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By email

1 March 2022

Commissioner McDougall & Anti-Discrimination Act Review Team
Queensland Human Rights Commission

Email: ADAReview@qhrc.qld.gov.au

To the Commissioner and the Anti-Discrimination Act Review Team,

Consultation on the Review of the *Anti-Discrimination Act 1991*

Thank you for the opportunity to participate in the Review of the *Anti-Discrimination Act 1991* (Qld). We commend the comprehensive Discussion Paper¹ and the Round Table consultation.

The following encompasses the feedback of the Office of the Special Commissioner, Equity and Diversity (OSC) only and given the remit of my office, is confined to the impacts on the Queensland public sector in its capacity as an employer.

Introducing a positive duty to eliminate discrimination

The OSC is highly supportive of the introduction of a positive duty on employers to eliminate discrimination, sexual harassment, and victimisation in workplaces².

We support the strengthening of some sections of the current legislative framework that centre on a prohibition against discrimination relying on affected individuals to identify breaches of law, and in turn, make formal complaints. It is also suggestive of a requirement for breaches to occur and be validated before employers should devote time, attention and resources to prevention of discrimination or to equity and diversity issues more generally.

A movement towards a framework that includes positive duties is important helps to shift this mindset as well as placing more of the onus of responsibility on the better resourced party, an employer. It is consistent with workplace health and safety obligations on employers to ensure safe and health workplaces and the increasing focus beyond physical hazards to include psychosocial hazards. It also supports the reframing of equity discussions towards not only how we prevent

¹ Queensland Human Rights Commission (Nov 2021) Review of Queensland's *Anti-Discrimination Act 1991* – Discussion Paper.

² See Discussion Paper at Question 21.

discrimination, harassment and victimisation but also how we advance the rights of groups that have historically experienced disadvantage.

My office is in the process of strengthening the employer response to increasing diversity and addressing inequalities, and is examining options to introduce complementary obligations through the Public Service Act Review. In collaboration with the Public Service Commission (PSC), we will provide a comprehensive equity and diversity dataset to public sector agencies and work with them to understand and audit their workforce, identify inequities and design responses to address them.

Special Measures

The Discussion Paper at Question 20 explores the possibility of moving away from describing special measures as an “*exemption*” and incorporating it into the definition of “*what is discrimination*”. While special measures are currently permitted by the *Anti-Discrimination Act 1991*, the relevant provisions are hidden in the body of the legislation and are framed as “*exemptions*” – both of which may be suggestive of a need for employers to seek approval before utilising. The words exemption and exception are also very similar – which may further be contributing to lack of clarity as to how special measures operate and when.

The discussions I have had with public sector employers have demonstrated there is a real willingness from employers to do more to improve the underrepresentation of particular groups by special measures recruitment. This enthusiasm however is tempered by a concern that any proactive measures could be unlawful. There is also confusion from some public sector employers as to whether they should first consult or seek approval from central agencies or from QHRC before taking any action and concerns as to how long or complex that approvals process might be. I have also observed some conflation by employers of the concept of special measures recruitment with that of identified roles, where there is a genuine occupational requirement for a candidate to possess certain attributes³.

For these reasons our office would be very supportive of the proposed changes to the legislation to clarify special measures, including changing the terminology from “*exception*” and re-framing the definitions of discrimination from the outset to make it clear that special measures are not unlawful discrimination.

Separate to this, my office has begun working to identify how we can better support public sector employers’ policies and practices, including by way of the provision of clearer advice and pathways to allow for special measures recruitment in the public sector.

Amendments related to sexual harassment

The Review is exploring the adequacy of protections against sexual harassment and as part of this is considering expanding the definition of sexual harassment by removing at section 118 the relational aspect of “*another person*” and replacing it with words to the effect of “*in the presence of a person.*”

The OSC supports the policy intention of this change and sees it as an important step to addressing a legislative gap, being the preventing of, and responding to, sexualized work environments, where

³ See section 25 of the *Anti-Discrimination Act 1991*.

conduct may not be readily identifiable as directed towards a person but is instead a systemic workplace cultural problem.

The OSC would similarly be supportive of introducing into public sector workplaces the new separate contravention of sex-based harassment and introducing a new prohibition of *“creating an intimidating, hostile humiliating or offensive environment on the basis of sex.”*

As you know, the PSC is leading a Sexual Harassment Response Working Group, to strengthen the current public sector response to the prevention and management of sexual harassment, and would also support any strengthening of the QHRC’s capacity to provide training that supports agency expertise in dealing with incidents and complaints, and advisory services to affected employees.

Changes to complaints

The OSC would be supportive of changes to allow both representative bodies and trade unions to make complaints on behalf of others and for such matters to proceed to a substantive hearing.

Socio economic factors, cultural factors and other barriers may prevent persons subject to unlawful treatment from seeking redress. Permitting a wider pool of applicants to bring claims of discrimination is therefore important. These potential changes to standing would also be consistent with the representative rights given to industrial associations under other legislation such as the *Industrial Relations Act 2016*.

Thank you for the opportunity to provide feedback on the Discussion Paper. Our office remains available to discuss should you have any further questions about the above.

Yours sincerely,

Dr Linda Colley
Special Commissioner, Equity and Diversity