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1 March 2022

Queensland Human Rights Commission
City East Post Shop
PO Box 15565
City East QLD 4002

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

Dear Madam/Sir,

We welcome the opportunity to provide feedback in relation to the Queensland Human Rights Commission's review of the Anti-Discrimination Act.

Please do not hesitate to contact me and my colleagues on [redacted] or via my [redacted] if we can further assist with the Commission's important work.

Yours faithfully,

Giri Sivaraman
Principal Lawyer
MAURICE BLACKBURN

Submission in Response to the QHRC Review of the Anti-Discrimination Act.

March 2022

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Submission

In the last year, Australia has been grappling with what appears to be a seriously pervasive issue of sexual harassment and sex discrimination in our workplaces. In just two high profile cases, we have seen the alleged rape of a woman in the halls of Parliament, and allegations of sexual assault against the highest lawmaker in the country.

Plainly, the position of women in our workplaces remains unequal. The 'challenge' of a woman's gender arises not only in the search for work for which the woman is duly qualified, but also in her attempts to secure fair and equal remuneration, not to mention promotions and pay rises.

Perhaps most confronting of all, many women have to fight just to ensure their place of work is safe, and free from even the most blatant forms of discrimination and harassment. Of course, these challenges are even harder for members of the LGBTQI+ community, women of colour, and those from diverse cultural, ethnic and linguistic backgrounds.

To this end, Maurice Blackburn's submission to this inquiry can best be summarised through the following case study.

> *Our firm heard from an AMWU member who identifies as female and a member of the LGBTQI+ community, who we'll refer to as 'Jane'.*
>
> *Since 2018, Jane has been completing her apprenticeship to become a qualified Refrigeration and Air-conditioning Mechanic. Over the course of those three years, Jane has experienced what can only be described as incessant harassment and discrimination on the basis of her gender and sexuality.*
>
> *Of course, some of the discrimination has been subtle, such as being passed over for work in favour of her male colleagues. However, much of it has been so overt as to leave no question about whether it was purposeful. For example, at the beginning of her apprenticeship, she was told outright that she was "wasting her time", that she was only hired to fill diversity quotas, and that male Trades Assistants deserved the job over her.*
>
> *However, Jane's overwhelming experience can be described as the creation by her male co-workers of a hostile work environment. She has had male colleagues repeatedly ask each other in front of her, "Are you a pussy? Do you have a pussy?", repeating it until Jane left the room.*
> *She has witnessed male colleagues routinely talk about their genitals in front of her, and openly discuss their sexual 'exploits' in the workplace. She has heard her male*

colleagues speak about another female colleague as either "being on her rags" if she was in a bad mood, or "getting a root" if she was in a good mood.

On one occasion, she was approached by her direct supervisor, and asked if a particular colleague had made 'anti-gay' comments to her. When she told him that he hadn't, her supervisor proceeded to repeat a number of derogatory and homophobic slurs that the colleague had purportedly made. The following day, Jane saw that other colleagues had posted Pride stickers and posters around the workstation of that employee. Jane was left with the distinct impression that her sexuality was being used to antagonise not only her, but her colleague as well.

On a further occasion, she was approached out of the blue by a colleague who gave her a calendar filled with pictures of naked women. He told her, "We saved you one too because we knew you would appreciate it".

Like many women, Jane would do her best to ignore the behaviour, or to force a laugh to avoid a particular situation escalating. She also reported the behaviour through her employer's internal processes. This resulted in her being advised that making a formal complaint was only likely to make her remaining time as an apprentice "more difficult". She made the complaint anyway, only to be told at her next workplace that they had heard about it, and her new colleagues were now avoiding speaking or joking with her.

Jane's experience of sexual harassment and discrimination culminated in an incident in a scheduled union meeting. As Jane arrived and sat down, she heard her male colleagues engage in a conversation directly behind her. They were joking about ejaculating inside of her. Jane looked to her direct supervisor and Trade Coordinator sitting next to her for support. He simply looked at her, leaned back, and laughed with the colleagues. As Jane got up and left the meeting, she heard a colleague say, "What's her problem? She's in a bad mood today", and the meeting erupted into laughter.

Jane's experience is confronting, but perhaps what is more confronting is that she is not the exception. Many Australian workplaces – particularly in male-dominated industries – continue to foster environments that are hostile to their female employees. There is a lack of training to prevent this behaviour, and insufficient support offered to those targeted by it. Moreover, the governing laws mean that, in many cases, proper legal recourse is inaccessible due to the narrow scope of the prohibited conduct, or the restrictive time limits, or is ineffective in bringing about an outcome that is just and equitable.

Maurice Blackburn submits that Jane's experience highlights the need for reform that deals with workplace cultures that are toxic to women. There is a clear need to place positive obligations on employers to ensure female employees are not subjected to routine sexual harassment and sex discrimination.

This submission will first consider the deficiencies and necessary reforms for those issues, and then consider amendments to other provisions in the *Anti-Discrimination Act 1991* (Qld) (the **AD Act**).

Current Deficiencies and Necessary Reforms

Maurice Blackburn submits that the majority of necessary reforms to the AD Act are related to sections of the Act dealing with sexual harassment and sex discrimination.

We draw the following reform proposals to the attention of the Commission.

Broaden the definition of 'sexual harassment' under section 119

The current meaning of sexual harassment encompasses '*unsolicited demands or requests for sexual favours, remarks with sexual connotations and unwelcome conduct*'. That definition requires a direct demand, request or remark to be made by the perpetrator.

Gender is often objectified via advertisements, stock imaging and marketing strategies, specifically against women in a sexualised manner. Such material can be used or displayed in workplaces, either by employers or employees.

For example, in some male dominated workplaces, it is not uncommon for employees to hang pornographic or sexually explicit calendars or posters in common areas.

That material can lead to a person of a particular gender feeling offended, humiliated or intimidated, or otherwise unsafe in the workplace.

The use of such materials is now out of step with community standards. The meaning of sexual harassment should be broadened to capture offensive imagery that is present in a workplace environment, in any context.

Further to this, the meaning should be broadened to include behaviour that contributes to – or is likely to contribute to – a hostile work environment for a person of a particular gender or sexuality. That would capture behaviour that leads to a work environment that is, for example, misogynistic or homophobic, but that isn't directed at a particular female or gay complainant.

An example of such behaviour would be engaging in a sexist conversation in the workplace, that would be capable of making a person of a particular gender feel offended, humiliated, intimidated or harassed.

'Sexual harassment' in its current form requires conduct to be directed at the complainant and therefore, does not capture the scenarios described above. This is an issue, as indirect discrimination perpetuates a culture of harassment against women.

Recommendation 1:

That the meaning of sexual harassment to broadened to capture offensive imagery

Recommendation 2:

That the meaning of sexual harassment be broadened to include behaviour that contributes to – or is likely to contribute to – a hostile work environment for a person of a particular gender or sexuality.

Positive duty on employers

Recommendation 17 of the Federal Respect@Work Report[1] was to amend the *Sex Discrimination Act* 1984 (Cth) (**the SD Act**) to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.

The Queensland Government has acknowledged in their call for submissions that placing a positive duty on the employer is a key consideration in their development of stronger policies in this area.[2]

Where there is no positive duty, the law remains reactionary to sexual harassment and provides no mechanism to prevent the behaviour from occurring, specifically:

(a) the current legislative scheme places the onus on the subjects of harassment to seek redress for the harm they have suffered, rather than placing a positive obligation on employers to prevent the harm from occurring in the first instance;

(b) the current legislative scheme requires victims of sexual harassment to take the step of making a formal complaint before they are able to pursue a remedy in relation to unlawful harassment;

(c) under the current scheme, an employer's obligation to take reasonable steps to prevent sexual harassment only becomes relevant where they are defending a claim of sexual harassment.

Maurice Blackburn believes that rather than the employer's reasonable steps being relevant to their defence to liability, the AD Act should impose a positive obligation on employers to take all reasonable steps to prevent sexual harassment occurring in the workplace, whether an incident has occurred or not.

Drafting guidance may be taken from Victoria's *Equal Opportunity Act 2010* (**the EO Act**).[3] Section 15 of the EO Act states as follows:[4]

> *15 Duty to eliminate discrimination, sexual harassment or victimisation*
>
> *1. This section applies to a person who has a duty under Part 4, 6 or 7 not to engage in discrimination, sexual harassment or victimisation.*
>
> *2. A person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.*
>
> *3. Part 8 does not apply to a contravention of the duty imposed by subsection (2).*
>
> *4. A contravention of the duty imposed by subsection (2) may be the subject of an investigation undertaken by the Commission under Part 9.*
>
> *5. The duty imposed by subsection (2) is in addition to—*

[1] Ref: https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020#Nhh47
[2] Refer Term of Reference 3 (f) of this inquiry
[3] Ref: https://www.legislation.vic.gov.au/in-force/acts/equal-opportunity-act-2010/024
[4] Emphasis added

a. a duty under Part 4, 6 or 7; and

b. in the case of a person who is a public authority, a duty under section 38 of the Charter of Human Rights and Responsibilities.

The section also provides two examples:

1. *A small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation's commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.*

2. *A large company undertakes an assessment of its compliance with this Act. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.*

Section 15 of Victoria's EO Act is drafted in such a way that allows for different employers or different sizes and resourcing capacities to implement measures that are achievable, but which seek to eliminate the objectionable conduct 'as far as possible'.

Maurice Blackburn submits that the AD Act ought to introduce a provision that is similar, if not in the same terms as section 15 of the Victorian Act. That would create a positive obligation on employers to ensure that sexual harassment and discrimination are not present in their workplaces, rather than the onus being on the employee to make a complaint when it is.

Recommendation 3:

That the AD Act should impose a positive obligation on employers to take all reasonable steps to prevent sexual harassment occurring in the workplace, whether an incident has occurred or not.

Mandatory training

Either as part of the duty to eliminate discrimination, or as a separate and additional requirement, the AD Act ought to be amended to also impose a positive obligation on employers to facilitate anti-discrimination training. This should cover all prohibited discrimination, including sexual harassment.

A similar provision may be found in the *Work Health and Safety Act 2011* (Qld).[5] Section 19 of that Act states that, as part of the primary duty of care owed by a person conducting a business or undertaking, that person:

….must ensure, so far as is reasonably practicable-

(f) the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking.

[5] Ref: https://www.legislation.qld.gov.au/view/html/inforce/current/act-2011-018

Maurice Blackburn believes that by imposing an additional, positive obligation on employers to introduce and facilitate anti-discrimination training, the AD Act would effectively be recognising that discrimination in the workplace is a health and safety issue, and should be dealt with in the same way.

Alternatively, where the industry has significant union membership, there may be scope for the mandatory training to be facilitated by the relevant union. This may increase engagement and compliance.

Recommendation 4:

That the AD Act be amended to also impose a positive obligation on employers to facilitate anti-discrimination training.

Investigatory powers

Maurice Blackburn believes that the AD Act should also be amended to include an investigation process, as is seen in the EO Act. Section 127 provides that the Equal Opportunity Commission may conduct an investigation into 'any matter', if the matter:

a) *raises an issue that is serious in nature; and*

b) *relates to a class or group of persons; and*

c) *cannot reasonably be expected to be resolved by dispute resolution or by making an application to the Tribunal under section 122; and*

d) *there are reasonable grounds to suspect that one or more contraventions of this Act have occurred; and*

e) *the investigation would advance the objectives of this Act.*

The investigatory powers are of particular use where, for example, the matter involves a discriminatory policy or toxic workplace culture. Often, the resolution of an individual's complaint about those issues will not result in that policy being changed, or result in a shift in culture.

The AD Act ought to be amended to include such investigatory powers, which may also be wielded where the QHRC reasonably believes an employer is not fulfilling their positive obligations (as outlined above).

Recommendation 5:

That the AD Act be amended to include investigatory powers.

Remove immunity for judges and parliamentarians

The Federal Government has agreed to amend the SD Act to include judges and parliamentarians, which will provide wider protections across the executive and judiciary branches.[6]

There is plainly no proper reason why discrimination and harassment perpetrated by members of our judiciary and Parliament should be lawful.

Maurice Blackburn suggests that this review should consider and ensure that the Queensland legislation is in line with the recent amendments to the Federal legislation, in this respect.

'Stop sexual harassment orders'

The Federal Government has agreed to implement the recommendation of the Respect@Work Report for employees to make an urgent application to the Fair Work Commission for 'stop the bullying orders'.[7] If those orders are made and employers or individuals to whom the orders relate breach the orders, civil penalties may apply. Matters may also be referred to state regulators for investigation.

At present, national system employees who have been subjected to sexual harassment may use the Fair Work Commission's anti-bullying jurisdiction, only if the harassment has been 'repeated'.

A significant advantage of the Fair Work Commission's anti-bullying jurisdiction is that it is required to deal with the application within 14 days. This ensures a fast resolution for an employee who is potentially experiencing unsafe behaviour by colleagues.

The extension of the jurisdiction to allow victims to apply for 'stop sexual harassment orders' would provide a more suitable pathway for individuals to seek to have the harassment stop.

This would be particularly useful for complainants who do not feel that they can trust any person in their organisation enough to report the matter informally, or where the organisation doesn't have or hasn't followed their internal policies or complaints resolution processes. However, it is noted that the QHRC is already under-resourced with lengthy delays in complaints being heard.

Maurice Blackburn submits that, if this were to implemented in the Queensland context, further resourcing must accompany the change, including additional staff and financial resources to execute the orders. Those staff would also require training in dealing with the nuances and sensitivities of sexual harassment.

Apprentices

Apprentices face specific challenges across certain industries. In our experience, the most impacted include female apprentices in male-dominant workforces, where age disparities exist, where a lack of experience in a workplace exist, and where notable power-imbalances exist with their peers.

This was acknowledged in the Respect@Work Report, which cited the case of *Hopper v Mt Isa Mines Ltd*.[8] In that case, the Queensland Anti-Discrimination Tribunal found that nothing had been done to prepare the work area in the mine for the company's first female

[6] Ref: https://www.ag.gov.au/sites/default/files/2021-04/roadmap-respect-preventing-addressing-sexual-harassment-australian-workplaces.pdf: p.12
[7] Ibid, p.16
[8] Ref: https://humanrights.gov.au/sites/default/files/document/publication/ahrc_wsh_report_2020.pdf: p.478

apprentice. There was no education of the male workforce to change entrenched attitudes and ensure that she would not be subjected to harassment on the basis of her gender. Policies were not communicated effectively to employees.

In these circumstances, the defence of reasonable steps under s.133(2) of the AD Act was not available.

This example illustrates the need for a positive duty on the employer to prevent harassment from occurring.

However, the Report did not address the other nuances involved in being an apprentice in a workplace. Those nuances mean that apprentices are more vulnerable than others to sexual harassment or sex discrimination in the workplace. A blanket rule for a positive duty may not fully protect apprentices in the future from harm in the workplace.

Maurice Blackburn submits that the AD Act ought to be amended to include stronger protections for apprentices.

Recommendation 6:

That the AD Act be amended to provide for stronger protections for apprentices.

WGEA accreditation

Accreditation by the Workplace Gender Equality Agency (**WGEA**) is often sought by employers.

Maurice Blackburn believes that, if possible, the AD Act ought to be amended to provide that WGEA accreditation is dependent on the employer demonstrating the positive steps they have taken to prevent harassment and abuse from occurring in the workplace.

Recommendation 7:

That the AD Act be amended to provide that WGEA accreditation is dependent on the employer demonstrating the positive steps they have taken to prevent harassment and abuse from occurring in the workplace.

Proposed Amendments

Amendments to the Preamble

Term of Reference 3(b) requires QHRC to consider then need for reform to the Preamble.

The preamble of the AD Act speaks specifically to Australia's obligations under various international conventions that the country is a signatory to. To ensure that Queensland specifically is meeting those obligations through the AD Act, a detailed analysis should be undertaken of the obligations under the various conventions, and the protections currently afforded by the AD Act.

Alternatively, the preamble to the AD Act should be amended to emphasise the primacy of community standards of Queensland residents, rather than obligations under international law. This may aid the relevant tribunals and the Queensland Human Rights Commission (**QHRC**) to provide guidance on possible outcomes and judgments, and to calculate adequate awards of compensation where discrimination is substantiated.

Additional attributes of discrimination

Term of Reference 3(c) requires QHRC to consider then need for reform to the attributes of discrimination articulated in the AD Act.

Maurice Blackburn believes that the Act in its current state does not reflect current community standards in relation to all the attributes that require protection under the law.

Maurice Blackburn believes that the following additional attributes of discrimination should be introduced to section 7 of the AD Act. This will support the AD Act to achieve its objective of promoting equality of opportunity for everyone

It is noted that other states such as Victoria and the Australian Capital Territory have already amended their respective discrimination legislation to capture the following attributes.

<u>Irrelevant criminal record</u>

Irrelevant criminal record should be inserted as a protected attribute to prevent discrimination in the following circumstances:

(a) Where a person has been charged with an offence but a proceeding for the alleged offence is not yet finalised, or where the charge has lapsed, been withdrawn or discharged, or struck out;

(b) Where a person has been acquitted of an alleged offence or has had a conviction for an alleged offence quashed or set aside;

(c) Where a person has been served with an infringement notice for an alleged offence or has a conviction for an offence but the circumstances of the offence are not directly relevant to the situation in which discrimination arises;

(d) Where a person has a spent conviction or an extinguished conviction, within the meaning of the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) for the offence. It is noted that legislation sets out the rehabilitation period in relation to a conviction recorded against any person (see s.3(1)) and the circumstances in which disclosure is accepted (see s.6).

Irrelevant medical record

Maurice Blackburn believes that it ought to constitute unlawful discrimination when a person's medical record is used as a basis for treating them differently by, for example, unfairly excluding them from the same opportunities as others, unless the medical record is relevant to the situation.

Medical records are any documents that contain information about a person's health or medical status. This includes:

(a) a person's workers' compensation history;

(b) records relating to a person's genetic makeup (including predisposition to a particular medical condition);

(c) records of past medical conditions;

(d) records relating to a person's mental health; and,

(e) records relating to a person's sex, sexual characteristics or gender identity.

Situations where irrelevant medical record discrimination should be made unlawful:

(a) Work, whether the work is paid or voluntary;

(b) Training or studying, for example at school, TAFE or university, or workplace training;

(c) Providing or accessing facilities or services;

(d) Buying or selling goods;

(e) Club membership or club-related activities;

(f) Hotels and pubs;

(g) Housing and accommodation – including short-term accommodation such as a hotel or hostel;

(h) Offices and other business premises;

(i) The design or implementation of state laws or programs; and,

(j) Making or implementing industrial awards, enterprise agreements or industrial agreements.

Immigration status

Migrants are discriminated against in Queensland both directly and indirectly due to their visa status. It should be prohibited for someone to discriminate against a person because of their immigration status, including whether or not they are a refugee or asylum seeker, holding a visa, the visa that they hold or have previously held, or the way in which they arrived in Australia.

Importantly, immigration status is different to the existing attribute of race. It is closer in meaning to 'national extraction', which is used in the Federal legislation, but is not identical in meaning.

This ground of discrimination is particularly important to the following areas:

a) Housing. For example:

    i. Real estate agents should not be permitted to request visa status.

b) Public services. For example:

    i. A bank requires that proof of citizenship or permanent residency be provided before providing banking services to new migrants.

    ii. A local club refuses membership to people who are in Australia on a student or bridging visa.

c) Work. For example:

    i. A business refuses to employ someone because they are on a visa, but the visa itself does not restrict the person from lawfully working.

    ii. A woman in Australia on a 457 working visa is sexually harassed by her employer, who threatens to dismiss her and tells the authorities that her visa is no longer valid because she is not working.

Statutory exceptions can apply. For example, where a visa condition or Commonwealth restriction places conditions which prohibit the holder of a visa from working, it is not lawful to employ them and so would not be unlawful discrimination.

<u>Physical features</u>

Examples of physical features that the AD Act should capture should include:

(a) Height;

(b) Weight;

(c) Size;

(d) Shape;

(e) Facial features;

(f) Hair; and

(g) Birthmarks

Examples of discrimination because of physical features:

(a) A fast food company only hiring people with a certain 'look', that is, a specific height, weight and build.

(b) A teacher making rude comments about a student's birthmark.

(c) A nightclub refusing entry to someone because of their weight.

(d) A local basketball team only signing up people over 185cm tall.

An exemption should be included where the discrimination is necessary. For example, where an actor with particular physical features is required to play a role.

Potential pregnancy

Discrimination against 'potential pregnancy' would include the fact that a person is or may be capable of bearing children, or where they've expressed a desire to become pregnant. It is more specific and accurate than sex discrimination, as not all women want to, or are able to, become pregnant.

Potential pregnancy discrimination is prohibited under the *Sex Discrimination Act* 1984 (Cth) (see that Act, s.14(1)).

Potential pregnancy discrimination in recruitment can occur when a person is not given an opportunity to apply for a position, or is not offered a position, or is only offered a short-term or temporary position, because that person may become pregnant in the future.

Employers must also not be permitted to discriminate against existing employees when seeking to fill internal positions. Potentially pregnant employees must not be discriminated against when decisions about promotions, transfers and existing or new positions with the same employer are being made.

Recommendation 8:

That the following additional attributes of discrimination should be introduced to section 7 of the AD Act:

- Irrelevant Criminal Record
- Irrelevant Medical Record
- Immigration Status
- Physical Features
- Potential Pregnancy

Current prohibitions on discrimination under Part 4 of the AD Act

Term of Reference 3(d) requires QHRC to consider areas of activity which discrimination is prohibited under Part 4 of the AD Act.

Maurice Blackburn provides the following input.

Prohibitions in sporting activities

Maurice Blackburn believes that the AD Act should reflect a more gender-neutral approach. In particular, this should affect primary to middle schools, and amateur and recreational clubs where sport is largely focused on health and developing teamwork. An exception may be made for elite or professional sports.

Maurice Blackburn believes that the wording of section 111 of the AD Act is currently too narrow and offers no guidance as to 'reasonableness', particularly for sporting institutions who rely on this law to build their policies.

The AD Act s.111 – Sport:

> *1) A person may restrict participation in a competitive sporting activity—*
>
> *a) to either males or females, if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity; or*
>
> *b) to people who can effectively compete; or*
>
> *c) to people of a specified age or age group; or*
>
> *d) to people with a specific or general impairment.*

In contrast, the Victorian *Equal Opportunity Act* 2010 (Vic) Act (**VEO Act**) includes a section on factors to consider when determining if the discrimination is necessary. This is more relevant to amateur sporting clubs and both primary and high schools, as it helps to remove any unnecessary discrimination on the basis of gender identity.

Section 72 – Exception—competitive sporting activities:

> *A person may exclude people of one sex or with a gender identity from participating in a competitive sporting activity in which the strength, stamina or physique of competitors is relevant.*
> *…*
> *(1B) A person may exclude people of one sex from participating in a competitive sporting activity …*
>
> *(b) the exclusion or restriction is reasonable having regard to —*
>
> *i. the nature and purpose of the activity; and*
> *ii. the consequences of the exclusion or restriction for people of the excluded or restricted sex; and*
> *iii. whether there are other opportunities for people of the excluded or restricted sex to participate in the activity.*

The AD Act also does not currently contain a prohibition against offering varying levels of prize money to sporting competitors who possess different protected attributes. For example, the prize money offered to female athletes is often dwarfed by the prize money offered to their male counterparts, in the same events.

Maurice Blackburn suggests that this review should consider amendments to the AD Act which prohibit offering lesser amounts to sporting competitors in a way that is discriminatory.

Exemptions to discrimination in work and work-related areas

Term of Reference 3(e) requires QHRC to consider definitions in the AD Act, including genuine occupational requirements.

Genuine occupational requirements and reasonable alterations

The AD Act currently provides that an employer may impose genuine occupational requirements for a position. The examples provided include selecting an actor for a dramatic performance on the basis of age, race or sex for reasons of authenticity.

Following the decision in *Chivers v State of Queensland*,[9] there has been some consideration of what constitutes a 'genuine occupational requirement', or an 'inherent requirement'. In that decision, a junior nurse's ability to work night shifts was considered a genuine occupational requirement.

Maurice Blackburn believes that the AD Act should be amended to provide further clarification as to what constitutes a genuine occupational requirement.

Further, and in aid of this uncertainty, the AD Act should be amended to include an obligation to make reasonable adjustments, in similar terms as federal legislation.

Sections 5 and 6 of the *Disability Discrimination Act 1992* (Cth) (**the DD Act**) define discrimination to include circumstances where a person does not make, or proposes to make 'reasonable adjustments' for the person with the protected attribute, and that failure has the effect of treating the person with the protected attribute less favourably.

The AD Act does not currently contain any positive obligation on a person to make 'reasonable adjustments' so as to avoid treating a person with a protected attribute less favourably.

To the contrary, the AD Act currently appears to support a person's refusal to do so. Sections 35, 44 and 51 provide that it is not unlawful for a person to discriminate on the basis of an impairment if the second person would require special services or facilities, and the supply of those services or facilities would impose unjustifiable hardship on the first person.

Reasonable adjustments are only considered by the AD Act in respect of accommodation (see section 84).

Recommendation 9:

That the AD Act be amended to provide further clarification as to what constitutes a genuine occupational requirement.

Recommendation 10:

That the AD Act be amended to include an obligation to make reasonable adjustments, in similar terms as federal legislation.

Work with children

Section 28 of the AD Act currently provides that it is not unlawful to discriminate 'on the basis of lawful sexual activity or gender identity' against a person if the work involves the care or instruction of minors, and the discrimination is 'reasonably necessary to protect the physical,

[9] [2014] QCA 141

psychological or emotional wellbeing of minors having regard to all the relevant circumstances of the case'.

To prevent a person from working in childcare on the basis of *lawful* sexual activity is outdated, out of line with community standards, and potentially offensive to a number of people, including members of the LGBTIQ+ community.

This implies that employing a member of the LGBTIQ+ community to work in child care *may* pose a risk to a child's physical, psychological or emotional wellbeing.

Recommendation 11:

That the AD Act be amended to omit the provision that it is not unlawful to discriminate 'on the basis of lawful sexual activity or gender identity' against a person if the work involves the care or instruction of minors, and the discrimination is 'reasonably necessary to protect the physical, psychological or emotional wellbeing of minors having regard to all the relevant circumstances of the case'.

Youth wages

Section 33 of the AD Act currently states that a person may remunerate a person under 21 years of age according to their age.

However, it is not clear whether this provision renders it unlawful to not hire a person on the basis that they are older than 21 years, and therefore, they cannot be paid youth wages.

This provision should be amended to ensure that age discrimination – including on the basis that the person is older than 21 years – remains unlawful.

Recommendation 12:

That section 33 of the AD Act be amended to ensure that age discrimination – including on the basis that the person is older than 21 years – remains unlawful.

Exemptions to discrimination in goods and services

Section 45A currently provides that discrimination is not unlawful where it relates to the provision of assisted reproductive technology services, and is on the basis 'of relationship status or sexuality'.

Maurice Blackburn believes that this provision reinforces outdated notions of the primacy of the nuclear family, which has a mother and a father who are married. It is out of line with community standards.

Moreover, following the decision in *McBain v State of Victoria*[10], such provisions are unconstitutional, pursuant to section 109 of the Constitution.

[10] [2000] FCA 1009

Recommendation 13:

That section 45A of the AD Act be amended to omit the provision that discrimination is not unlawful where it relates to the provision of assisted reproductive technology services, and is on the basis 'of relationship status or sexuality'

General exemptions

Term of Reference 3(h) requires QHRC to consider exemptions and other legislative barriers that apply to the prohibition on discrimination.

Section 106C provides it is not unlawful to discriminate in refusing to supply a person with accommodation, evict a person from accommodation, or to treat the person unfavourably, if the person is using the accommodation for sex work, or is a sex worker.

This provision is outdated, out of line with community standards, and fails to recognise the value of sex work as real work. It also has the potential to place sex workers in significant danger in their work, as accommodation providers that are less scrupulous may be more likely to offer them unsafe accommodation.

It is noted that currently, sex work in brothels and sole operator sex workers who provide in-house or outcall services are regulated in Queensland.

It is also noted that in August 2021, Queensland Attorney-General Shannon Fentiman indicated that decriminalisation of sex work in the state was to be reviewed.[11]

Recommendation 14:

That section 106A of the AD Act be amended to omit the provision that it is not unlawful to discriminate in refusing to supply a person with accommodation, evict a person from accommodation, or to treat the person unfavourably, if the person is using the accommodation for sex work, or is a sex worker – pending the outcome of the upcoming review.

Time limits

The Federal Government has extended the Australian Human Rights Commission's time limit on complaints from 6 months to 24 months in their recent Amendment Bill, as per the recommendation provided within the Respect@Work Report.

The QHRC currently has a 12-month time limit to bring a claim.

Maurice Blackburn suggests that the AD Act ought to be amended to extend the time limit on complaints to 6 years. This is appropriate in the circumstances, given the wealth of research confirming that survivors of sexual assault do not always share their story immediately, due to traumatisation, fear and shame.

[11] Ref: https://statements.qld.gov.au/statements/93061

Alternatively, the time limit should be extended to three years, which is the current time limit for personal injury claims. This would also be appropriate, given many subjects of sexual harassment and assault develop secondary psychiatric injuries.

Recommendation 15:

That the AD Act be amended to extend the time limit on complaints to 6 years. The time limit for minors should commence after they turn 18.

Functions, processes, powers and outcomes of the Commission

Term of Reference 3(j) requires QHRC to consider whether the functions, processes, powers and outcomes of the Commission are appropriately suited to ensuring it can further the objective of eliminating discrimination and other objectionable conduct under the AD Act, to the greatest possible extent.

Maurice Blackburn offers the following input.

Compensation

Currently, the QHRC cannot order compensation. This makes it more difficult for complainants to seek and engage legal representation throughout the complaints process to conciliation, as the costs of doing so may outweigh any amount of compensation they recover.

Maurice Blackburn submits that the introduction of powers to award pecuniary penalties in relation to discriminatory conduct should also be considered, for the same reason, and to enforce compliance.

On the matter of compensation, we note the recent appeal in *Golding v Sippel and The Laundry Chute Pty Ltd*.[12] There was an original award of $30,000.00 for general damages which did not reflect community standards. This has since been substituted for an award of $130,000.00.

An issue remains that there was no detailed analysis of whether the Commissioner erred in law in first instance – the judgement was simply set aside as 'manifestly inadequate'. This does not remedy the issue that at present, the state tribunals do not appear bound by the federal decision in *Richardson v Oracle Corporation Australia Pty Ltd,*[13] which saw an award for compensation reflect community standards.

Maurice Blackburn suggests that there is still scope for inserting a section on ensuring that awards reflect community standards, and that this would help guide future judgments.

Consideration should be given as to whether the AD Act may be amended to include a requirement that, when making orders in relation to contraventions of the AD Act, the relevant tribunal must consider community standards in respect to awards of compensation.

[12] [2021] QIRC 74
[13] [2014] FCAFC 82

Other issues

Term of Reference 3(n) requires QHRC to consider any other matters the Commission considers relevant to the review.

Maurice Blackburn offers the following as matters of potential interest to the Commission.

Retraumatisation

The current process of a discrimination complaint to the QHRC involves a significant risk of re-traumatising the complainant. Consideration should be given to whether the process can be altered to avoid that as much as possible. Alternatively, QHRC officials should receive specialised training in dealing with victims of trauma, if they do not already.

Waiting Times

The waiting times for the QHRC are currently significant - in the order of six months. Amendments which impose an obligation on the QHRC to deal with serious complaints quickly – for example, within 14 days, as in the Fair Work Commission's anti-bullying jurisdiction – should be considered.