

**Submission to Queensland Human Rights Commission’s
Review of Queensland’s Anti-Discrimination Act,
28 February 2022**

1. Introduction

The *Anti-Discrimination Act 1991* (Qld) (‘QADA’) ADA was an important post-Fitzgerald development in Queensland when it was enacted. The Queensland Parliament intended to enact legislation that was broadly based on human rights and the human rights origins of the QADA were clear: all human beings are equal and discrimination between people based on irrelevant grounds is unacceptable.¹

The QADA itself acknowledges the Parliament’s intention to provide ‘for the promotion of equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct.’²

However, there are shortcomings in the scope and operation of the QADA’s protections and the complaint-based model for which it provides. For this reason, reviews of the QADA are important to identify and stimulate discussion of these shortcomings to ensure that the QADA is ‘fit for purpose’ in the community and contemporary public life in Queensland.

This submission addresses only some of those concerns: the requirement for a complainant to prove that discriminatory treatment was a dominant or substantial reason for less favourable treatment; and broad religious exemptions that permit discrimination based on certain protected attributes if the discrimination is consistent with religious beliefs or doctrines.

2. Protected attribute must be ‘a substantial reason’

Section 10(4) of the QADA requires complainants to prove that their discriminatory treatment was a dominant or substantial reason for less favourable treatment if there are two or more reasons for such treatment. This requirement places an additional burden on complainants who must already satisfy the tests to determine direct or indirect discrimination.

The ‘substantial reason’ requirement is neither necessary nor helpful. Less favourable treatment involving even one reason based on an attribute protected under anti-discrimination law is sufficient to ‘infect’ an alleged discriminator’s conduct with prejudice and irrelevant or irrational considerations³ so that such conduct may be equated with unlawful discrimination. Requiring the reason to be ‘a substantial reason’ for the less favourable treatment ignores its harmful effects and allows alleged discriminators to shield their conduct by claiming that it was substantially based on another reason.

Many years ago Kirby J acknowledged that ‘[m]ost activities of life have multiple causes’ and that ‘typically, human motivation is complex [and discriminatory] conduct can rarely be ascribed to a single “reason” or “ground”.’ For this reason, Kirby J pointed out that requiring a complainant or a court or tribunal to untangle multiple causes for discrimination and to

¹ See, for example, Article 26 and other provisions of the *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); also commentary by Peter Bailey in *Human Rights: Australia in an International Context* (Butterworths, 1990) 28-35.

² *Anti-Discrimination Act 1991* (Qld), Title page, Preamble and s 6(1); also Queensland Parliament, *Anti-Discrimination Bill 1991 Explanatory Notes*, 1-2.

³ *IW v City of Perth* (1997) 191 CLR 1, 63 (Kirby J, diss).

characterise protected grounds or attributes ‘where multiple possible causes for discrimination are presented [...] is a difficult one’.⁴

This submission recommends that the QADA be amended to remove the requirement that a protected attribute must be ‘a substantial reason’ for a complainant’s less favourable treatment. Such an amendment would overcome the evidentiary difficulty of establishing whether a protected attribute was a substantial reason for less favourable treatment, which would ease the evidentiary burden on complainants.

It would also align the QADA with anti-discrimination laws in the Commonwealth jurisdiction and most other States and Territories, which require complainants to prove only that their protected attribute was a reason for the discrimination.

3. Exemptions for religious bodies in accordance with belief

The QADA (and other anti-discrimination laws) permits religious bodies and organisations to enjoy broad exemptions from liability for conduct that would otherwise amount to unlawful discrimination. These exemptions permit discrimination that is in accordance with religious belief or doctrine in work and work-related areas, education, accommodation and other areas of public life and activity.⁵

This submission does not support broad exemptions that permit religious bodies to discriminate against people on the basis of sex, gender identity and sexuality in particular.

In part, this is because some (although not all) of the exemptions that religious bodies enjoy would not be permitted if they allowed discriminatory conduct sourced in religious belief or doctrine that was based on other protected attributes such as race or disability. It is not acceptable that discriminatory conduct may be exempted because it is based on a person’s sex, gender identity and sexuality and treating the person equally would be inconsistent with a religious belief or doctrine.

Clearly, religious beliefs and doctrines do not necessarily accord with community standards. However, anti-discrimination law and its agencies serve an important human rights purpose, articulating and influencing community standards regarding equality of treatment and protection from discrimination.⁶ On this basis, the rights of women and people of all gender identities and sexualities should not be subordinated to the broad religious exemptions enjoyed by religious bodies and organisations.

It is particularly inappropriate when religious organisations that provide community and essential services benefit from public funding despite being permitted to discriminate based on religious belief or doctrine, when such discrimination might mean that the services are not provided equally to all people in the community.

⁴ *Haines v Leves* (1987) 8 NSWLR 442, 471 (Kirby P); *IW v City of Perth* (1997) 191 CLR 1, 63 (Kirby J, diss).

⁵ For example, in ss 25, 41, 89-90 and 109 of the *Anti-Discrimination Act 1991* (Qld).

⁶ Neil Rees, Simon Rice & Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (3rd ed, 2018, Federation Press) 7.

The human rights origins of the QADA are relevant to such considerations, as is its purpose ‘to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity’.⁷

The QADA’s preamble also acknowledges the influence of eight international human rights instruments that impose human rights obligations on Australia under international law. The preamble records the Queensland Parliament’s support for the Commonwealth government’s ratification of these international human rights instruments and notes the Commonwealth government’s enactment of ‘certain human rights legislation’ to fulfill its obligations under these instruments.

However, most human rights protected under international law are not absolute or unlimited. International human rights law provides that human rights (including the right to freedom of religion) co-exist with and are balanced against other human rights, notably rights to equality and freedom from discrimination.⁸

This submission proposes that the broad religious exemptions enjoyed by religious bodies and organisations under the QADA be narrowed to provide that religious bodies and organisations can only discriminate on the basis of religious belief or religious activity in work and work-related areas.⁹

In particular, if religious bodies receive State government funding to provide community and essential services, they should be bound by the prohibitions on discrimination in the QADA. They should not be able to avoid anti-discrimination obligations by relying on exemptions based on religious belief or doctrine.

4. Broad support for ‘Ten-Point Plan for a Fairer Queensland’

In addition, I support amendments that are proposed in the ‘Ten-Point Plan for a Fairer Queensland’ drafted by the Alliance of Queensland Lawyers and Advocates.¹⁰

Thank you for considering my written submissions. I would welcome an opportunity to expand upon them.

Yours sincerely,

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⁷ *Anti-Discrimination Act 1991* (Qld), Preamble and s 6(1).

⁸ Queensland Human Rights Commission, *Review of Queensland’s Anti-Discrimination Act: Discussion Paper* (November 2021) 114.

⁹ With a similar effect to s 51 of the *Anti-Discrimination Act 1998* (Tas), bearing in mind the different wording of relevant provisions in the Tasmanian and Queensland laws; see also Queensland Human Rights Commission, *Review of Queensland’s Anti-Discrimination Act: Discussion Paper* (November 2021) 117-118.

¹⁰ The Alliance of Queensland Lawyers and Advocates, ‘Ten-Point Plan for a Fairer Queensland’ (2021) Community Legal Centres Queensland <<https://www.communitylegalqld.org.au/reviewofantidiscrimination>>.