally, we note that consideration should be had to the Mandela Rules[148] as regards internal complaints mechanisms. The most pertinent rules to consider are:

- that prisoners immediately be provided information on prison rules and procedures for making complaints (r 54);
- that procedures for making complaints be in a form that prisoners can understand (r 55);
- that prisoners can raise complaints internally and to relevant external authorities (r 56); and
- that any complaint can be raised safely, confidentially, and without risk of 'retaliation, intimidation or other negative consequences' (r 57(2)).[149]

Procedural challenges

We submit that the requirements of the internal complaints process are unsatisfactory for a number of reasons.

First, the requirement for offenders to make complaints in writing[150] indirectly discriminates against persons who, for example, have low literacy or language abilities, persons with visual, mental and cognitive impairments, non-English-speakers, Indigenous persons, children and elderly people. LAQ is concerned particularly by the implications of this requirement for Aboriginal and Torres Strait Islander prisoners given that 28% of Australia's prison population identify as Aboriginal or Torres Strait Islander.[151] Likewise, in financial year 2019-2020, 57% of young people aged 10-17 years in youth detention settings were Indigenous.[152] The intersecting attributes of young Indigenous persons in detention disproportionately makes these provisions harder to comply with. Further, 40% of prisoners in 2018 reported having been told they had a mental health condition at some point in their life.[153] These unreasonable requirements are compounded by the fact that

[147] Queensland Crime and Corruption Commission, *Taskforce Flaxton: An examination of corruption risks and corruption in Queensland prisons* (Report, December 2018), 53; Walter Sofronoff QC, *Queensland Parole System Review* (Final Report, November 2016) 248.
[148] United Nations General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* GA Res 70/175, UN GAOR, 7th sess, Agenda Item 106, UN Doc A/RES/70/175 (8 January 2016) ("the Mandela Rules").
[149] Lisa Ewenson and Bronwyn Naylor, 'Protecting human rights in youth detention: listening to the voices of children and young people in detention' (2021) 27(1) *Australian Journal of Human Rights* 97, 101.
[150] *Corrective Services Act 2006* (Qld) s 319E-319F.
[151] Australian Institute of Health and Welfare, 'Health of prisoners', *Australia's health 2020* (Web Page) <https://www.aihw.gov.au/reports/australias-health/health-of-prisoners>.
[152] Australian Institute of Health and Welfare, *Youth detention population in Australia* (Bulletin 148, February 2020) 11.
[153] Australian Institute of Health and Welfare, 'Health of prisoners', *Australia's health 2020* (Web Page) <https://www.aihw.gov.au/reports/australias-health/health-of-prisoners>.

prisoners are not afforded the opportunity to adequately keep records of written correspondence. LAQ considers it appropriate for prisoner complaints processes to accommodate for circumstances where a prisoner may not have the resources or capacity to make a complaint in writing.

Second, we note that the provisions under part 12A of the *Corrective Services Act 2006* (Qld) create undue delay in the resolution of potential discriminatory conduct, may facilitate victimisation, and act as an unnecessary and substantial barrier for prospective complainants.

The imposition of a mandatory four-month waiting period is problematic for a number of reasons. Most glaringly, we note that the statutory 12-month limitation period under the Act is not paused upon receipt of an internal complaint. In circumstances where a complainant is not immediately aware of their rights, this could prove costly to their complaint. Further, if a complainant does not make an internal complaint until eight months after the discriminatory conduct, the chief executive may intentionally delay their response so as to exhaust the Act's limitation period. This effectively cuts the limitation period for prisoners to no more than eight months after the discriminatory conduct. We note that the additional one month wait under section 319F(2) of the *Corrective Services Act 2006* (Qld) further shortens these time limits.

We note earlier in these submissions that time delays generally act as a substantial barrier for discrimination complainants in all settings. The provisions limit a prisoner's access to justice in circumstances where other less vulnerable classes of people are not subject to the same delays. Denying access to justice to a group who are already deprived of their liberty is a form of discrimination in itself that is unwarranted and unjust. We consider the provisions of the *Corrective Services Act 2006* (Qld) to act as an additional deterrent to prospective complainants who may decide not to lodge a complaint knowing that it would likely be drawn out.

Another implication of extended delays is that a substantial period of time will elapse before a complaint is resolved and necessary orders are made. It is possible that the discriminatory conduct will continue to not only affect the complainant during this period, but also be experienced by additional prisoners. This is particularly so where the conduct constitutes indirect discrimination.

We consider the possibility of victimisation to be an unacceptable consequence of sections 319E and 319F of the *Corrective Services Act 2006* (Qld). The Royal Commission into the Protection and Detention of Children in the Northern Territory, for example, heard submissions that it was commonplace for juvenile detainees to be reprimanded for speaking to their lawyers or an Official Visitor about their treatment while in detention.[154] The fear of reprisal has been identified by former UN Subcommittee on the Prevention of Torture member Hans Draminsky Petersen as a major obstacle for effective monitoring of human rights violations in detention.[155] Regardless of whether victimisation is actually occurring, the culture and power imbalances of detention evoke fear into prisoners that either prevents reporting abuses or further traumatises them while they wait for their complaint to be processed. A person may wish to refrain from filing a complaint until they have been released from custody because of fears of reprisal, but their complaint may then fall outside of the 12 month time limit and may not be accepted (it is also difficult for someone outside of custody to engage in the *Corrective Services Act 2006* (Qld) process).

Finally, we note that the purported intention of these provisions – to minimise the public burden of dealing with prisoner complaints (i.e. reducing the volume of complaints made to the QHRC which have not first been raised with the prison general manager) – does not actually create greater efficiencies in the complaint process. On the contrary, these provisions of the *Corrective Services Act 2006* (Qld) increase the workload for the QHRC,

[154] Lisa Ewenson and Bronwyn Naylor, 'Protecting human rights in youth detention: listening to the voices of children and young people in detention' (2021) 27(1) *Australian Journal of Human Rights* 97, 107-108.
[155] Lisa Ewenson and Bronwyn Naylor, 'Protecting human rights in youth detention: listening to the voices of children and young people in detention' (2021) 27(1) *Australian Journal of Human Rights* 97, 100-101; Hans Draminsky Petersen, 'Factor interaction in prevention of torture: Reflections based on Carver and Handley's research' (2018) 28(1) *Torture Journal* 101.

the Office of the Chief Inspector, Queensland Corrective Services, Crown Law and legal representatives (often LAQ, Prisoners' Legal Service or other CLCs) when dealing with prisoner complaints brought under the Act. In particular these processes generate voluminous paperwork (multiple rounds of correspondence and an Official Visitor report before the QHRC complaint is even made), require the QHRC and parties to check for procedural compliance with s 319E and F (and exchange submissions if there is a jurisdictional objection), and these issues will arise again if additional allegations are added to the complaint or the discrimination is ongoing and fresh complaints are made.

While some prisoners may become disheartened and discontinue their complaint before it reaches the QHRC stage, that does not necessarily reflect the nature of the complaint (i.e. whether it is genuine or vexatious) and there is a real risk that serious discrimination complaints are being abandoned before reaching the QHRC stage – whereas vexatious complainants may be quite capable of waiting and persisting up to the QHRC process, and generating lengthy correspondence which requires significant public resources to respond to.

We appreciate that if there were a direct right for prisoners to complain to the QHRC, the QHRC may be inundated with vexatious prisoner complaints, or simple complaints that could be easily resolved by a Blue Letter to the General Manager. However we reiterate our concerns around the requirement for a complaint to be made internally within the prison before progressing further, namely the lack of independence and capacity for abuse arising out of that process. In the absence of the full implementation of OPCAT we suggest an interim measure would be for the Act to require a complaint to be made to the Official Visitor first, unless the matter is urgent or the prisoner has reasonable concerns about ongoing discrimination or victimisation in which case they should be able to complain directly to the QHRC – though we stress this recommendation is for an interim arrangement *only* and would not conclusively resolve the issue.

CASE STUDY

Prior to being prosecuted in Australia, Michael spent more than a decade in a foreign prison where he was subjected to torture, including physical beatings and being forced to sleep under bright lights in crowded cells (sleep deprivation torture). Michael had a mental breakdown, attempted suicide and was in a coma for a number of weeks. He has since been diagnosed with severe PTSD from this experience, and continues to suffer flashbacks, seizures and nervous and endocrine system problems. He also sustained a brain injury and multiple broken bones and organ injuries from being severely bashed.*

When he returned to Australia Michael was sentenced to approximately 20 further years in custody.

Because of his PTSD he finds it extremely difficult to share a cell with another prisoner. If a small noise or light disturbance wakes him, he suffers from panic attacks and is unable to sleep at all. Light disturbances can also cause seizures. Being deprived of sleep causes his mental state to decline and for flashbacks to get worse. For this reason Michael requested that he be accommodated in a single cell so that he was not woken up by another prisoner during the night.

Despite this, in July 2020 he was told that due to overcrowding would be required to share a cell with another prisoner.

Michael raised concerns about how sharing a cell would trigger his PTSD. He requested to be reconsidered for single cell accommodation as a reasonable adjustment.

Michael's Supervisor told him that he was aware of Michael's trauma history but "Your needs are not great enough. If you get a letter of referral from the prison psychologist I will move you into a single cell again".

The severity of his PTSD and related health issues have been recognised by Queensland Health who provided a letter confirming that they supported Michael's request for a single cell.

Michael gave the letter to the prison psychologist who stated "We won't consider your matter until you provide us with documents proving your torture and foreign prison stay". This was despite the fact that Michael's time spent in custody overseas had been discussed in his sentencing.

It is impossible for Michael to obtain documentation about his time in custody overseas because embassy staff have been unable to obtain those documents from the foreign government which was under military dictatorship.

Because he is unable to obtain the required letter from the prison psychologist, Michael was accommodated in a shared cell for approximately 9 months which meant he experienced severe distress and exacerbated PTSD daily.

Michael made a complaint about this treatment to the General Manager and later the Official Visitor, following the correct process under 319E and s 319F of the Corrective Services Act 2006 (Qld). *He kept a diary note of the date that he sent the Blue Letter to the General Manager, but has not been able to retain a copy of the letter itself due to difficulties for prisoners in photocopying documents. Prisoners can give documents to the Supervisor to request they be photocopied but in Michael's experience, this often doesn't happen or the documents get lost.*

The General Manager said they had no record of this letter, and Michael had to send a second Blue Letter to the General Manager. Michael received a reply which said that he was not deemed suitable for a single cell. After progressing the complaint ot the Official Visitor told him they "cannot tie all of the factors together" and the matter should be escalated to the QHRC.

He then made a written complaint to the QHRC in December 2020. The QHRC told him that his complaint could not be accepted because he had not satisfied the requirements under the Corrective Services Act 2006 (Qld). *Michael then had to respond to the QHRC explaining that he had actually complied with those requirements, despite not having copies of the necessary documentation because he was in prison. Out of caution he also issued another Blue Letter to the General Manager about the same issues, and queried whether the QHRC now needed him to restart the process again and file a second complaint with the Official Visitor.*

This was further complicated by the possibility that these processes would result in the initial complaint being outside of the 12 month time limit by the time it was capable of being filed with the QHRC. This back and forth with the QHRC to have the complaint accepted took a few months, and then there was a further wait until a conciliation conference could be arranged.

As Michael has stated in his own words:

> *I did send a Blue Letter to the prison General Manager with details of my complaint.*

It is extremely difficult for inmates to secure copies of documents, but I recorded this event on my calendar.

Subsequently I filed a complaint to the official visitor and informed the official visitor that I had in fact sent a Blue Letter to the GM.

This is exactly the correct procedure.

I sent the complaint correctly. It is not my failing that the letter was ignored or "disappeared".

My complaint has already passed a duration of 7 months or so. Every step of this process takes time.

What should I do? My Blue Letters of complaint are ignored or "lost".

Michael's case illustrates the confusing procedure created by the Corrective Services Act 2006 (Qld) *and the reality that these provisions significantly limit prisoners' access to the QHRC process, and do not recognise their right to equality before the law. This is particularly concerning because discrimination in the prison context can have serious and detrimental impacts, as in this case where Michael's mental health was deteriorating while his complaint was not being addressed.*

**Michael's name has been changed for confidentiality reasons.*

- We make the following observations based on our experience working with clients in custody:Discrimination continues to occur in the prison system. Discrimination in the prison context is particularly serious because it is often perpetrated by the state against a person who they have in their care, there is a significant imbalance of power between prisoners and corrective services officers (so that prisoners are highly vulnerable to abuse), it is not possible for prisoners to escalate complaints so that they can be dealt with immediately by a person independent of the correctional centre, and the discrimination may be ongoing and significantly affect a person's day-to-day living conditions and quality of life.
- When discrimination happens in prison, it serves to further entrench the structural disadvantages which may have contributed to a person's criminal offending and incarceration in the first place.
- Prison staff are either not adequately trained in human rights and anti-discrimination practices or do not incorporate that training into their day-to-day work.
- In many cases, when prisoners complain about their treatment in custody, they are further victimised by corrections staff. This highlights the need to ensure complaints are treated seriously and responded to promptly by someone independent of the prison.
- The existing complaints mechanism under the *Corrective Services Act 2006* (Qld) creates significant delays for prisoners when seeking to raise serious complaints about their living conditions; this is not responsive enough.
- The specific provisions of the *Corrective Services Act 2006* (Qld) are difficult for prisoners to navigate. Those who are capable of navigating those processes typically

have higher literacy and an ability to self-advocate. This means that the barriers created by the *Corrective Services Act 2006* (Qld) are inconsistent with the human rights of prisoners, specifically the right to equality before the law (i.e. the right to have equal access to the QHRC complaints process without discrimination).

- While discrimination occurs in the prison context on the basis of many protected attributes, we have specific concerns that Queensland prisons are largely unsuitable for the accommodation of persons with disabilities. There is a lack of capacity or willingness to implement reasonable adjustments in the prison context. The discriminatory treatment of prisoners with disabilities delays their rehabilitation and reintegration into the community, resulting in greater restrictions on their liberty and longer periods of time spent in custody.[156]

Other Issues

Discussion question 18:

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

Recommendations:

- **The QHRC should let complaints be dealt with as both discrimination and human rights complaints, without complainants having to 'choose' whether their complaint is dealt with under the ADA or HRA**
- **There is a need for additional funding of legal services and also community groups to provide assistance to persons seeking to bring discrimination complaints**
- **The Public Trustee should not charge fees for sanctioning or administering payments made to persons under a legal disability under s 59 of the *Public Trustee Act 1978* (Qld) or payments made to prisoners under Part 12B of the *Corrective Services Act 2006* (Qld)**
- **The Act should confirm that no sanction by a court or the Public Trustee is required under s 59 of the *Public Trustee Act 1978* (Qld) for matters which settle at the QHRC stage, *prior* to being referred to the Tribunal**

Discrimination and human rights complaints

Complainants may be able to raise both a discrimination complaint under the Act and a human rights complaint against a public entity or functional public entity under the *Human Rights Act 2019* (Qld). The current practice is when complainants identify both a discrimination and human rights complaint, the QHRC will ask them to elect whether they wish for their complaint to be dealt with under the Act or the *Human Rights Act 2019* (Qld).

[156] See, for example, Human Rights Watch, 'Australia: Prisoners with Disabilities Neglected, Abused. Inquiry Urgently Needed into Use of Solitary Confinement' (Web Page, 6 February 2018) <https://www.hrw.org/news/2018/02/06/australia-prisoners-disabilities-neglected-abused>.

If the complaint is only dealt with under the *Human Rights Act 2019* (Qld) there is no right to proceed to the Tribunal if it does not resolve at conciliation.

Often, complainants without the benefit of legal advice choose to pursue their complaint under the Act, due to the possibility of compensation and the ability to proceed through to the Tribunal if the complaint is not resolved. However there may be strategic reasons for a complainant to elect for their matter to proceed as a stand-alone human rights complaint rather than both a discrimination and human rights complaint. We are aware that QHRC conciliators may suggest to complainants that their complaint would be better dealt with as a complaint under the Act, rather than referring a complainant on for legal advice to discuss the merits of dealing with the complaint in one forum or the other.

LAQ recommends that the QHRC should not make a recommendation as to whether a complaint is to be dealt with as a complaint under the Act or the HRA. If complainants identify both a human rights and discrimination complaint, it should be dealt with as such, rather than having to choose a complaint mechanism under the relevant act.

Knowledge and understanding of rights, assistance to bring a complaint

Australian anti-discrimination law is notoriously complex to interpret and navigate.

First Nations persons have commented on the lack of general familiarity with discrimination law at a community level, including not understanding that discrimination is a legal issue for which you can bring a formal complaint or knowing where to go for information and advice.[157] We have received similar feedback from community groups who have expressed an interest in community legal education sessions being delivered to increase general knowledge of anti-discrimination law. At community legal education sessions that LAQ delivered to the Queensland African Communities Council in 2021 we received the following feedback:

> *It is always important to know your rights and I feel like I have understood the steps to take to protect myself and my family.*
>
> *Clear explained and easy to understand.*
>
> *The presentation was great, the legal team answered in a satisfactory manner. Overall was helpful and useful.*
>
> *The explanation was understandable but more sessions are needed next time.*
>
> *These kind of meetings are very important to the people that don't know their rights and how to speak for themselves.*
>
> *It would be good to have another session like this another day.*
>
> *More next time.*
>
> *I think we need more of this program.*

[157] Fiona Allison, 'A limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens' (2013) 17(2) *Australian Indigenous Law Review* 3, 13.

Make the event bigger next time for those who don't understand the language.

Very engaging. Very important to know your rights.

While this feedback is positive and indicates a demand for community legal education sessions around anti-discrimination law and workplace rights, LAQ has very limited capacity to offer these sessions due to competing demands to provide legal advice and representation. We suggest the Review should consider the current level of community legal education that is provided in relation to anti-discrimination law, and support increased funding for these initiatives.

Even in circumstances where there is a general community awareness of anti-discrimination law, people may be effectively excluded from accessing the complaints process under the Act as the law requires complainants to be '"sufficiently informed, motivated… empowered" and resourced to use its complex legal machinery.'[158] LAQ also acknowledges that intersectionality may mean that some people face multiple, compounding barriers to accessing legal services.

In this regard, we note that there is a lack of availability of free or affordable legal representation for persons seeking to bring a complaint under the Act. There are few private legal practitioners who specialise in this area of law, and the limited monetary remedies available mean that it is usually not viable for private lawyers to act on a 'no win no fee' basis (or offer other terms that would make legal services more affordable). In addition, in anti-discrimination cases it is often not a monetary award which is sought but the other types of orders available under s 209 of the Act (such as a declaration recognising that discrimination has occurred, orders to stop ongoing discrimination, etc). This means that complainants will either try and engage in the process without legal representation, or seek assistance from LAQ or CLCs (both of whom have limited resources). We acknowledge that the lack of availability of free or affordable legal representation disproportionately affects persons from lower socioeconomic backgrounds.

As is recognised throughout this submission, discrimination often occurs in situations involving some pre-existing power imbalance. This power imbalance also means that respondents are more likely to have the resources to engage legal representation (for example, if the respondent is a public entity, private business, or individual of means). We also note that the difficulty of navigating a complex area like anti-discrimination law is further exacerbated by the pressure of appearing at a conciliation or before the Tribunal without legal representation.[159]

For these reasons, we strongly recommend additional funding be provided to LAQ and CLCs to provide legal advice, representation and community legal education. It is noted that increasing the funding available to LAQ and CLCs would have a positive impact on the efficiency of the QHRC and Tribunal functions, because early access to legal advice and representation would facilitate the early resolution of disputes, clarify legal issues that arise, and discourage vexatious complaints from being made or pursued.

We also reiterate our recommendations regarding the need to fund community groups to bring representative complaints and overcome cultural barriers for individuals in bringing complaints or engaging with legal services.

In addition we recognise there is a further need to recognise that cases involving discrimination may involve clients experiencing poor mental health, trauma or other vulnerabilities, where social worker support is also

[158] Fiona Allison, 'A limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens' (2013) 17(2) *Australian Indigenous Law Review* 3, 13, quoting Jennifer Nielson, 'Whiteness and Anti-Discrimination Law – It's in the Design' (2008) 4(2) *Australian Critical Race and Whiteness Studies Association* 1, 2.
[159] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 57.

needed to ensure matters are treated with a required level of sensitivity and holistic understanding of client needs. The Review should also consider the current funding of wrap-around social work support and how those supports are also needed to help complainants access just outcomes and overcome other structural disadvantages in their lives.

Public Trustee involvement in settlements

LAQ is aware of the following provisions which require the Public Trustee to become involved when a complaint is settled or results in damages being awarded:

- s 59 of the *Public Trustee Act 1978* (Qld), which provides that a compromise by or on behalf of persons with a legal disability claiming moneys or damages is valid only with sanction of the court or the Public Trustee. This typically arises when settling discrimination cases that are brought by or on behalf of children, persons with intellectual disabilities or impaired capacity. LAQ is aware that it is only possible to obtain a sanction from the Tribunal if the matter has been referred to the Tribunal before settlement, and obtaining the sanction will require an opinion from counsel confirming the settlement amount is reasonable (noting that awards of damages in these matters are generally low, and the cost of obtaining counsel's opinion may be similar to the settlement amount); and

- Part 12B of the *Correctional Services Act 2006* (Qld), which mandates that any settlement amount or award of damages for complaints made by prisoners against QCS must first be held in a "Victim Trust Fund" which can be claimed from before the funds are finally disbursed to the complainant. This is discussed in further detail in these submissions at "Prisoner Complaints".

In both of those circumstances, the Public Trustee charges fees for the administration of those funds.

We submit that Public Trustee fees should be waived or significantly discounted in these cases, having regard to the fact that monetary awards in this jurisdiction are generally quite low and the fees charged by the Public Trustee may significantly deplete the amount that is finally received by the complainant.

In addition, there is a need for the Act to clarify whether sanctions under s 59 of the *Public Trustee Act 1978* are required for matters that settle at QHRC conciliation, prior to QCAT referral. At present, the legislation is not clear about whether these settlements need to be sanctioned. We are aware that the QHRC has expressed an informal view that these settlements do not need to be sanctioned, and both the Public Trustee and QCAT have been unwilling to sanction them, however the lack of clarity in the legislation means that the person's guardian must assume the risk of potentially being liable for failing to obtain a sanction. In addition, there are costs associated with getting advice about sanction obligations and seeking QCAT/Public Trustee sanctions. Clarifying this in the legislation would provide greater certainty for complainants seeking to access funds from settlement. We suggest the legislation should confirm that no sanction is required in those circumstances.

Eliminating Discrimination

Objectives of the Act

Discussion question 19:

- *What should be the overarching purposes of the Anti-Discrimination Act?*

- *Should an objects clause be introduced?*

- *If so, what are the key aspects that it should contain?*
- *If the purposes of the Act change, should the name of the legislation change to ensure it reflects those purposes?*

Recommendations:

- **The preamble should be updated to reflect current international human rights instruments which are relevant**
- **We are not aware of any compelling reasons in support of the need to introduce an objects clause, though we do generally support the introduction of provisions which:**
  - **confirm the QHRC is to take a proactive role in eliminating discrimination; and**
  - **emphasise the need to eliminate systemic discrimination**
- **We do not consider it necessary to change the name of the legislation**

The preamble to the Act provides helpful guidance around the statutory purpose, which also allows the courts/Tribunal to have regard to international instruments as relevant extrinsic material when interpreting the Act.[160] We suggest that it would be appropriate to update the preamble to reflect current international instruments that are relevant for this purpose.

Otherwise, we are not aware of any cases where there has been significant confusion or dispute regarding the statutory purpose of the Act. In recent caselaw the Tribunal has correctly taken a broad approach to the Act that is consistent with its status as beneficial and remedial legislation.[161]

That said, we do note that:

- in our experience, the QHRC can be reluctant to involve itself in matters if there is a concern that this could affect their perceived "impartiality", and on occasions those concerns about "impartiality" take priority over what we consider should be the QHRC's primary purpose – to take a proactive approach to eliminating discrimination; and
- the Tribunal is typically reluctant to award remedies other than those which address discrimination which has occurred on an individual level (i.e. compensation or apologies). Providing greater clarity in an objects clause about the need to eliminate systemic discrimination may give the Tribunal greater scope to make orders which seek to address discrimination that occurs on the systemic as well as individual level.[162]

[160] See *Acts Interpretation Act 1954* (Qld) s 14B(3)(d).
[161] See, for example, *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249 (under appeal).
[162] See further Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 83.

We note that in the recent decision of *Ritson v The Giving Network Pty Ltd & Anor* [2021], that case involved a conflict between the protections against discrimination on the basis of political belief or activity and the prohibition on racial and religious vilification. In that instance we respectfully suggest that the decision could have benefited from a more rigorous analysis of the statutory purpose and context, however this does not necessarily reflect the need for an objects clause but rather supports the other recommendations we have made above regarding the need for a specialist Tribunal list.

We do not see any benefit in changing the name of the legislation. This may cause confusion for persons who are familiar with the current name of the legislation. It will also create considerable cost for many organisations (e.g. CLCs) in updating their resources to reflect the change in the name of legislation.

Special Measures

Discussion question 20:

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

Recommendations:

- **We support the collapsing of these exemptions into a single special measures provision, following the human rights proportionality approach taken in the *Equal Opportunity Act 2010* (Vic)**
- **If a single special measures provision is implemented, the exemptions will not need to be retained**

We note that the Discussion Paper provides an overview of the recommendations that emerged from the ACT Law Reform Advisory Council in 2015 and the Victorian Gardner review in 2008.

We support amendments to the Act which incorporate those recommendations.

Positive Duties

Discussion question 21:

- *Do you support the introduction of a positive duty in the Anti-Discrimination Act?*
- *Should a positive duty cover all forms of prohibited conduct including discrimination, sexual harassment, and victimisation? Why, or why not?*
- *Should a positive duty apply to all areas of activity in which the Act operates, or be confined to certain areas of activity, such as employment?*

- *Should a positive duty apply to all entities that currently hold obligations under the Anti-Discrimination Act?*

- *What is the extent of the potential overlap between WHS laws and a positive duty in the Anti-Discrimination Act? If a positive duty is introduced, what considerations would apply to the interface between existing WHS laws and the Anti-Discrimination Act?*

- *What matters should be considered in determining whether a measure is reasonable and proportionate?*

Recommendations:

- **We support the introduction of positive duties in the Act**

- **Positive duties should cover all forms of prohibited conduct**

- **Positive duties should apply to all areas of activity in which the Act operates**

- **Positive duties should apply to all entities that currently hold obligations under the Act**

- **Positive duties should be consistent with existing obligations under WHS laws, noting that the WHS exemption should also be retained which will permit WHS measures to prevail in the event of inconsistency**

- **Factors to be considered in determining whether a measure is reasonable and proportionate should follow the Victorian legislation, and may draw on the approach taken towards determining "reasonableness" in indirect discrimination (i.e. require some level of case-by-case analysis) but also the special services/reasonable accommodations factors discussed above**

As discussed above, we recognise there are deficiencies with the current model which relies on individuals to make complaints about experiences of discrimination.

We have made a number of recommendations that are intended to assist the QHRC to take a more proactive approach towards eliminating discrimination and sexual harassment.

In general terms we support the introduction of broad positive duties in the Act, which the Discussion Paper notes is consistent with the outcomes of previous Australian reviews and inquiries into discrimination laws at various levels.

While many workplaces are likely to already view themselves as having equivalent WH&S duties, the extension of positive duties to areas other than the employment context would be beneficial.

Similarly, while many businesses or organisations will generally understand their obligation to make reasonable adjustments for people with disabilities, an extension of that responsibility to other protected attributes will contribute to developing inclusivity across many areas of public life.

That said, we also observe that practitioners from the Victorian jurisdiction have reflected that in practice these provisions do little to enhance the protections already available because the positive duties are not enforceable.

We are concerned that general positive duties may be viewed as a "check box" exercise for employers, businesses and other entities to mitigate their liability, without actually taking meaningful steps to eliminate discrimination and sexual harassment. For example, we are aware of many circumstances where organisations have policies and procedures that would appear to be compliant on paper, but do not actually prevent discrimination or sexual harassment from occurring. In addition, we note the significant cost to businesses and organisations in engaging human resource professionals to create policies of this nature, which may not be justified if it is only to mitigate liability under positive duties provisions.

We also note that it is likely that well-resourced businesses and organistaions will be better equipped to maintain compliance with positive duty obligations, but this compliance may not 'trickle down' into businesses and organisations which are already failing to adhere to their basic legal obligations (e.g. paying staff correctly, maintaining a safe workplace).

In addition, we note concerns about the capacity for the QHRC to receive and act on complaints about breaches of positive duties obligations, having regard to the current pressures on QHRC resources. We would caution against the direction of QHRC resources towards monitoring for compliance with positive duties obligations, where this will potentially detract from the need to ensure access to justice and appropriate remedies for persons who have experienced discrimination and sexual harassment. We suggest that if the QHRC were to take on more of a compliance monitoring role in relation to positive duties, this would require additional funding.

Accordingly, we generally support the suggestion of broad-ranging positive duties, but are unable to provide further comments without having an opportunity to review a draft of those proposed amendments to the Act.

Role of the Commission

Discussion question 22:

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

- *If you recommend an expansion of the Commission's functions and powers, what is the justification for this expansion?*

Recommendations:

- **We support a redesign of the QHRC's processes to encompass a more active investigation/regulatory function**
- **We support the QHRC being the entity responsible for performing this regulatory role**
- **The regulatory model could be similar to the role of the Fair Work Ombudsman and should be focused on investigating and bringing proceedings in relation to cases of systemic discrimination and/or sexual harassment, rather than on enforcement of positive duties**
- **The QHRC should have guidelines for investigation of matters which would require them to have regard to the size of the business/organisation, seriousness of conduct alleged, etc**
- **The QHRC should consider utilising s 228 to seek Tribunal opinions and reduce individual complaints being brought about the same or similar issues; this would be further assisted by the creation of a specialist Tribunal list.**

As discussed above, we recognise there are deficiencies with the current complaints model. In particular we have noted that this model places the onus on individual victims to seek redress, even though discrimination often occurs at a systemic level that is beyond the scope of an individual complaint. We have also noted that the current focus on the "Gatekeeper" and complaints-handling role of the QHRC is very resource-intensive and detracts from the ability of the QHRC to tackle larger systemic issues. For these reasons we strongly support a re-design of the QHRC's role and functions so that the QHRC is empowered to take an active role in responding to and eliminating discrimination.

We support amendments to the Act to expand the QHRC's powers to require or compel information and data to allow for better identification of systemic issues and trends, in line with the approach taken by the *Equal Opportunity Act 2010* (Vic) at s 134. However we note that the granting of those powers under the Act will only be of utility if the QHRC makes use of those provisions.

At present the QHRC has broad powers to investigate possible contraventions of the Act, to deal with those matters in the same manner as if a complaint had been lodged by an individual, and refer matters to the Tribunal (in which case the QHRC will become the applicant in the proceeding).[163] We understand that these powers may occasionally be used for preliminary investigation of complaints, but we are not aware of any Tribunal proceedings that have been initiated by the QHRC under these provisions. In general terms we support the broadening of those powers to allow for 'own motion inquiries' however note that the existing powers are already fairly broad, yet do not appear to be utilised.

[163] See *Anti-Discrimination Act 1991* (Qld) ch 7, div 2.

In addition, we note that the Act permits the QHRC to apply to the Tribunal for an opinion under s 228 where this would assist to clarify an issue. Again, these powers are used infrequently, though appear to have been more popular before 2006 when there was a specialist Tribunal. Over the past few years we have seen a significant number of complaints arising in relation to COVID-19 regulations, and suggest it would be helpful for the QHRC to use this mechanism to provide clarification where there are many individuals seeking to make complaints about the same issue. We also recommend that the QHRC consider whether further amendments to the Act are required to support that function.

We support the QHRC taking a more active role in investigating and initiating proceedings under those existing provisions, particularly in circumstances where there is a history of multiple complaints being made about the same issues or brought against the same respondents, and the QHRC suspects there are systemic discrimination issues. In our previous submissions to the Queensland Parliament's Inquiry into Hate Crimes and Serious Vilification[164], we also noted deficiencies with the policing of serious vilification offences and suggested that the Act should be amended to allow the QHRC to investigate and prosecute offences under the Act, including permitting the QHRC to obtain warrants to preserve evidence in certain circumstances. We note that orders available from the Tribunal could be broadened in these circumstances to allow for the ordering of civil penalties.

We note that the QHRC may be concerned that involvement in proceedings of this nature may compromise their perceived impartiality, however we do not consider this to be a significant departure from the current work of the QHRC which often involves expressing views about discrimination or human rights issues, and actually seeking an opinion from the Tribunal may assist in maintaining separation between the function of the QHRC and Tribunal decision-makers.[165] We do however note that the Fair Work Commission/Fair Work Ombudsman model could provide a basis for creating a new regulatory body that is separate from the QHRC if that is deemed necessary.

Role of the Tribunals

Discussion question 23:

- *Should there be a specialist list for the tribunals?*
- *If so, what would the appropriate qualifications be for a tribunal decision-maker?*

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[164] Legal Aid Queensland, Submission No 55 to the Legal Affairs and Safety Committee, Parliament of Queensland, *Inquiry into Serious Vilification and Hate Crimes* (12 July 2021).

[165] See, for example, Ben Smee, ''Unlawful discrimination': Queensland rights commissioner says schools can't use student contracts to avoid laws', *The Guardian* (online, 31 January 2022) <https://www.theguardian.com/australia-news/2022/jan/31/unlawful-discrimination-queensland-rights-commissioner-says-schools-cant-use-student-contracts-to-avoid-laws>; Ben Smee, 'Queensland's ex-top cop blasts corruption watchdog over claims of discrimination against men', *The Guardian* (online, 15 May 2021) <https://www.theguardian.com/australia-news/2021/may/15/queenslands-ex-top-cop-blasts-corruption-watchdog-over-claims-of-discrimination-against-men>; Ciara Jones, 'Human rights watchdog criticizes Queensland government over COVID-19 border exemptions', *ABC News* (Web Page, 22 September 2021) <https://www.abc.net.au/news/2021-09-22/qld-coronavirus-human-rights-watchdog-slams-border-exemptions/100477126>; Ashleigh Stevenson and Kate McKenna, 'Queensland's Human Rights Commissioner raises concerns over handling of youth and vulnerable people during coronavirus lockdown', *ABC News* (Web Page, 10 December 2020) <https://www.abc.net.au/news/2020-12-10/qld-coronavirus-human-rights-commissioner-pandemic-watch-house/12967680>; Matt Dennien, 'Queensland police use of check-in data sparks reform call', *Brisbane Times* (online, 29 June 2021) <https://www.brisbanetimes.com.au/national/queensland/queensland-police-use-of-check-in-data-sparks-reform-calls-20210628-p584x8.html>.

- *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?*

Recommendations:

There should be a specialist anti-discrimination and human rights list embedded within the existing Tribunal

- **A Member appointed to the specialist list should have a background in anti-discrimination and human rights work, legal qualifications and/or a history of working for community organisations which represent persons with protected attributes**
- **A uniform set of procedural rules should be developed to apply to the specialist list of the Tribunal**
- **Tribunals should be required to publish all decisions**
- **Data collection and sharing should be permitted and mandated between the QHRC, Tribunal and QPS**
- **The QHRC should be permitted to intervene in the same manner as equivalent provisions under the *Human Rights Act 2019* (Qld). Leave of the Tribunal should not be required.**
- **There is a need to reconsider the remedies available in discrimination matters and require the Tribunal to consider ordering remedies that afford individual redress but also seek to address systemic discrimination**

Throughout this submission we have recommended that a specialist Tribunal list be created to hear and determine anti-discrimination and human rights matters.

We note that a stand-alone specialist Tribunal existed in the form of the Anti-Discrimination Tribunal before its merger with QCAT in 2009, and many practitioners have remarked that the older system was preferable. In particular, anti-discrimination lawyers have recognised that there was a distinct benefit in having a specialist tribunal with expertise in anti-discrimination matters which are legally, conceptually and factually

complex.[166] In addition to requiring a level of legal expertise, sometimes anti-discrimination cases will require decision-makers to consider non-legal concepts that require some background level of understanding which is not common to generalist Tribunal members.[167] This is recognised in the Victorian jurisdiction with a Human Rights List within VCAT.

In this regard, we note that there is a distinct lack of diversity in the current membership of QCAT and the QIRC, and we suggest it would be appropriate when constituting the specialist Tribunal list to have regard to diversity measures that could be adopted to ensure that there are members with lived experience of discrimination. This may require the acceptance of persons who come from a non-legal background but have extensive experience working in the human rights/anti-discrimination space. Additional measures could also be considered to ensure cultural competency, for example, facilitating First Nations truth-telling by having Elders present to provide contextual understanding for Tribunal Members (in a model similar to the Murri Court).[168]

At present, QCAT does not always publish decisions that are made under the Act. We note that this is unhelpful for practitioners as there are limited precedents in this area of law, and in cases where decisions are not published there is a lack of public accountability (which is inconsistent with the underlying purpose of the Act). In addition to requiring the publication of Tribunal decisions, we strongly support the development of data collection and sharing mechanisms between the QHRC, Tribunal and also the QPS in relation to offences under the Act.[169]

In addition, we confirm that there is a need for clear procedures to be stipulated in any legislation establishing a specialist Tribunal list. Many procedures could be adopted from those under the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) and the *Industrial Relations Act 2016* (Qld) which govern anti-discrimination proceedings in QCAT and the QIRC respectively. However we suggest that additional provisions should be created:

a) clarifying rules of pleading and processes for amending Statements of Contentions, including whether leave is required;

b) clarifying how representative actions are to proceed;

c) broadening scope of orders that can be made by the Tribunal under s 144;

d) broadening the scope of remedies that can be ordered under s 209 to require the Tribunal to order remedies that can specifically address systemic discrimination, as well as providing redress to the individual complainant. For example, orders could require a

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[166] Community Legal Centres Queensland, 'Ten-Point Plan for a Fairer Queensland' (Web Page, 2022) <https://www.communitylegalqld.org.au/reviewofantidiscrimination/#1635297119374-ba7606ce-9444>.
[167] To provide an example, in the original Tribunal decision of *Tafao v State of Queensland and Ors* [2018] QCAT 409 the Member elected to use the terms "sex" and "gender" interchangeably, to confusing effect.
[168] This level of historical and cultural context was given significant consideration in *Wotton v State of Queensland (No 5)* [2016] FCA 1457, but in that case largely relied on expert evidence presented by the complainants to establish that background. It would be preferable for a specialist Tribunal list to be able to take steps to inform itself of relevant cultural and historical considerations, rather than relying on the complainant who may not be able to engage experts for this purpose.
[169] Better data collection was also a recommendation of the report of the Inquiry into Serious Vilification and Hate Crimes – see Parliament Legal Affairs and Safety Committee, Parliament of Queensland, *Inquiry into serious vilification and hate crimes* (Report No 22, January 2022).

respondent who is found to have engaged in discrimination to submit to an audit/investigation by the QHRC (where the QHRC could initiate further proceedings if evidence of other contraventions is uncovered).[170]

We recommend that the QHRC be permitted to intervene in proceedings without leave of the Tribunal, as we consider it is unlikely that the Tribunal would refuse to grant leave, and the need to seek leave would only create an unnecessary additional procedural step that would create further work for all parties.

Non-legislative measures

Discussion question 24:

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

Recommendations:

- **Revision of current QHRC processes, having regard to efficiency/flexibility considerations**
- **The QHRC should accept complaints for assessment by way of telephone and statements made in person, and should explore options for other means of receiving complaints**
- **Mandated data collection and sharing across the QHRC, QPS and Tribunal**
- **Resourcing of community groups who are capable of assisting individuals to make complaints and/or bring representative complaints**
- **Funding of LAQ and CLCs to provide legal advice and representation to complainants**
- **Waiver of Public Trustee Fees for payments made to complainants in anti-discrimination matters under s 59 of the *Public Trustee Act 1978* (Qld) and Part 12B of the *Corrective Services Act 2006* (Qld)**

[170] Section 209 of the Act provides a list of orders that the Tribunal can make where a complaint is proven, including compensation, an apology, or injunction. We note that compensation ordered in discrimination proceedings is low in comparison to amounts awarded for other claims (e.g. sexual harassment, defamation, intentional torts). It is our experience that, after receiving legal advice, many people do not consider it worthwhile to pursue a complaint having regard to the potential outcomes that are available under the Act, and the time it may take to receive a final outcome. For example, in the racial vilification case of *McGlade v Lightfoot* [2002] FCA 1457, the applicant sought a declaration that the respondent engaged in unlawful conduct and an order for the respondent to donate to the Aboriginal Advancement Council. The matter took five years to resolve and the Federal Court found that the conduct was unlawful, made a costs order against the respondent, but did not make an order to donate. It has been said that legislation offers an Aboriginal person no more than the opportunity to 'persuade white people to release their grip upon privilege that actually supports white privilege because it imposes no demand that it must change.' – see Fiona Allison, 'A limited right to equality: evaluating the effectiveness of racial discrimination law for Indigenous Australians through an access to justice lens' (2013) 17(2) *Australian Indigenous Law Review* 3, 13 quoting Jennifer Nielsen, 'Whiteness and Anti-Discrimination Law – It's in the Design' (2008) 4(2) *Australian Critical Race and Whiteness Studies Association* 1, 7-8.

The recommendations for non-legislative measures have been drawn from various issues discussed at length above.

Grounds of Discrimination

Impairment

Discussion question 25:

- *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?*

Recommendation:

- **The QHRC should consider the views of people with disabilities in determining whether the term "impairment" should be replaced with disability**
- **We are not aware of any specific reasons that would justify the creation of a separate attribute for mental health or psychosocial disability**
- **The legislation should clarify that it also intends to cover people who experience addiction**
- **Reliance on a guide, hearing or assistance dog should be broadened to be reliance on an assistance animal and these provisions should be made consistent with the *Disability Discrimination Act 1992* (Cth)**

We note the comments made in the Discussion Paper regarding the attribute of impairment and we largely agree with those comments.

We have previously received feedback from a client with a disability, who noted that the term 'medical condition' was not an appropriate way to refer to their disability (despite that being the terminology used in the definition of 'impairment'), as that client's preference was to use the term 'disability'. In addition, we note that the definition of the term 'impairment' encompasses many conditions including temporary medical conditions which people may not feel comfortable referring to as a 'disability', or people with disabilities may not view as appropriate to refer to as a 'disability'.

LAQ is not able to further comment on whether the attribute would be better referred to as 'disability' as opposed to 'impairment'. We suggest the Review should consider the views of people with disabilities in determining if the term 'impairment' should be re-named 'disability'.

With regards to mental health conditions or psychosocial disabilities, our view is that the attribute of 'impairment' sufficiently protects the rights of those who experience mental health conditions or psychosocial disabilities. We do not consider the need for a separate attribute and take the view that the impairment attribute (or however it is re-named) should continue to encompass mental health conditions and psychosocial disabilities.

We support the move to broaden the scope of the legislation to expressly cover people who experience substance addiction. We note that although it may be arguably protected under the current provisions, express provisions would solidify protections and legitimise the legal position of substance abuse as a mental health disorder.

We support the harmonisation of the Act to be in line with Commonwealth legislation regarding assistance animals. We note that the current inconsistencies between State and Federal legislation create extensive complications which should be remedied. The difficulty with the current inconsistencies in approach is illustrated by Sam's case below.

CASE STUDY

Sam has a range of conditions including PTSD, seizures, and comprehension difficulties. Sam has an assistance dog, Bruce, who provides her with significant support.

*Bruce was registered under the federal legislation of the Disability Discrimination Act 1992 (Cth) (**DDA**) but was not yet certified under the Queensland Guide Dogs and Assistance Animals Act 2009 (Qld) as he had not yet completed the requirement of a public access test.*

A public access test is a requirement under section 38(b) of the Guide, Hearing and Assistance Dogs Act 2009 (Qld) but not under the DDA.

After a period of time in hospital with serious illness, Sam was planning to catch a flight home to stay with her family . The airline Sam was due to fly with would not allow Sam's assistance dog to board the flight as they did not accept the dog was sufficiently trained to alleviate Sam's disabilities because he had not completed a public access test prior to the flight. Sam provided voluminous documentation to the airline which showed the documentation was not required as Bruce already was registered under the DDA.

Because of this misunderstanding and the airline's refusal to allow Bruce to travel on the flight, Sam had to get her father to drive to Queensland, pick her up and drive back to their hometown (a 10 hour drive). In addition to the logistical difficulties in doing so this cost Sam significant money and stress which could have

been avoided if there was a consistent approach to assistance animals under both the State and Federal laws.

Gender Identity

Discussion question 26:

- *Should there be a new definition of gender identity, and if so, what definition should be included in the Act?*

Recommendation:

- **Yes, there should be a new definition of gender identity which extends beyond the binary construct**
- **The definition of gender identity should include protection from discrimination on the basis of sex characteristics**

As discussed in our submissions on sex-based harassment, discrimination law is currently insufficient in recognising the differences between sex and gender. We note that the Act's current definition of 'gender identity' is modelled on a binary understanding of sex notwithstanding that the two are separate concepts.[171]

By pinning sex as intrinsic to gender identity, the Act relies on anatomy to define a category based on individual social identity and fails to accommodate for anyone who identifies as, for example, gender fluid, non-binary or transgender.[172]

We support the redefining of gender identity to correctly include people who identify outside of the scope of binary classifications of gender. We note that protections referring to gender identity should also expressly include protection from discrimination on the basis of sex characteristics for these reasons.

Sexuality

Discussion question 27:

- *Should there be a new definition of sexuality, and if so, what definition should be included in the Act?*

Recommendation:

- **Yes, there should be a broader, non-exhaustive definition of sexuality**

[171] *Anti-Discrimination Act 1991* (Qld) sch Dictionary (definition of 'gender identity').
[172] See, for example, Australian Government, *Guidelines on the Recognition of Sex and Gender* (Guidelines, July 2013) 4; Jonathan Rekstad, 'Replacing Sex with Gender' (Law School Student Scholarship, Seton Hall University, 2021) 4.

Similarly to gender identity, the definition of sexuality should be broader than just heterosexuality, homosexuality or bisexuality to accommodate for anyone who identifies outside of those categories.[173]

We note that applying rigid, exhaustive definitions to protected attributes under discrimination law threatens to exclude anyone who challenges traditional societal norms by identifying outside of those exhaustive definitions. Often, these people are discriminated against *because* of the way they challenge societal norms.[174]

We support the amendment of the definition of sexuality under the Act to provide protection on this basis. The definition should be non-exhaustive, but to allay any concerns about the scope of this attribute being used to justify criminal conduct (e.g. sexual abuse of children) should recognise that it is limited to lawful sexual attraction or activity.

Lawful Sexual Activity

Discussion question 28:

- *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?*

Recommendation:

- **Yes, there should be a broader definition of lawful sexual activity to encompass all aspects of sex work**
- **The attribute of 'lawful sexual activity' should change to 'sex work' and 'sex worker'**

We note that 'lawful sexual activity' currently covers a person's status as an employed sex worker, but not their activities as a sex worker.[175] We also note that the criminal law regarding sex work in Queensland is complex and does not reflect the realities faced by sex workers in many circumstances, meaning that the lawfulness of their conduct may be hard to establish or vary throughout their history of work.

We support the view of Respect Inc who have stated:

> *It is important that all sex workers be protected under a clearly defined attribute that covers both their status and practical engagement in sex work, and regardless of whether they have previously done or currently do sex work in a lawful manner.*[176]

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[173] See, for example, April Scarlette Callis, 'Bisexual, pansexual, queer: Non-binary identities and the sexual borderlands' (2014) 17(1-2) *Sexualities* 63.
[174] See, for example, Jennifer L Berdahl, Vicky Magley and Craig R Waldo, 'The Sexual Harassment of Men? Exploring the Concept with Theory and Data' (1996) 20(4) *Psychology of Women Quarterly* 527, which explored the prevalence of sex-based harassment as a means of maintaining traditional gender structures.
[175] *Anti-Discrimination Act 1991* (Qld) sch Dictionary (definition of 'lawful sexual activity').
[176] Respect Inc, *8 key points for sex workers and organisations making a written submission to the Queensland Anti-Discrimination Act (ADA) Review* (Fact Sheet, 2022) 2.

The protection should be redefined to include both a sex worker's status and practical engagement in sex work, regardless of whether the work is lawful and occurred in the past, present or future.

We note that in Tasmania and Victoria, 'lawful sexual activity' has adopted a broader meaning whereby all sexual activity that is lawful is covered.[177] Likewise, both statutes extend to protection from discrimination on the basis of sexual preference or engagement in sexual activity.[178] We note that sexual activity related to sexual preference should typically be covered by protections under the attribute of sexuality and therefore should not need to be included under this attribute.

On that basis, we support this attribute being re-named to clarify its specific relevance to sex work and sex workers and amending the definition to reflect protections based both on status and activities.

Other current attributes

Discussion question 29:

- *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?*

Recommendation:

- **There is a need to clarify the definition of 'political belief or activity'**

Under the "Objects" section of this submission, we note the lack of consistency between the protection for political belief and activity recognised in *Ritson v The Giving Network Pty Ltd & Anor* [2021] and the prohibitions on vilification in the Act. In the earlier decision of *Mitchell v Kenmont Investments Pty Ltd* [2013] QCAT 65, a complaint brought under this ground failed because a tenant advocating on behalf of a group of tenants in their negotiations with their landlord was found not to amount to "political belief or activity". We suggest the interpretation of the "political belief or activity" attribute would be assisted by a clearer definition. We note that previous authorities have interpreted that term narrowly and require the demonstration of some nexus with activities of the government. We suggest that a broader definition would be consistent with a human rights approach and would also reflect the reality of our neo-liberal society, where many private entities perform functions that have some political or public aspect.

[177] *Anti-Discrimination Act 1998* (Tas) s 3; *Equal Opportunity Act 2010* (Vic) s 4(1).
[178] Mr Groom, *Parliamentary Debates (Hansard)*, Tasmanian House of Assembly, 21 May 1998, 131; *Anti-Discrimination Act 1998* (Tas) s 3; *Equal Opportunity Act 2010* (Vic) s 4(1).

Otherwise, we do not consider the need to amend the terminology or legislative definitions under the Act for any other attributes that have not already been discussed.

Criminal history

Discussion question 30:

- *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)?*

Recommendation:

- **Yes, there is a need to cover discrimination on the grounds of irrelevant criminal history**
- **The ground should include in its definition protection for spent criminal record, irrelevant criminal record, and expunged homosexual convictions**
- **Irrelevant criminal record considerations should be framed in a way that amends the current arbitrary application of section 226 of the *Working with Children (Risk Management and Screening) Act 2000* (Qld) in relation to exceptional cases in Blue Card applications**
- **The ground should apply to all areas of activity**

We note that although a person's criminal history may be a relevant determining factor in some decision-making (such as in employment where it is a genuine occupational requirement), there remains a substantial amount of discrimination on the basis of a person's criminal record which is not relevant or justified.

Currently, the AHRC allows inquiries into workplace discrimination on the basis of criminal record.[179] The interpretation of 'criminal record' is broad:

> *the term encompasses not only the actual record of a conviction but also the circumstances of the conviction including the underlying conduct… The term should [not] be confined to the criminal record itself thereby drawing a distinction between the record and the circumstances of the underlying*

[179] *Australian Human Rights Commission Act 1986* (Cth) ss 30-32; *Australian Human Rights Commission Regulations 2019* (Cth) reg 6.

> *offences. [An] overly narrow construction… 'enables the ascription of negative stereotypes or the avoidance of individual assessment'…*[180]

However, the AHRC may only investigate and make non-enforceable recommendations.[181]

We propose that the protected attribute of irrelevant criminal history be introduced under the Act to protect individuals from discrimination on that basis. We note that spent convictions, irrelevant criminal record and expunged homosexual convictions should fall within the definition of 'irrelevant criminal history' and be captured by these protections.

Likewise, while we note employment is the most common area of activity that this ground is likely to apply to, we do not consider it appropriate to restrict its application to the area of employment. We instead support its application to all areas of activity to offer protections more broadly.

Spent convictions

Western Australia has incorporated a protection for spent convictions as a standalone attribute.[182] However, the approach is narrow: only convictions outside the rehabilitation period are covered, and only in areas of work, membership of industrial organisations, and qualifying for a profession, trade or occupation.

The rehabilitation period in Queensland is usually between 5 years (for non-indictable juvenile offences) and 10 years (for indictable adult offences).[183]

We note that spent convictions provisions are considered an opportunity to 'reward' persons with criminal convictions for their efforts in rehabilitating. That is, they are able to move forward with a clean slate where it has been shown that they are no longer a risk of recidivism.

Consideration of previous convictions has been viewed for decades as a 'serious prejudice to the offender which will outweigh to a great degree its value as an indicator of future behaviour'.[184]

We consider it inconsistent with the purposes of spent convictions provisions to not protect a person from discrimination on the basis of their spent conviction. Persons with criminal records often experience intersecting disadvantages – such as low levels of education, health problems, housing problems and lack of job experience [185] – and exposure to spent conviction discrimination disproportionately impacts this demographic. Studies have likewise shown that such compounding factors lead to an increased rate of recidivism.[186]

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[180] Neil Rees, Simon Rice and Dominique Allen, *Australian anti-discrimination and equal opportunity law* (Federation Press, 3rd ed, 2018) 519 quoting Human Rights and Equal Opportunity Commission, *Reports of inquiries into complaints of discrimination in employment on the basis of criminal record* (HREOC Report No 19, 2002) [9.2.2].
[181] International Labour Organization, *C111: Convention concerning Discrimination in Respect of Employment and Occupation*, adopted 25 June 1958, art 1(b). See, for example, *AN v ANZ Banking Group Limited* [2015] AusHRC 93.
[182] See *Spent Convictions Act 1988* (WA) pt 3 div 3.
[183] *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(1).
[184] The Law Reform Commission, *Spent Convictions* (Report No 37, 1987) 9.
[185] Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record* (Discussion Paper, December 2004) 7.
[186] Human Rights and Equal Opportunity Commission, *Discrimination in Employment on the Basis of Criminal Record* (Discussion Paper, December 2004) 7; The Law Reform Commission, *Criminal Records* (Discussion Paper No 25, December 1985) 77; Bronwyn Naylor, Moira

We reiterate the emphasis placed on rehabilitation by the legal system and training and support undertaken during a period of incarceration.[187] Where genuine rehabilitation efforts – and subsequent progress – have been made, discrimination on these grounds is unfounded and harmful.

We submit that irrelevant criminal record discrimination provisions should cover spent convictions for these reasons. Likewise, the rehabilitation period should be drastically decreased if not removed entirely.

We propose that the protections be extended to all areas of activity under the Act.

Irrelevant criminal record

The ACT, Northern Territory and Tasmania currently all prohibit discrimination on the ground of an 'irrelevant criminal record'.[188] These protections include spent convictions.

An 'irrelevant criminal record' pertains to arrests, interrogations and criminal proceedings only if no charge, prosecution or conviction were recorded or where the circumstances of a conviction are not directly relevant to the alleged discrimination.[189] In terms of relevance, distinctions would be made on the basis of the direct relationship between the criminal record and the opportunity sought.[190]

The best example of this is in the context of employment law (i.e. following the AHRC model), such as where a criminal record prevents an applicant from meeting the inherent requirements of a role.[191]

On this front, we note that particular issues have arisen regarding working with children checks (Blue Card matters) whereby criminal records have led to rejection on the grounds of an 'exceptional case'.[192]

In the Blue Card decision of *FBN*,[193] the applicant's case was considered an exceptional case on the basis of his previous drug-related charges notwithstanding that the cannabis use with which he was charged was largely for social, recreational or medicinal purposes. None of the offences were 'serious' or 'disqualifying' under the *Working With Children (Risk Management and Screening) Act 2000* (Qld)[194] and FBN was not considered to have a disregard for the law and social norms.[195]

Likewise, FBN's application was crucial in completing the placement components of his education degree, of which he had previously achieved the most favourable score in all areas of competency.[196]

Paterson and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2009) 32(1) *Melbourne University Law Review* 171.

[187] See, for example, Karen Heseltine, Andrew Day and Rick Sarre, *Prison-based correctional offender rehabilitation programs: The 2009 national picture in Australia* (Report, Research and Public Policy Series 112, 2011).

[188] *Discrimination Act 1991* (ACT) s 7(1)(k); *Anti-Discrimination Act 1992* (NT) s 3(b); *Anti-Discrimination Act 1998* (Tas) s 16(q).

[189] *Discrimination Act 1991* (ACT) Dictionary; *Anti-Discrimination Act 1992* (NT) s 4; *Anti-Discrimination Act 1998* (Tas) s 3.

[190] Bronwyn Naylor, Moira Paterson and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2009) 32(1) *Melbourne University Law Review* 171, 182.

[191] See, for example, The Law Reform Commission of Western Australia, *Review of the* Equal Opportunity Act 1984 *(WA)* (Project 111 Discussion Paper, August 2021) 126.

[192] *Working with Children (Risk Management and Screening) Act 2000* (Qld) ch 8 pt 4 div 9.

[193] *FBN v Director-General, Department of Justice and Attorney-General* [2020] QCAT 260.

[194] *FBN v Director-General, Department of Justice and Attorney-General* [2020] QCAT 260 [56].

[195] *FBN v Director-General, Department of Justice and Attorney-General* [2020] QCAT 260 [47].

[196] *FBN v Director-General, Department of Justice and Attorney-General* [2020] QCAT 260 [36].

Despite this, the negative notice was issued on the basis of FBN's risk of relapse into heavier drug use and failure to demonstrated sustained abstinence.[197] This was based on the fact that he continued to use cannabis even after being charged in 2018. There was no real evidence that relapse was a possibility; on the contrary, the Tribunal accepted that the risk of losing his career may provide motivation for permanent discontinued use.[198]

We are aware of a significant number of similar cases that, in our view, perpetuate systemic discrimination on the basis of irrelevant criminal history because of the overwhelmingly risk-averse approach that is taken in Blue Card decision-making. We again reiterate the potential ramifications of criminal history discrimination and the impacts it can have on individuals who may experience intersecting disadvantage. For example, the over-representation of Indigenous people and persons with disability in the criminal justice system combined with this seemingly unattainable threshold indirectly and disproportionately discriminates against these groups. We further note the potential inconsistency with the provisions of the *Human Rights Act 2019* (Qld), specifically the right to equality before the law and right to privacy and reputation.

In our view, the inclusion of an attribute that protects discrimination on the ground of irrelevant criminal history would require careful navigation of the interaction with the *Working With Children (Risk Management and Screening) Act 2000* (Qld). This may be achieved by express legislative directions as to exactly what matters should be proscribed from being issued a positive notice.

Expunged homosexual conviction

Consensual homosexual activity was decriminalised in Queensland in 1991, and convictions recorded prior have been able to be expunged since 2017 under the *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (Qld).

In accordance with other Australian jurisdictions,[199] expunged homosexual convictions should be protected under the umbrella of irrelevant criminal history.

LAQ supports the sentiment that consensual homosexual acts should never have been a criminal offence[200] and considers it appropriate to protect individuals from discrimination on the basis of an expunged homosexual conviction. This would be consistent with the prohibition of discrimination on the grounds of sexuality and the provisions of the *Human Rights Act 2019* (Qld).[201]

Irrelevant medical record

Discussion question 31:

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

[197] *FBN v Director-General, Department of Justice and Attorney-General* [2020] QCAT 260 [59].
[198] *FBN v Director-General, Department of Justice and Attorney-General* [2020] QCAT 260.
[199] Victoria, for example, has protected the attribute of 'expunged homosexual conviction' against discrimination since 2014. See *Equal Opportunity Act 2010* (Vic) s 6(g); *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic).
[200] See, for example, State of Victoria, *Parliamentary Debates*, Assembly, 17 September 2014, 3352 (Mr Clark, Attorney-General).
[201] See *Anti-Discrimination Act 1991* (Qld) s 7(n); *Human Rights Act 2019* (Qld) ss 3, 15, 25.

Recommendation:

- **Yes, the Act should cover discrimination on the ground of irrelevant medical record**
- **The ground should include protection on the bases of workers' compensation/impairment history, mental health in insurance and superannuation, genetic discrimination and sex, sexual characteristics and gender identity**
- **Age and impairment exemptions to discrimination in insurance and superannuation should be amended to prohibit systemic mental health discrimination and genetic discrimination, particularly in relation to exemptions based on no data**

Similarly to irrelevant criminal history discrimination, the AHRC has the power to conduct an inquiry into workplace discrimination on the basis of irrelevant medical record.[202] However, because the AHRC only has power to make non-binding recommendations,[203] complaints are usually brought under the *Disability Discrimination Act 1992* (Cth) instead.[204]

We support the introduction of discrimination on the ground of irrelevant medical record under the Act. This has already been introduced in both Tasmania and the Northern Territory.[205]

We note that 'medical history' was listed as a protected attribute in the area of work only in the 2012 federal *Human Rights and Anti-Discrimination Bill* as a means of providing broader protection than what is already covered by disability discrimination, such as relationship counselling.[206]

We recommend the following as non-exhaustive examples of what could constitute irrelevant medical record discrimination which should be covered by these protections.[207] The protection should broadly cover all areas of activity despite these examples possibly being more catered towards specific areas of activity.

Workers' compensation/impairment history

We note that workers' compensation claims often attract substantial stigmatisation which can affect an employee's recovery or motivation to bring a claim at all.[208]

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[202] Neil Rees, Simon Rice and Dominique Allen, *Australian anti-discrimination and equal opportunity law* (Federation Press, 3rd ed, 2018) 535.
[203] *Australian Human Rights Commission Act 1986* (Cth) s 31.
[204] Neil Rees, Simon Rice and Dominique Allen, *Australian anti-discrimination and equal opportunity law* (Federation Press, 3rd ed, 2018) 535.
[205] *Anti-Discrimination Act 1998* (Tas) s16(r); *Anti-Discrimination Act 1992* (NT) s 19(1)(p).
[206] Explanatory Notes, Exposure Draft, Human Rights and Anti-Discrimination Bill 2012, 24.
[207] These examples, with the exception of mental health in insurance and superannuation, have been identified as being covered by Tasmania's irrelevant medical record discrimination protections. See Equal Opportunity Tasmania, 'Irrelevant Medical Record Discrimination: Your health. Your private business' (Web Page) <https://equalopportunity.tas.gov.au/__data/assets/pdf_file/0017/330092/oadc_A4_irreleventmedicalrecord_final.pdf>.
[208] See, for example, Dr Tristan W Casey et al, *Stigma towards injured or ill workers: Research on the causes and impact of stigma in workplaces, and approaches to creating positive workplace cultures that support return to work'* (Report, June 2021) 10-11; Bonnie Kirsh, Tesha Slack and Carole Anne King, 'The Nature and Impact of Stigma Towards Injured Workers' (2012) 22(2) *Journal of Occupational Rehabilitation* 143.

We are concerned by the possibility of prospective employers using a prospective employee's prior workers' compensation history as grounds for rejecting their application notwithstanding the fact that the injury no longer persists. In circumstances where an employer considers an employee to pose a risk or have a tendency to succumb to injury based on prior claims which bear no relevance to the job in question, such adverse treatment should be considered discrimination on the grounds of irrelevant medical record.

We appreciate that it is commonplace for some areas of employment to have inherent requirements of the role which relate to a person's health and do not suggest that this should be altered where it is necessary.

Such protections are particularly important given the prevalence of mental health conditions in professional roles. For example, between 30% and 50% of the legal profession suffers from mental illness or distress.[209] Alarmingly, in 2019 the Queensland Legal Services Commission's shared that lawyers with psychological stressors will 'fall short of the standard of competence and diligence and the ethical standards that members of the public and their professional peers are entitled to expect of them'.[210] This is but one example of where misguided and unevidenced correlations are drawn between competence and mental health. We posit that these assumptions are not exclusive to the legal profession: in 2018, Safe Work Australia found that 72.4% of workers thought they would be treated differently at work for having a mental illness.[211]

In circumstances where a person has a history of workers' compensation or stress leave for mental health treatment, there is a need for protection from misguided assumptions that they lack competence for a specific role.

Additionally, we note that disclosure obligations exist under the *Workers' Compensation and Rehabilitation Act 2003* (Qld) whereby an employer is allowed to ask a prospective employee to disclose information relating to their capacity to perform the inherent requirements of a role where a pre-existing injury or medical condition exists.[212]

The obligations aim to prevent workers' compensation claims where false or misleading disclosure was provided about pre-existing injuries during the recruitment process.[213] Likewise, Queensland government guidelines stipulate that information must be obtained in accordance with the Act, namely that employment cannot be refused solely because:

- of an assumed predisposition to an illness or injury; or
- of an assumption that the candidate cannot perform the role, or the role will aggravate an established illness or injury.[214]

[209] Bridget Burton, 'Mental illness and stigma in legal practice' (2019) 39(3) *QLS Proctor* 22, 23.
[210] Bridget Burton, 'Mental illness and stigma in legal practice' (2019) 39(3) *QLS Proctor* 22, 22.
[211] Safe Work Australia, *National Return to Work Survey 2018: Summary Report* (Report, September 2018) 2.
[212] *Workers' Compensation and Rehabilitation Act 2003* (Qld) ch 14 pt 1 div 1.
[213] *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 571C.
[214] Queensland Department of Health, 'Guideline for disclosure of pre-existing conditions under the Workers Compensation and Rehabilitation Act 2003' (Web Page, October 2018) 4 <https://www.health.qld.gov.au/__data/assets/pdf_file/0034/397429/qh-gdl-212-1.pdf>.

We consider it appropriate to clarify in the legislation that an employer cannot discriminate against a prospective employee on the grounds of their workers' compensation/impairment history where the impairment has resolved and bears no relevance to the role.

Mental health in insurance and superannuation

The systemic discrimination of persons with mental health conditions in the insurance and superannuation space has been a point of concern since the early 1990s.[215] Despite progress having been made, there are still challenges in this space.

Persons with mental health conditions face increased premiums, excessive policy restrictions and blatant rejection of their applications or claims when they disclose their mental health history.[216]

We note that the Act currently provides exemptions to discrimination for insurance and superannuation providers based on actuarial or statistical data related to age or impairment.[217] However, the Actuaries Institute has acknowledged that insurers have difficulties in responding to mental health conditions for a number of reasons, including:

- a lack of available data regarding mental health prevalence, profiles and insurance claims;
- the subjective nature of diagnoses which does not mention prognosis or work capacity;
- difficulties understanding severity of mental health conditions and appropriate treatment or prospects of recovery;
- the possibility of less favourable outcomes through financial compensation or harm from the claims process itself; and
- issues with the regulatory framework.[218]

We are concerned that these exemptions are inadequate in striking a balance between genuine risk of approving policies and the rights of applicants.

For example, the Insurance Council of Australia has released a guide for the General Insurance Code of Practice which helps insurance companies navigate the complexities of insurance premiums for individuals with mental health conditions.[219] The guide explains, among other things, that premiums for mental health conditions will be reflective of the risk of those conditions. In circumstances where premiums are based on actuarial or statistical data despite the fact that insurers struggle to adequately assess such data, we view

[215] See, for example, Human Rights and Equal Opportunity Commission, *Human rights and mental illness: Report of the national inquiry into the human rights of people with mental illness* (Report, 1993).
[216] Public Interest Advocacy Centre, *Mental Health Discrimination in Insurance* (Report, October 2019) 19.
[217] *Anti-Discrimination Act 1991* (Qld) ss 58-65, 72-75.
[218] Actuaries Institute, *Mental Health and Insurance Green Paper* (Report, October 2017) 25.
[219] Insurance Council of Australia, *Guide on mental health: To support the Insurance Council of Australia's General Insurance Code of Practice* (Guidelines, 1 July 2021).

such resources as offering little guidance and, conversely, perpetuating the systemic discrimination faced by persons with mental health conditions in this space.

As with workers' compensation history discrimination which is discussed above, we are concerned that persons with a mental health history are being discriminated against on the basis of mental health conditions that have been appropriately managed and pose low to no contemporary risk.

While we consider it appropriate for general amendments to the exemptions for insurance and superannuation on the basis of impairment discrimination, we consider it equally appropriate to protect applicants from discrimination on the basis of their irrelevant mental health history in circumstances where the conditions no longer persist.

Genetic discrimination

The concept of 'genetic discrimination' emerged in the early 2000s on the back of developments in human genetics.[220] The concept is not foreign to the Australian Law Reform Commission, having been the topic of extensive reporting between 2001 and 2003.[221]

Genetic discrimination is typically based on a misunderstanding of the nature and meaning of genetic information, such as by misinterpreting a predisposition to a genetic condition as conclusive that the individual *will* develop the condition.[222]

Genetic discrimination is particularly rife in 'life insurance products such as death cover, disability and income protection insurances, and employment' as well as adoption, armed services and educational institutions.[223]

We note that genetic discrimination should be considered a component of irrelevant medical history discrimination as distinct from impairment discrimination on the basis that genetic discrimination demonstrates a misinformed prediction of a person developing a condition without any real evidence that it will definitely come to fruition. That is, the person is treated less favourably on the basis of possibly acquiring an impairment instead of actually having one or any symptoms of one.

Sex, sexual characteristics or gender identity

We note that a protection based on irrelevant medical history related to sex, sexual characteristics or gender identity would significantly overlap with pre-existing protections for sex and gender identity protections under the Act, as well as the provisions of the *Sex Discrimination Act 1984* (Cth). Nonetheless, we support the inclusion of such a protection under the umbrella of irrelevant medical history in circumstances where a person may be discriminated against for previous/ongoing hormone treatments or gender reassignment treatments.

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[220] Sandra D. Taylor et al, 'Investigating genetic discrimination in Australia: opportunities and challenges in the early stages' (2004) 23(2) *New Genetics and Society* 225, 225.
[221] See Australian Law Reform Commission & Australian Health Ethics Committee of the National Health and Medical Research Council, *Protection of Human Genetic Information* (Issues Paper Number 14, 5 February 2001); Australian Law Reform Commission & Australian Health Ethics Committee of the National Health and Medical Research Council, *Protection of Human Genetic Information* (Discussion Paper No 66, August 2002); Australian Law Reform Commission & Australian Health Ethics Committee of the National Health and Medical Research Council, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report No 96, May 2003).
[222] Australian Law Reform Commission & Australian Health Ethics Committee of the National Health and Medical Research Council, *Protection of Human Genetic Information* (Issues Paper Number 14, 5 February 2001) 162.
[223] Sandra D. Taylor et al, 'Investigating genetic discrimination in Australia: opportunities and challenges in the early stages' (2004) 23(2) *New Genetics and Society* 225, 226.

Despite existing provisions covering much of what these issues would entail, we consider additional provisions on these grounds to provide a more well-rounded level of protection in circumstances where a matter may fall through the cracks of existing sex and gender discrimination provisions.

Immigration status

Discussion question 32:

- *Is there a need for the Act to cover discrimination on the grounds of immigration status? If so, should it stand alone or be added as another aspect of 'race'?*

Recommendations:

- **Yes, immigration status should be recognised as a protected attribute that is distinct from race under s 7 of the Act**
- **The definition of "immigration status" under s 7(1)(i) of the Discrimination Act 1991 (ACT) should be adopted**

The Act currently provides protection on the basis of 'race' which is defined to include 'colour, descent or ancestry, ethnicity or ethnic origin and nationality or national origin'. There is no specific protection relating to a person's immigration status.

Immigration status includes whether or not a person is a refugee or asylum seeker, holds or have held a visa and the way in which a person arrived in Australia.

Examples of immigration status discrimination can include:

- A business owner placing pressure on staff members who hold a 457 visa to accept less pay than other staff who do not hold a visa.
- A real estate agent requiring persons to disclose their immigration status on rental application forms.
- A local sporting club refusing membership to people on student visas.

In practice, clients who experience discrimination on the basis of immigration status may be reluctant to seek legal advice if they have been terminated from their employment and are fearful of reporting unfavourable conditions and treatment during their employment. This is due to fear of repercussion from their employer, and/or fear of reporting to the Department of Home Affairs if they have breached any visa condition, e.g. working more than 20 hours if on a student visa.[224]

From an intersectional perspective, young women in insecure work arrangements in remote areas may be at risk of sexual harassment and assault as we understand anecdotally there can be 'sexual favours for work'

[224] These fears are also not unfounded – see Richard Baker, 'Pacific workers face deportation despite probe into their employer', *Brisbane Times* (online, 14 February 2022) <https://www.brisbanetimes.com.au/business/workplace/pacific-workers-face-deportation-despite-probe-into-their-employer-20220207-p59ua3.html>.

situations that arise or threats made against migrant farm workers if they seek to report workplace health and safety concerns to WorkSafe.

The Australian Human Rights Commission's Respect @ Work[225] heard evidence that migrant women were more likely to be exposed to sexual harassment in their work. Further:

> *Migrant workers have been identified as at increased risk of workplace exploitation due to their reduced power in the labour market, difficulties in securing alternative employment, social isolation, their lack of language skills and financial resources, and power imbalances that arise from their immigration status and visa conditions.*[226]

Even if clients do bring complaints, their access to complaint mechanisms while available is difficult due to language, cultural, power imbalances and accessibility to Commissions if they are deported or leave Australia.

The following case study highlights these issues as reflected in practice.

CASE STUDY

May is from a refugee background. She worked at a small business and the only other person that worked there was the owner. May found out about the job from her neighbour and was introduced to the owner. The owner was an older male from the same community as May.

The owner was underpaying her for her work which she was not aware of at the time. Due to her having a young family she needed the income to support her family. The owner offered to help May out by giving her a loan, which she accepted.

While May worked with the owner, he would repeatedly make sexual advances towards her and touch her inappropriately. May left her employment as she was in an unsafe situation.

May sought legal advice and is bringing a complaint against her former employer.

If immigration status was recognised as a protected attribute, coupled with the recognition of intersectional discrimination, May would have a strong complaint of discrimination on the basis of immigration status and sex, and also sexual harassment.

Protections in other Australian jurisdictions

Immigration status is protected in the Australian Capital Territory and is defined as:

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[225] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 29 January 2020) 189.
[226] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 29 January 2020) 189..

> *Immigration status includes being an immigrant, a refugee or an asylum seeker, or holding any kind of visa under the Migration Act 1958 (Cwlth). Note Immigration status includes the immigration status that the person has or has had in the past, or is thought to have or have had in the past (see s 7 (2)).*

There are exceptions to discrimination on the basis of immigration status where a person's visa status may be taken into consideration if it is reasonable in the circumstances, having regard to any relevant factors and where there are visa conditions relating to that person's employment.

In the Northern Territory and Tasmania 'being or having been an immigrant' is included in the definition of race under their anti-discrimination legislation. Further, the *Racial Discrimination Act 1975* (Cth) extends the grounds of prohibited discrimination to the status of being 'an immigrant'.

LAQ's preference is the approach taken by the Australian Capital Territory which adequately captures the scope of immigration status to be protected.

Employment activity

Discussion question 33:

- *Is there a need for the Act to cover discrimination on the grounds of employment activity?*
- *Is this an unnecessary duplication of protections under the Fair Work Act?*

Recommendations:

- **Yes, there should be a protection against discrimination on the basis of employment activity, which should specifically provide coverage for sex work**
- **This would provide broader coverage than the protections that exist under the *Fair Work Act 2009* (Cth)**

We are in favour of implementing a protection on the ground of employment activity to cover circumstances where general protections under the *Fair Work Act 2009* (Cth) cannot be exercised.

We note that Victoria already prohibits discrimination on the basis of 'employment activity'[227] to combat situations where employees are reluctant to raise issues about workplace entitlements.[228]

General protections provisions currently exist on a federal level to protect employees against discrimination, victimisation, coercion or otherwise adverse action.[229] While we acknowledge that employment activity protections under discrimination law would largely overlap, we note that the circumstances in which general protections apply are much more specific and therefore narrower.[230] Employment activity discrimination could

[227] *Equal Opportunity Act 2010* (Vic) s 6(c).
[228] Victoria, *Parliamentary Debates (Hansard)*, Victorian Legislative Assembly, 19 April 2007, 1143 (Rob Hulls, Attorney-General).
[229] *CFMEU v Endeavour Coal Pty Ltd* [2015] FCAFC 76; (2015) 231 FCR 150; 250 IR 422, [182] (Bromberg J).
[230] Tim Donaghey and Emma Goodwin, *General Protections under the Fair Work Act* (LexisNexis Butterworths, 2019) 4.

provide broader coverage in circumstances where an employee does not have a general protections claim but has nonetheless been discriminated against because of their exercise of workplace rights.

Not only would this provide greater jurisdictional choice where an employee could exercise both avenues, but it ensures that those not captured by general protections law can still have their case heard.

Likewise, should our recommendations from question 28 above regarding lawful sexual activity not be adopted, we consider it prudent to extend employment activity protections to cover sex work and sex workers. We note the complex legal issues currently surrounding discrimination against sex work and sex workers in Queensland and believe that such a move would be a necessary step in improving protections in the sex work industry.

Physical features

Discussion question 34:

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

Recommendation:

- **Yes, the Act should include 'physical features' as a protected attribute under s 7**
- **The Act should also adopt the exceptions for physical feature discrimination as found in the Victorian and ACT legislation**

The Act does not currently protect discrimination on the basis of physical features.

Example of physical features discrimination can include:

- An airline company recruiting people who have a certain 'look' that fits within their brand with reference to a person's height, weight and shape.
- A café only offering takeaway service to a person with a facial disfigurement.
- An employee being removed from reception duties after suffering hair loss.

In practice, physical features may be already be covered by being a characteristic of a person's religion or culture i.e. ceremonies for cutting children's hair[231], or a person's weight may be associated with a medical condition therefore could be covered by impairment. However, the introduction of this attribute will assist those who cannot establish that the treatment is a characteristic of their race, religion or impairment. Such as those born with a birthmark across their face or scarring due to a medical procedure.

It is submitted that piercings, tattoos or bodily modifications should be covered by physical features discrimination as a person's self-expression may have these particular features and be treated less favourably as a result.

[231] As in *Taniela v Australian Christian College Moreton Ltd* [2020] WCAT 249 (under appeal).

In applying a human rights approach, the recognition of physical features discrimination would give effect to the guarantee of recognition and equality before the law[232] and, at also, would respect the rights of freedom of thought, conscious religion and belief[233] and freedom of expression belief[234].

Protections in other Australian jurisdictions

Physical features have been protected in Victoria since 1995 and in the Australian Capital Territory since 2016.

The ACT *Discrimination Act 1991* defines physical features as 'a person's height, weight, size or other bodily features.' Similarly, the Victorian *Equal Opportunity Act 2010* defines physical features as 'a person's height, weight, size or other bodily characteristics.'

In the Victorian decision of *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849 Mr Jamieson applied for a hospitality role at a Golf Club and he had numerous tattoos on his legs and arms which could be covered up when wearing a long sleeved shirt and trousers, he claimed discrimination on the basis of his physical features. Deputy President McKenzie found that tattoos were a bodily characteristic:

> *Although height is not a matter of choice, weight and size, at least to the extent that size is dependent on weight, are at least in some circumstances. The acquiring of tattoos is of course entirely a matter of choice. In my view the choice of the words "physical features" as the definition itself, the term which is being defined, cannot be ignored when construing the rest of the definition. In its ordinary meaning physical features would embrace any distinctive bodily mark or attribute. I consider that the words "other bodily characteristic" has a broad meaning when looked at in this way. I note of course that there is no express exclusion of characteristics acquired after birth or of characteristics acquired as a matter of choice, as long as they can be described as characteristics of the body.*

Both jurisdictions have exceptions relating to physical features where it is reasonably necessary to protect health, safety or property, or when offering dramatic, artistic, photographic or modelling work.[235]

Gender

Discussion question 35:

- *Should an additional attribute of 'gender' be introduced? Should it be defined, and if so, how?*

Recommendation:

- **No, an additional attribute of 'gender' does not need to be introduced if the attribute of gender identity is broadened in accordance with our recommendations above**

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[232] *Human Rights Act 2019* (Qld) s 15.
[233] *Human Rights Act 2019* (Qld) s 20.
[234] *Human Rights Act 2019* (Qld) s 21.
[235] *Equal Opportunity Act 2010* (Vic) ss 26(4), 86; *Discrimination Act 1991* (ACT) ss 57Q, 57R.

We note the points previously made regarding the distinction between sex and gender in questions 9 and 26 above.

If our recommendations are adopted, then we consider it would be obsolete to also introduce an additional attribute of gender.

Sex Characteristics

Discussion question 36:

- *Should an additional attribute of sex characteristics be introduced? Should it be defined, and if so, how?*

Recommendation:

- **There should be protections in place against discrimination on the basis of sex characteristics, however we do not consider the need for a stand-alone attribute if our recommendations regarding 'gender identity' and 'physical features' are adopted**

- **If one, or both, of those recommendations are not adopted, then we support the introduction of a stand-alone attribute of sex characteristics**

Our recommendations on gender identity expressly include protection from discrimination on the basis of sex characteristics. We consider these recommendations, combined with our recommendations relating to 'physical features', to be sufficient in protecting persons from discrimination on the basis of their sex characteristics.

For example, a transgender man who is transitioning would be protected by gender identity and physical features grounds in circumstances where he is treated less favourably because he does not conform to traditional concepts of sex and/or sexual anatomy.

Should our recommendations on gender identity and physical features not be accepted, then we would consider it appropriate to introduce an attribute based on sex characteristics.

Subjection to domestic or family violence

Discussion question 37:

- *Should an additional attribute of subjection to domestic violence be introduced? Should it be defined, and if so, how?*

Recommendation:

- **An additional attribute of "subjection to domestic and/or family violence" should be introduced**

LAQ has identified a strong need for 'domestic and family violence' to be adopted as a protected attribute within the Act. Domestic and family violence is a large human rights issue within Australia. LAQ submits protection ought to be afforded to victims who have experienced discrimination on this basis.

The Queensland Industrial Relations Commission heard the case of *Wright v Bishop*[236] in 2018. This case involved a female employee's claim that the domestic violence she experienced amounted to sex discrimination under the Act. The Applicant called in sick to work one morning after suffering from an incident of domestic violence. The Applicant was dismissed shortly after, on the basis that the Applicant had "*too many personal problems"*[237]. The Applicant tried to argue sex discrimination had occurred, *"as women are more prone to be victims of domestic violence"*[238]. Here, Deputy President Swan did not accept that *"being a victim of domestic violence is a characteristic that women generally have…"*[239]. It was also not accepted that being a victim of domestic violence is a feature or quality of being a woman. As a result, the Applicant's claim was dismissed.

This case highlights the limitations victims of domestic or family violence endure in their ability to bring discrimination complaints. The case also illustrates a scenario where an 'employment activity' attribute may have provided broader protections and better recognised the intersectional discrimination that occurred.

If domestic and family violence was recognized as a stand-alone protected attribute, the Applicant in *Wright v Bishop* would have had a significantly stronger case of discrimination.

Other jurisdictions

Presently, the ACT is the only jurisdiction which recognizes domestic and family violence as a protected attribute.

The subjection to domestic or family violence is protected in the ACT as defined in section 7 of the *Discrimination Act 1991* (ACT). However, there is no definition provided for domestic or family violence. This may present difficulty for claimants alleging discrimination within the meaning of domestic and family violence.

LAQ submits it is important a clear definition of domestic and family violence be provided for in the ADA to avoid difficulties or further barriers for those victims. LAQ further recommends the definition be gender neutral.

Accommodation status

Discussion question 38:

- *Should an additional attribute of accommodation status be introduced? Should it be defined, and if so, how?*

Recommendation:

- **Yes, an additional attribute of accommodation status should be introduced**
- **The attribute should be defined narrowly to ensure the protections are not unnecessarily extended**

[236] [2018] QIRC 7.
[237] *Wright v Bishop* [2018] QIRC 7, [8].
[238] *Wright v Bishop* [2018] QIRC 7, [8].
[239] *Wright v Bishop* [2018] QIRC 7, [44].

We note that accommodation status is a protected attribute in the ACT and has been previously considered in Victoria and the Northern Territory.[240] We support the introduction of the attribute of accommodation status primarily to provide protection to people who are experiencing homelessness or do not have a fixed home address.

Under the ACT provisions, protection against discrimination on the basis of accommodation status also extends to tenants, occupants within the meaning of the *Residential Tenancies Act 1997* (ACT), and persons currently receiving or waiting to receive housing assistance.[241]

We are not aware of compelling reasons to extend protections beyond persons experiencing homeless or who do not have a fixed home address. We are of the view that the attribute should be narrowly defined to ensure the protections are not unnecessarily extended and exploited.

Other additional attributes

Discussion question 39:

- *Should any additional attributes 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?*

Recommendation:

- **Low socio-economic status should be recognised as a protected attribute and defined narrowly to include reliance on Centrelink benefits, unemployment, or low income**
- **Low literacy/numeracy should also be recognised as a protected attribute**

Low socio-economic status

We support the introduction of an attribute of low socio-economic status. In this regard, we note comments by Thornton that:

[240] *Discrimination Act 1991 (ACT)* s 7(1)(a); Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 98; Department of the Attorney-General and Justice (NT), *Modernisation of the Anti-Discrimination Act* (Discussion Paper, September 2017) 13.
[241] *Discrimination Act 1991* (ACT) sch Dictionary (definition of 'accommodation status').

> *Despite the rhetoric of equality that infuses anti-discrimination legislation, a close analysis reveals that it is in-equality that is invariably privileged… A striking exclusion from the legislation is the attribute of class, the most significant manifestation of social inequality.*[242]

We note that Australia's income support and social security systems are a key contributor in the stigmatisation and discrimination of persons 'who experience psychosocial and mental health challenges, and those who receive government supports, particularly income support'.[243] The receipt of social welfare is itself stigmatised, and persons who attain low socio-economic status – for whatever reason – are those who are most reliant upon the system.[244]

There is a need to protect discrimination against persons who are reliant on income support and social security systems. The system itself has been critiqued for exacerbating structural discrimination,[245] and this is disproportionately compounded where discrimination is also experienced because of a dependence on the system.

We note that there is likely to be substantial overlap with this attribute and other attributes that are either already protected or have been proposed in these recommendations. For example, disability and unemployment income support recipients are often associated with worse mental health.[246] Recognising low socio-economic status as a stand-alone attribute would provide for a greater acknowledgement of intersectional discrimination in these circumstances, and is a necessary step in reducing the stigma associated with dependence on social security measures.

Low literacy/numeracy

Based on earlier comments regarding the difficulties some complainants have with complying with written requirements of correspondence, we suggest the addition of a protected attribute based on low literacy and numeracy levels.

Using that specific example, this would prevent organisations from imposing requirements whereby requests or complaints must be in writing. As noted, these are indirectly discriminatory in nature. However, the attribute would also offer protection more broadly to persons who have low literacy and numeracy (noting especially the intersectionality with other protected attributes) and prevent less favourable treatment generally on that basis.

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[242] Margaret Thornton, *Equality and Anti-Discrimination Legislation: An Uneasy Relationship* (ANU College of Law Research Paper No 21.32, 6 December 2021).
[243] Aurora Elmes et al, *Social Security and Stigma in Australia* (Report, Centre for Social Impact, 1 September 2021) 11, citing Kim M. Kiely and Peter Butterworth, 'Social disadvantage and individual vulnerability: a longitudinal investigation of welfare receipt and mental health in Australia (2013) 47(7) *Australia and New Zealand Journal of Psychiatry* 654.
[244] Aurora Elmes et al, *Social Security and Stigma in Australia* (Report, Centre for Social Impact, 1 September 2021) 13.
[245] Aurora Elmes et al, *Social Security and Stigma in Australia* (Report, Centre for Social Impact, 1 September 2021) 6.
[246] Aurora Elmes et al, *Social Security and Stigma in Australia* (Report, Centre for Social Impact, 1 September 2021) 13, citing Kim M. Kiely and Peter Butterworth, 'Social disadvantage and individual vulnerability: a longitudinal investigation of welfare receipt and mental health in Australia (2013) 47(7) *Australia and New Zealand Journal of Psychiatry* 654.

Exemptions

Sport Exemption

Discussion question 40:

- *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?*

Recommendation:

- **LAQ recommends retaining the wording "reasonable having regard to the strength, stamina or physique requirements of the activity" unless other wording is proposed that reflects contemporary standards but allows a similar case-by-case approach**
- **LAQ suggests that s 111(1)(a) should be re-worded to clarify how the exemption would apply to people who are intersex, of indeterminate sex or non-binary**
- **LAQ suggests that the term "competitive" could be better defined and under s 111(4) to clarify that competitive sporting activity only extends to elite sporting competitions**

We recognise the complexities involved for sporting clubs or organisations in navigating their obligations under the Act. The recognition under subsection (1)(a) of the need for restrictions to be "reasonable having regard to the strength, stamina or physique requirements of the activity" allows for these issues to be determined on a case by case basis, which we consider is an appropriate way of managing these complexities.

We note that, at present, the s 111(1)(a) exemption refers to participation in a competitive sporting activity being restricted "to either males or females". This does not clarify if the reference is to a person's sex or gender. This leaves considerable uncertainty as to how the exemption applies to people who are intersex, of indeterminate sex or non-binary. This point requires further consideration as to how the exemption can be framed in a manner that is inclusive of those attributes.

We also suggest that greater clarity could be provided by further defining what activities do or do not constitute "competitive" sporting activities, in particular by specifying that social sport and school sport is not considered competitive. We support the suggestion that only elite sporting competitions should be considered "competitive" in this context.

Religious bodies

Discussion question 41:

- *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?*

Recommendation:

- **The religious bodies exemption should be removed for religious bodies who receive public funding**
- **To the extent that the religious bodies exemption remains, its scope should be narrowed to permit discrimination on the basis of religious belief or activity in the employment area, but only where that is part of the genuine occupational requirements/inherent requirements of the role**

We do not consider it appropriate to apply a blanket exemption to discrimination in the manner current provided for under the religious bodies exemption of the Act.[247]

We acknowledge that certain faiths may prescribe requirements for certain positions or roles where possessing the same religious beliefs are a genuine occupational requirement, and consider it necessary to strike a balance between the genuine exercise of faith and where conduct is unjustifiably discriminatory.

While we accept that there may be circumstances in which certain persons are not considered appropriate for employment in such roles because of inherent requirements to maintain a specific religious belief, our view is that a person should not be subjected to discrimination on the basis of other irrelevant protected attributes.

We are likewise concerned with the interplay between the need to ensure public access to government-funded services, and religious bodies being permitted to engage in discrimination that reduces inclusivity and accessibility of those services. This is discussed further in our response to question 42 below.

For these reasons, our view is that the religious bodies exemption should be narrowed.

Religious service providers

Discussion question 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?*

[247] *Anti-Discrimination Act 1991* (Qld) s 109.

Recommendation:

- **Religious bodies should not be permitted to discriminate when providing services on behalf of the state**

We note that a number of religious bodies engage in activities which are beyond the scope of purely religious activity. Organisations such as the Salvation Army, while established as religious entities, perform commercial public services such as counselling, disability care, aged care and homelessness services with the help of government funding and private donations. Where, for example, aged care residents are paying for accommodation, such companies begin to operate under a commercial lens.

We note that 2013 amendments to the *Sex Discrimination Act 1984* (Cth) narrowed the religious bodies exemption to remove its application to conduct connected to Commonwealth-funded aged care services.[248] We view this as being a step in the right direction but consider the implications of the exemption to be more far-reaching than just the provision of aged care services.

We are concerned that religious exemptions to discrimination allow these organisations to retain the ability to refuse goods and services to certain groups of people, under the guise of religious belief, despite the fact that they are utilising public money for the apparent public good. In circumstances where a person who is already disadvantaged is reliant on these services but is refused because of their alignment with the company's religious stance, their exclusion may be disproportionately harmful to their wellbeing.

While we support religious entities maintaining autonomy of expression of their religious beliefs, we do not consider it appropriate for these companies to be government funded while *also* being exempt from anti-discrimination provisions and therefore allowed to conduct themselves in a discriminatory way.

Discrimination exemptions should not be granted where such exemptions will limit public access to government-funded goods, services or public places. Our view is that where such a limitation may be imposed, the exemptions should be removed.

Religious accommodation providers

Discussion question 43:

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

Recommendation:

- **This exemption should only be retained for religious accommodation providers who are operating on a purely private/commercial basis and are not publicly funded**

[248] See Supplementary Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth).

We acknowledge that where religious bodies own accommodation in their private capacity and are not publicly funded, they should retain this exemption to the extent necessary to avoid offending their own (or other tenants) religious beliefs.

As noted above at question 42, we reiterate our position that discrimination exemptions should not be granted where such exemptions will limit public access to government-funded goods, services, accommodation or public places. Our view is that where such a limitation may be imposed, the exemptions should be removed.

Genuine occupational requirements

Discussion question 44:

- *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)?*

Recommendation:

- **Government-funded institutions should not be allowed to discriminate for any reasons**
- **Educational institutions which are not government-funded should be allowed to discriminate only on the basis of religious belief, affiliation or activity; and**
- **'Genuine occupational requirement' should be defined narrowly to describe situations where religious knowledge, practice or teachings are an inherent requirement of the role**

We note our considerations provided in relation to questions 41, 42 and 43 above are largely applicable to the genuine occupational requirements exemption for religious education institutions and other bodies.

We echo the sentiment that institutions which are being funded by the government should not also have the ability to exclude persons from accessing their services.

We note that the reasons that were cited for the exemption being introduced in the first place are no longer consistent with community standards or a human rights analysis.[249] While we appreciate and understand that there are circumstances where religious beliefs and practices need to be considered in recruitment, we view the current position as disturbing the balance between religious freedoms and other human rights.

Using the example provided in the second reading speech,[250] we do not consider any display of sexuality to be a genuine occupational requirement – that is, a person's sexuality has no bearing on whether or not they

[249] See Queensland, *Parliamentary Debates,* Legislative Assembly, 28 November 2002, 5010 (P Beattie). See further 'Make school funding conditional on equity', *The Sydney Morning Herald* (online, 12 February 2022) <https://www.smh.com.au/national/nsw/make-school-funding-conditional-on-equity-20220211-p59vlh.html>. For a reflection of Victorian position, see Josh Taylor, 'Religious schools in Victoria will lose right to sack workers based on sexuality in law change', *The Guardian* (online, 16 September 2021) <https://www.theguardian.com/australia-news/2021/sep/16/religious-schools-in-victoria-will-lose-right-to-sack-workers-based-on-sexuality-in-law-change>.
[250] Queensland, *Parliamentary Debates,* Legislative Assembly, 28 November 2002, 5010 (P Beattie).

can be an adequate maths teacher. It is on these grounds that we consider the current exemption to apply in circumstances too broadly for achieving a fair balance, particularly having regard to the significant hurt that is caused by sexuality and gender identity discrimination.[251]

The exemption in Tasmania allows religious educational institutions to discriminate only on the ground of religious belief, affiliation, or activity in the area of employment.[252] This allows a religious institution to only discriminate in the course of hiring and retaining staff of the same faith.

However, we are concerned that adopting such an approach will give rise to circumstances similar to those in *Walsh v St Vincent de Paul Society Queensland (No 2)*,[253] in which a woman in an office bearer role was threatened with dismissal unless she became Catholic. This was held not to be a genuine occupational requirement.

Having regard to the provision of government funding, the Tasmanian approach and the possibility of creating situations analogous to *Walsh*, we recommend a reshaping of the genuine occupational requirement exemption in a way that strikes a fairer balance for all persons involved.

We support the abolition of the genuine occupational requirement exemption for institutions which are government funded as we consider this to be restrictive of community access to public goods and services. We do not think the government should be funding discriminatory practice and we do not think religious entities should be excepted.

Where a religious educational institution is not government-funded, we support a genuine occupational requirement exemption modelled on the Tasmanian exemption mentioned above whereby an applicant's faith or religious practice is the only attribute-based consideration that should be taken into account during the pre-employment screening process.

Finally, to avoid similar circumstances to *Walsh*, we suggest an express definition of 'genuine occupational requirement' which explains that the exemption is only to be exercised where the role being sought actually requires consistent knowledge, practice or teachings of religion or religious practice. For example, an applicant for the role of religion teacher or a form of pastoral caretaker should be subject to this requirement, but an administration assistant should not.

Working with children

Discussion question 45:

- *Are there reasons why the work with children exemption should not be repealed?*

[251] See for example 'A dedicated teacher – except I am transgender', *The Age* (online, 11 February 2022) <https://www.theage.com.au/national/victoria/a-dedicated-teacher-except-i-am-transgender-20220210-p59vhv.html>; Ben Schneiders and Royce Millar, 'Steph Lentz was sacked this year for being gay. It was perfectly legal', *The Sydney Morning Herald* (online, 10 August 2021) <https://www.smh.com.au/national/steph-lentz-was-sacked-this-year-for-being-gay-it-was-perfectly-legal-20210809-p58gzv.html>.
[252] *Anti-Discrimination Act 1998* (Tas) s 51.
[253] [2008] QADT 32.

Recommendation:

- **The work with children exemption should be repealed**

LAQ notes that the work with children exemption under s 28(1) of the Act is discriminatory, is not aligned with contemporary community standards or the approaches in other jurisdictions, and is inconsistent with the human right to equality before the law. LAQ strongly recommends that this exemption should be repealed to afford equal status to persons with diverse sexualities, gender identities, or history of sex work.

It is also unnecessary to retain s 28(2) in light of the regime that is created by the *Working with Children (Risk Management and Screening) Act 2000* (Qld).

For these reasons, the exemption should be repealed in its entirety.

Assisted reproductive technology services

Discussion question 46:

- *Are there reasons why the Act should not apply to provision of assisted reproductive technology services?*

Recommendation:

- **The assisted reproductive technology services exemption should be repealed**

LAQ is not aware of circumstances in which persons have been refused access to assisted reproductive technology services in Queensland because of their sexuality or relationship status. In our experience, the fact that these services are offered by private businesses (often to same-sex couples) means that these businesses do not typically engage in this type of discrimination which is likely to affect the profitability of their business model. We also note the comments in the Discussion Paper that there are no current clinical or ethical standards that prevent offering these services on those grounds. Given the lack of industry reliance on this exemption, we suggest that it is not relevant or reflective of community standards in Queensland and should be repealed.

Accommodation exemptions

Discussion question 47:

- *Should the sex worker accommodation exemption be retained, changed or repealed?*

Recommendation:

- **The exemption for use of accommodation by sex workers should be repealed**

LAQ notes that the definition of 'accommodation' is broadly defined and this significantly extends the scope of this exemption.

We acknowledge the comments made by Respect Inc that:

> *a large percentage of sex workers experience accommodation discrimination in Queensland, resulting in housing instability, excessive costs, safety risks (when evicted from a hotel in early hours*

of the morning), etc. It is necessary therefore to repeal this amendment and that the attribute include both one's status as a sex worker and one's practice of sex work.

LAQ shares those concerns about the impact of this exemption on sex workers.

We recognise that some accommodation providers may be concerned about their ability to control the practice of sex work that occurs on their premises. However removing this exemption does not alter the rights of accommodation providers to maintain standards of cleanliness, noise restrictions, etc to protect their premises and ensure the quiet enjoyment of other customers/tenants.

For these reasons we recommend this exemption be repealed.

Prisoners

Discussion question 48:

- *Should the Corrective Services Act modifications be retained, changed or repealed?*

Recommendation:

- **The additional requirements for prisoner complaints under the *Corrective Services Act 2006* (Qld) should be removed**
- **There is a need for an overhaul of the existing internal complaint requirements in the correctional context, in particular by redesigning the Official Visitor role in line with recommendations from the Sofronoff report and OPCAT**
- **If the *Corrective Services act 2006* (Qld) provisions are retained, there is a need to remove the capacity for the Public Trustee to charge fees when administering payments made to prisoners which are initially held in Victim Trust Funds**

Please refer to our submissions above regarding "Prisoner Complaints".

Citizenship/visa status

Discussion question 49:

- *Should the citizenship/visa status exemption be retained, changed, or repealed?*
- *Are there certain groups in Queensland that are being unreasonably disadvantaged by this exemption?*

Recommendation:

- **The citizenship/visa status exemption should be repealed, in addition to the creation of "Immigration Status" as a new protected attribute**

We note that the exemption in its current form is inconsistent with the human right to equality before the law.

We recommend that the citizenship/visa status exemption should be repealed. There does not appear to be a need for this to be maintained as a separate exemption ground as it would be adequately covered by the 'acts done in compliance with legislation' exemption.

We do not support the retaining of this exemption where such discrimination is "reasonable" in accordance with the approach taken in the ACT legislation, as the "reasonableness" defence is already encompassed in the definition of indirect discrimination.

Insurance and Superannuation

Discussion question 50:

- *Should the insurance and superannuation exemptions be retained or changed?*

Recommendation:

- **The insurance and superannuation exemptions should be amended to remove the exemption where no actuarial or statistical data is available**
- **The onus of proof should be shifted (in accordance with recommendations under "Burden of Proof" above) to improve the ability for persons to bring discrimination complaints against insurers and superannuation providers**
- **A respondent insurer/superannuation provider should be required to disclose actuarial or statistical data upon which they seek to claim an exemption, prior to any QHRC conciliation**

We acknowledge the need for insurers and superannuation providers to adjust the products they offer to cater for varying levels of need and risk. For this reason we support the retention of the exemption where discrimination is reasonable based on actuarial or statistical data.

However we question the extension of this exemption to allow for discrimination in some circumstances even where no actuarial or statistical data is available. We suggest that, in the absence of relevant actuarial or statistical data, it is unclear what (if any) other information would be sufficient to support an exemption under this ground.

We refer to our discussion of the 'Irrelevant medical record' ground above, which sets out concerns about potential discrimination on the basis of medical history. In that discussion we note concerns have been raised about the extent to which insurance and superannuation providers discriminate on the basis of mental health history, in the absence of adequate actuarial or statistical data to justify that position.

It is also significant to note the very real repercussions for individuals who are discriminated against by an insurance or superannuation provider on the basis of their age or impairment. For example, an elderly person may be arbitrarily excluded from obtaining travel insurance because of their age, and this means that they cannot travel to see family. We have seen throughout the COVID-19 pandemic the harmful consequences of placing arbitrary limits on freedom of movement and right to privacy (including protection of the family unit).

In addition, we note that insurers and superannuation providers are large, well-resourced organisations and it is extremely intimidating for complainants to commence proceedings against these entities. This imbalance of power is a clear barrier to engaging in the QHRC complaints process or further proceedings brought under the Act against an insurer or superannuation provider. We recommend that suggestions made under the 'Burden of Proof' part of this submission above should be adopted to try and alleviate some

of the pressure on complainants in these circumstances. To some extent this would replicate the process in AFCA, where insurance and superannuation providers are required to respond to a complaint made against them before attempting to negotiate a resolution.

Other Exemptions

Discussion question 51:

- *Should any other exemptions be changed or repealed? What evidence justifies the continued need for these exemptions?*
- *Should further exemptions be created? What evidence justifies the need for further exemptions?*

Recommendation:

- **The 'acts authorised under another law' exemption under s 106 should be amended to clarify that the exemption only applies to the extent that there were no non-discriminatory options that were reasonably available**

In our experience, many public entities seek to rely upon section 106 to justify discrimination that occurs in the exercise of statutory powers, where the law grants a broad discretion and there was a reasonably available non-discriminatory way of achieving the same purpose.

For example, when in the prison context a prison officer exercises their discretion to use force to restrain a prisoner with disabilities, when other de-escalation techniques would have been reasonably available.

CASE STUDY

Adam has a diagnosis of Autism Spectrum Disorder.*

Adam was charged with a range of offences which occurred during his early 20's when he had first moved out of home, and had started hanging out with a bad crowd.

At Adam's sentencing the judge had regard to a psychiatrist report which explained that one of the features of Adam's disability severe touch aversion, which he has experienced since childhood. Any form of physical touch causes Adam severe unease, discomfort and anxiety. He has difficulty managing this reaction.

Other challenges that are associated with his disability are interpersonal communication, problem-solving, emotional regulation and responding to perceived unfair or unjust treatment. This can make it difficult for Adam to cope with interactions with prison staff in custody.

Following his sentencing hearing the judge requested that Adam's psychiatrist report be forwarded to corrective services to assist with his supervision in custody.

The main adjustment that has been implemented to recognise Adam's needs in custody is a "Cognitive Impairment" flag in the QCS system, which alerts officers to the fact that Adam has a disability. However this doesn't provide an adequate picture of Adam's needs, particularly considering that he has been assessed as above average intelligence with no learning disabilities.

Throughout his time in prison, Adam has experienced severe depression, suicidal thoughts, and has engaged in repeated acts of self-harm. He has been placed under safety orders because at times he has been assessed as being a high suicide risk.

Adam's custodial behaviour becomes more settled when he is aware of structure and routine, where he feels that he is being treated respectfully, where he is given warning of any changes and where physical contact is reduced to a minimum. He spent a period of his time in custody in the Maximum Security Unit where the officers were able to implement procedures consistent with those needs, in particular this involved clear communication, preparing him for any necessary physical contact and informing him of the process prior to handling, and giving him the opportunity to wear a jumper to cover his skin to reduce the sensory experience. However the same treatment cannot be provided in a mainstream unit.

Because of his touch aversion, Adam has extreme difficulty with situations where he is physically handled by prison officers. There have been multiple incidents where Adam has been grabbed by prison officers without being warned or given an opportunity to de-escalate. This results in Adam becoming extremely heightened and attempting to push officers away from him. This behaviour is interpreted as non-compliance and attempted assault of prison staff, when Adam has little capacity to control this reaction as it is a characteristic of his disability. The officers involved in these incidents appear to have little understanding of Adam's disabilities and how they should make adjustments to accommodate his condition. In one of the recent incidents, a specific officer who knew about Adam's condition told the other officers involved to "stop touching him" however this suggestion was ignored and that officer was later reprimanded.

Adam considers that QCS has engaged in indirect discrimination by repeatedly using force against him without making adjustments to accommodate his disabilities. He has made seven separate complaints to the Ethical Standards Unit about these incidents, including one incident where OC spray was sprayed directly into his mouth and caused breathing issues and burns to his mouth, and other incidents where he has been kneed or hit by officers despite complying with their directions and being pinned to the ground at the time. Video footage shows Adam screaming and visibly panicked and distressed when he is handled by prison officers in this manner.

The lack of appropriate training or adjustments means that these incidents quickly escalate into a violent confrontation, when de-escalation techniques were available and could provide a safer and less restrictive option for dealing with Adam's behaviour.

As a consequence of these incidents, Adam has been charged with additional offices of assaulting prison staff, and has received further sentences added to his prison term. He is also classified as a high security prisoner with a history of assaulting staff, which means that he does not have the opportunity to progress to low security custody and participate in programs which would help him work towards re-integration into the community.

Adam has provided the following statement in his own words about one of the most recent incidents, where he was pinned to the ground and kneed multiple times by a prison officer:

> *The way they grabbed me is not how they normally treat other prisoners.*
>
> *I'm scared they're going to keep doing this again.*
>
> *It's not just me either, I'm not the only one in here with autism.*
>
> *The issue is that people with autism can't navigate their way out of jail. If they respond in this way and push back when being grabbed, they will be charged with assault and have additional years added to their sentence.*

> *People with autism also have to serve their whole sentence because usually the parole board doesn't have confidence in their ability to live in the community, and views them as posing an unacceptable risk.*
>
> *I've done every course but I'm still judged to be an unacceptable risk.*
>
> *I'm going to have to serve my whole sentence and then be released straight into the community, with no supports in place.*
>
> *It's very stressful for me to think about adjusting to life on the outside when I do finish my sentence.*
>
> *I don't want any more problems before I finish my sentence and get out.*

Each time Adam makes a complaint about the use of force against him, he is required to write a blue letter to the General Manager who typically takes the view that the use of force is justified to maintain the "security and good order of the facility". He will then progress his complaint to the Official Visitor, who will decline to deal with the complaint if it has also been forwarded to the Ethical Standards Unit. This means that Adam may need to wait months to comply with the Corrective Services Act 2006 (Qld) before progressing his complaint to the QHRC.

To add to this complexity, each time a use of force incident occurs, Adam must make a fresh complaint and start the process again.

In the meantime, Adam is at ongoing risk of victimisation by prison staff. Recently, Adam was transferred to another prison without requesting a transfer. When he asked why he had been transferred, he was told by one of the officers "you must have complained too much and pissed someone off".

Adam's case illustrates the real barriers that prisoners face when seeking to complain about discrimination that occurs in prison. Adam first raised complaints about these issues in early 2017, but to date no changes have been implemented by QCS. Adam genuinely wants to work with QCS to ensure that they have better processes in place to deal with prisoners with autism, and has even offered to provide feedback for the QCS Use of Force review, but these suggestions have been ignored.

**Adam's name has been changed for confidentiality reasons.*

Public entities should already be familiar with the requirement to engage in this type of proportionality exercise as it requires similar considerations to section 13 of the *Human Rights Act 2019* (Qld). This legislative amendment is necessary to remove room for argument about how statutory powers should be interpreted in line with the *Human Rights Act 2019* (Qld).

We are also aware of cases where non-public entities similarly seek to rely on other laws, court orders, etc to justify conduct that is discriminatory. For example, where a landlord seeks to evict a family because they have a child with disabilities who is prone to having loud tantrums, the landlord may try and rely on other

tenants' rights to quiet enjoyment as authorising that conduct – even though the law does not go so far as to require the eviction of the family in those circumstances.[254]

We recommend that section 106 be amended by including a further subsection which specifies that this exemption does not apply if there were other reasonably available non-discriminatory options for complying with or exercising the powers so authorised, which had not yet been exhausted.

Areas of Activity

Goods and Services

Discussion question 52:

- *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?*

Recommendation:

- **The exclusion for non-profit goods and service providers should be removed**

We are aware of many circumstances where discrimination would be typically protected under the Act, but the respondent is a non-profit service provider and is able to rely on this exclusion to avoid liability.

Where this is immediately apparent, we will typically advise individuals to file their complaint in the AHRC to take advantage of the equivalent protections at Federal law which do not contain the same exemption for non-profit service providers.

However, on many occasions individuals will have already filed with the QHRC when they approach us for legal advice, and are limited in their ability to withdraw the complaint and re-lodge in the Federal jurisdiction.

On other occasions, the not-for-profit nature of the entity may not be evident at first (for example, some very large organisations are registered charities and are therefore able to rely on the exemption, despite appearing to operate on a commercial basis in most of their public dealings). Alternatively there may be some confusion about the relevant entity to name as a respondent (for example, when discrimination is perpetrated by a not-for-profit entity acting as an agent for a state or private entity and vicarious liability arguments arise).

[254] To provide a similar example from the public housing context, see the decision of *State of Queensland through the Department of Housing and Public Works v Simonova* [2017] QCAT 328 where a tenant with disabilities was evicted from public housing for 'objectional behaviour' which was behaviour that she could not control as it was a characteristic of her disability.

This can create confusion for individual complainants and may even be the source of protracted disputes between legal representatives. It also adds to the complexity of deciding which jurisdiction is the best option for a complaint.

We also consider this aspect of the Act is outdated and does not reflect current community standards.

Since the introduction of these provisions many not-for-profit organisations have become increasingly sophisticated in nature and many aspects of their operations may be indistinguishable from private businesses or public entities. In addition, many not-for-profit organisations will be in receipt of public funding which means that the nature of their work is similar to public services (and this is recognised in the definition of "public entity" under the *Human Rights Act 2019* (Qld)). As is noted in the Discussion Paper, Tasmania is the only other jurisdiction to retain this type of protection.

While some non-profit service providers may have very limited resources or capacity to ensure compliance with the Act, this should not be accepted as an excuse for discrimination. Retaining the 'reasonableness' component of the test for indirect discrimination and also the 'reasonable adjustments' measures suggested above would ensure that non-profit entities with limited financial resources are not unfairly burdened with compliance costs, while maintaining adequate protections against discrimination.

On this basis, we recommend that the exclusion for non-profit service providers be removed entirely.

Club Memberships and Affairs

Discussion question 53:

- *How should the Act define a 'club'?*
- *How would this interact with a potential further 'sport' area of activity?*

Recommendation:

- **The exclusion for non-profit clubs and associations should be removed**

For the same reasons that are set out above in relation to goods and services, we recommend that the exclusion for non-profit clubs and associations be removed entirely.

Sport

Discussion question 54:

- *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?*

Recommendation:

- **There is no need to create an additional area of activity for sport, provided the above recommendations in relation to the sporting activities exemption, goods and services and clubs areas are adopted**

We consider that sporting activities are already sufficiently covered by other areas under the Act (providing that our recommended changes to the Sport exemption, goods and services and clubs areas are adopted) and therefore are not aware of any compelling reasons for the introduction of sport as a standalone area of activity.

Other areas of activity

Discussion question 55:

- *Are any additional areas of activity required? Should any be repealed?*
- *Should the scope of any of the areas of activity be further refined?*

Recommendation:

- **LAQ does not propose any additional areas of activity**

Human Rights Analysis

Discussion question 56:

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

Recommendation:

- **The treatment of prisoner complaints under the Act and *Corrective Services Act 2006* (Qld) is incompatible with the right to equality before the law and should be repealed**
- **The 'acts authorised under another law' exemption should be amended to clarify that the exemption only applies to the extent that there were no less discriminatory options that were reasonably available (importing the proportionality test from s 13 of the *Human Rights Act 2019* (Qld))**
- **The QHRC should review its current processes and frameworks to ensure a human rights approach is adopted**

We have adopted a human rights analysis throughout this submission and will not reiterate all of those considerations here. However we do note the following issues which warrant particular attention:

- The treatment of prisoner complaints under the *Corrective Services Act 2006* (Qld) is incompatible with the right to equality before the law (and in some cases, facilitates prolonged breaches of other human rights e.g. protection from torture and cruel, inhuman or degrading treatment, humane treatment when deprived of liberty and the right to privacy);

- The 'acts authorised under another law' exemption is often relied upon by public entities to justify discriminatory conduct which is also not consistent with the *Human Rights Act 2019* (Qld), these provisions need to be amended so that they are understood coherently; and

- The current processes adopted by the QHRC provides the same level of servicing for all complaints. Providing equal treatment for everyone is not the same as substantive equality. There is a need for the functions of the QHRC to be reviewed in light of human rights obligations and allow for more flexibility in these processes to enhance efficiency and accessibility.

Conclusion

Thank you for providing us with the opportunity to make this submission.

We welcome any further queries you have about the above recommendations.