

MULTICULTURAL QUEENSLAND ADVISORY COUNCIL

Submission to the Queensland Human Rights Commission's review of the *Anti-Discrimination Act 1991 (Qld)*

FOREWORD

The Multicultural Queensland Advisory Council was established in 2016 under the *Multicultural Recognition Act 2016* to provide advice to the Minister for Multicultural Affairs on opportunities and barriers facing people from culturally and linguistically diverse backgrounds and how to promote the Multicultural Queensland Charter to support a unified, harmonious and inclusive community.

The Council is comprised of 11 members from across the state, including from Gladstone, Mount Isa, Cairns, the Gold Coast and Greater Brisbane. Council members come from a range of culturally and linguistically diverse backgrounds, have extensive networks and strong links with people from migrant, refugee and asylum seeker backgrounds.

Unfortunately, a number of Council members have lived experience of discrimination.

The Council advises the Minister on:

- the needs, aspirations and contributions of people from diverse backgrounds
- promoting the principles of the Multicultural Queensland Charter within the Queensland community
- developing and implementing government policies about multiculturalism
- how government-funded services and programs can be responsive to the needs of people from diverse backgrounds.

Our communities thrive when everyone, regardless of their culture, language or faith, is supported to connect, contribute and belong.

Realising this outcome requires us all working together to promote equity, fairness, welcome and belonging across all communities. We therefore welcome the review of the *Anti-Discrimination Act 1991 (Qld)* (ADA review) which will examine whether this legislation continues to best protect and promote equality, non-discrimination and the realisation of human rights.

Reviews of this nature are exactly what we need to actively maintain inclusion and ensure our efforts to protect against discrimination are effective and contemporary.

This submission represents the personal views of Council members on this key piece of legislation.

As the submission highlights, intersectionality puts Queenslanders from culturally diverse backgrounds at greater risk of discrimination. For example, individuals may experience racism based on their skin colour or be victimised due to their religious beliefs – and this disadvantage can be further compounded by things such as homophobia due to their sexual orientation, or isolation due to their mental health. It is our recommendation that the ADA review be approached with intersectionality front of mind.

Through the findings of the ADA review, it is our hope to see Queenslanders – from all cultural backgrounds, identities and abilities – thriving, contributing and achieving their ambitions.

SUBMISSION

1. Who council are & what they do

- 1.1 The Multicultural Queensland Advisory Council (**the Council**) advises the Minister for Children, Youth Justice and Multicultural Affairs on issues facing people from culturally and linguistically diverse backgrounds.
- 1.2 Its culturally diverse members include community leaders and professionals from a variety of fields, each with unique connections to the communities in which they live and work.
- 1.3 The Council works to genuinely listen to the needs of multicultural Queenslanders, and convey those to the Minister to ensure they are heard, seen and acted upon.

2. Importance of the *Anti-Discrimination Act 1991* (Qld) Review to Council

- 2.1 According to the latest available census results,¹ the overwhelming majority of Queenslanders have English or Australian ancestry, were born in Australia, have parents who were both born in Australia, speak only English at home, and/or have no religion or are Catholic.
- 2.2 While some of those statistics are slowly changing, with almost 2 in 5 Queenslanders born overseas or have a parent born overseas², they evidence the reality of life in Queensland: that the “white” experience remains the predominant one.
- 2.3 Inevitably, our society and culture reflect and often reinforce that lack of diversity. This ranges from the news we hear and the ‘issues’ our politicians campaign on (recall the “African Gangs” scare campaign), to the majority-white members of our judiciary.
- 2.4 The work of the Council is centred on listening to and projecting the experiences and concerns of Queensland’s multicultural communities: that is, the experiences of people who are often outside that white majority. That work gives the members of the Council unique insight into the challenges faced by those communities.
- 2.5 Adding to that insight is the cultural diversity of Council members. All of its eleven members hail from culturally and linguistically diverse backgrounds, with first- and second-generation migrant experiences. Six council members are women of colour, two of whom identify as Muslim.
- 2.6 The diverse make-up of the Council and its work results in a deep and nuanced understanding by its members of the common experiences of discrimination and bias faced by multicultural Queenslanders.

¹ Australian Bureau of Statistics 2022, 2016 Census QuickStats, viewed 23 February 2022, https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/3?opendocument#:~:text=In%20the%202016%20Census%2C%20there,up%204.0%25%20of%20the%20population.&text=The%20median%20age%20of%20people%20in%20Queensland%20was%2037%20years

² *Diversity Figures June 2018*, The State of Queensland, Department of Local Government, Racing and Multicultural Affairs, viewed 23 February 2022: <https://www.cyjma.qld.gov.au/resources/dcsyw/multicultural-affairs/multicultural-communities/diversity-figures-report-2018.pdf>

- 2.7 Part of that nuanced understanding is an acknowledgement that not every non-English speaking or Australian-born Queenslanders has the same experience of discrimination. This also includes a nuanced understanding of the complex intersectionality that multiple factors such as religion, skin colour and gender can contribute to an individual's access to opportunities. For those who find themselves at the intersection of race, religion and gender, their discrimination is likely to be compounded.
- 2.8 It is in this context that the Council strongly recommends any amendments to Queensland's anti-discrimination legislation recognise the importance of intersectional disadvantage.

3. Why we need changes

- 3.1 Despite the existence of anti-discrimination laws, racial, religious, cultural and linguistic minorities continue to experience discrimination and bias in their everyday lives.
- 3.2 For multicultural communities, that discrimination exists on a spectrum. It can range from casual racism experienced as subtle slights and jokes from friends to unconscious bias where one is overlooked for a promotion or loses on a job they have the qualification and experience for, to outright vilification by strangers and loss of personal safety.
- 3.3 In its prior Submission to Queensland Parliament's *'Inquiry into serious vilification and hate crimes'*³, the Council detailed how often the victims of vilification and hate speech (which is a serious form of discrimination) are already marginalised, disadvantaged and oppressed. That is often the cumulative effect of a person possessing more than one attribute which, on its own, would already place that person at a higher risk of facing discrimination or disadvantage.
- 3.4 For example, a young, newly-arrived migrant to Brisbane from the Cote d'Ivoire will likely deal not only with a language barrier, being a young person, and being a person of colour in a majority-white city, but if they are a follower of Islam, they may also deal with religious discrimination. That experience is made even more difficult if they are a woman who wears a hijab or niqab, has a disability, or if they are a member of the LGBTIQ+ community.
- 3.5 Under Queensland's current laws, if that person experiences discrimination, the legislation requires them to identify a single attribute as the reason for which they have been treated less favourably. What that requirement fails to realise is that often, a person is not discriminated against on the basis of one single attribute, but rather, a combination of attributes.
- 3.6 Using the example in the Discussion Paper,⁴ if the hypothetical migrant described above is targeted by security in a shop, it would be difficult for them to argue that it was because of their race, sex, age or religion alone, as it was more likely to have been because of a confluence of those characteristics.

³ Multicultural Queensland Advisory Council 2021, *Submission to the Legal Affairs and Safety Committee Inquiry into Serious Vilification and Hate Crimes*, viewed 23 February 2022:

<https://documents.parliament.qld.gov.au/com/LASC-C96E/I-20CA/submissions/00000064.pdf>

⁴ Queensland Human Rights Commission 2021, *Review of Queensland's Anti-Discrimination Act: Discussion Paper*, page 42, viewed 23 February 2022: <https://www.qhrc.qld.gov.au/law-reform/have-your-say/discussion-paper>

- 3.7 The current comparator test makes that exercise even harder. If the migrant argues the discrimination was on the basis of their religion, they are required to prove they were treated less favourably than another person of a different religion would be. But what if that comparator of a different religion was of the same race?
- 3.8 Queenslanders who belong to a minority race or religion are more likely to experience discrimination, and as a result, suffer its serious impacts. The hypothetical migrant from Cote d'Ivoire is simultaneously more likely to be targeted by security in a store, have their application rejected by a prospective employer or landlord, *and* experience racial abuse or vilification from a stranger. This in turn increases their likelihood of experiencing financial disadvantage and being able to access key social services like healthcare and transport. When dealing with the legal system specifically, if they do report the discrimination, they are more likely to be misinterpreted or not believed. Furthermore, many migrants and people from refugee backgrounds do not understand the legal system or are unwilling to access it to solve their concerns because many came from countries where they had no trust in the legal system.
- 3.9 The intersectional and cumulative nature of these factors present a further barrier that multicultural Australians must overcome to access justice, along with the other challenges faced by Australians generally, including convoluted legal processes, significant delays and limited penalties.

4. Suggestions for amendments

- 4.1 The Council submits that any review of the *Anti-Discrimination Act 1991* (Qld) (AD Act) should be approached with intersectionality in mind. Without it, the AD Act will continue to impose inequitable requirements on complainants who are already susceptible to disadvantage and discrimination simply by belonging to a minority.
- 4.2 The Council suggests the following specific amendments to deal with the issues explored above in this Submission:

(a) Prohibition of hostile work environments

- 4.3 The Council supports broadening the definition of 'sexual harassment' and of discrimination generally to encompass behaviour that contributes to, or is likely to contribute to, a hostile work environment for a person who possesses a particular attribute, whether that is their gender or sexuality, their race or religion, or other protected attribute.
- 4.4 This amendment would have the effect of prohibiting broadening the types of harmful and discriminatory behaviour that occurs in workplaces, beyond behaviour that is overt.

(a) Mandatory training

- 4.5 The Council also supports the introduction of mandatory training in relation to sexual harassment and discrimination. It submits further that the training should expressly deal with the cumulative impact of discrimination, and the increased likelihood that people who belong to multiple minority groups will experience discrimination.

(a) Discrimination on the basis of 'one or more' attributes

- 4.6 As detailed above, the current AD Act requires a complainant to identify one protected attribute in s. 7 as the basis of the discrimination.

4.7 Of course, complainants are not prevented from pleading multiple grounds in the alternative, but that is likely to be beyond the technical abilities of complainants who do not have formal legal training.

4.8 It is submitted that s. 10 of the AD Act be amended as follows:

10 Meaning of direct discrimination

*(1) **Direct discrimination** on the basis of ~~an attribute~~ one or more attributes happens if a person treats, or proposes to treat, a person with ~~an attribute~~ one or more attributes less favourably than another person without the ~~attribute~~ one or more attributes is or would be treated in circumstances that are the same or not materially different.*

...

(4) If there are 2 or more reasons why a person treats, or proposes to treat, another person with an attribute less favourably, the person treats the other person less favourably on the basis of ~~the attribute~~ one or more attributes if ~~the attribute~~ one or more of the attributes is a substantial reason for the treatment.

4.9 Similarly, section 12 should be amended to replace any reference to 'an attribute' to 'one or more attributes'.

4.10 The above amendments would not only remove a complainant's requirement to identify a single attribute against which they were discriminated, but also expands the comparator test to allow for a more accurate assessment of the discriminatory conduct where more than one attribute is identified. For example, if the hypothetical migrant complains of discrimination on the basis of his race *and* religion, the above amendments would provide for a comparator of the same race *and* religion.

(a) Harassment on the ground of an attribute

4.11 The federal *Sex Discrimination Act 1984* (Cth) was recently amended to include an additional legislative protection against sexual harassment, being the prohibition of harassment on the ground of sex.

4.12 The Council submits that the AD Act could be amended to introduce a prohibition of harassment on the ground of the protected attributes, to be drafted in a similar way:

*(1) For the purposes of this Act, a person harasses another person (the **person harassed**) on the ground of a protected attribute if:*

(a) by reason of:

- (i) the protected attribute of the person harassed; or*
- (ii) a characteristic that appertains generally to persons who possess one or more of the same protected attributes as the person harassed; or*
- (iii) a characteristic that is generally imputed to persons with one or more of the same protected attributes as the person harassed;*

the person engages in unwelcome conduct of a seriously demeaning nature in relation to the person harassed; and

(b) the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

(2) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;*
- (b) the relationship between the person harassed and the person who engaged in the conduct;*
- (c) any disability of the person harassed;*
- (d) any power imbalance in the relationship between the person harassed and the person who engaged in the conduct;*
- (e) the seriousness of the conduct;*
- (f) whether the conduct has been repeated;*
- (g) any other relevant circumstance.*

4.13 The above provision would broaden the prohibition against discrimination to include discrimination on the basis of harmful stereotypes associated with certain protected attributes.

5. Other comments and recommendations

- 5.1 The expansion of personal attributes to include other groups such as people with low literacy, diverse immigration status, survivors of violence including domestic violence and those from disadvantaged social origin for example and reflect the complexity of intersectional disadvantage.
- 5.2 This could mean the law has to accommodate difference and treat some people differently to achieve equality e.g., access to interpreters, cover hair for religious reasons or need special facilities to have access⁵.
- 5.3 The Council further agrees with the need to simplify the AD Act so it is more accessible, especially for people from non-legal backgrounds and those who speak English as a second or third language.
- 5.4 The Council in this submission also seeks to reinforce many of the issues raised during consultations by the Commission and that were highlighted in the Discussion Paper as follows.
- 5.5 A more positive approach with the view to addressing systemic discrimination and inequality. This includes putting in place the necessary structures, mechanisms and tools to enable a preventative culture and to enhance the individual access to justice and experience of the legal system.
- 5.6 This includes identifying who has the duty to create a safe environment for everyone and what their duty is and the consequences of non-compliance. For example, this could include direction for educational institutions and workplaces to maintain policies and provide training to their cohorts to address, manage and stop harassment in their environments including in social media.
- 5.7 A focus on prevention needs to go beyond legislation to include education and awareness raising in the mainstream context and support mechanisms for those seeking to access justice. These processes are important for the law to be meaningful.

⁵ Community Legal Centres Queensland 2022, *Reviewing the Anti-Discrimination Act*, Community Legal Centres Queensland, viewed 23 February 2022, <https://www.communitylegalqld.org.au/reviewofantidiscrimination/#easier>

- 5.8 This could be achieved by using human rights language to achieve balance. For example, rather than a focus on costs, the legislative framework could make it unlawful for an entity to discriminate against a person with a particular attribute in the same way that *Queensland's Human rights Act 2019* (Qld) achieves this balance of compatibility.
- 5.9 The Council agrees with the proposal to aid the construction of substantive terms in the AD Act by introducing an object clause to outline the purpose of the legislation. An object of the AD Act should seek to address systemic discrimination and inequality. This could mean highlighting the meaning and impact of the AD Act⁶ and the desire to bring about systemic change.
- 5.10 The Council notes that currently the burden of proof is shouldered by the mistreated party. They have to prove the discrimination which can sometimes be difficult. The Council proposes to shift the 'onus of proof' to the perpetrator of unfair treatment as in the case of the federal *Fair Work Act* (2004) (Cth). This shift in focus puts the responsibility for explaining their actions and the reasons to prove it is not discriminatory. This provides an opportunity to hear real evidence about the reasons why a person was discriminated against rather than relying on assumptions.
- 5.11 The Council calls for an expansion of the 12 months' time limitation within which a complaint can be made. This is because an individual is less likely to complain when they are still in the same environment or have suffered mental health injury. As many people in the consultation⁷ process have noted, they are less likely to lodge a complaint if they are in the same workplace for fear of backlash and loss of job and income. Furthermore, people who experience discrimination or vilification can be overcome by shame and need time to heal from the trauma of vilification or harassment before they have the strength to seek justice.
- 5.12 The Council proposes that the time limit can be extended to two years and brought in line with the federal *Sex Discrimination Act 1984* (Cth). This time frame affords an individual more time to put their affairs in order and have the strength to pursue their claim.
- 5.13 The Council also seeks to highlight the complex environments that children currently find themselves in, especially if they are in care. Under the current legislation a 10-year-old child has to find someone to assist them to bring their case to the Commission within 12 months. If this mistreated child is part of a family that also faces discrimination, then they are less likely to access justice.
- 5.14 The Council calls for this timeline to be extended for children, to start from the date they turn 18 so they can bring their claim of the harm they have suffered when they were children.

⁶ Queensland Council of Social Services 2022, *Response to the Queensland Human Rights Commission's consultation for a review of the Anti-Discrimination Act*, viewed 23 February 2022, <https://www.qcoss.org.au/wp-content/uploads/2022/02/QCOSS-Anti-Discrimination-Act-Review-Submission.pdf>

⁷ Queensland Human Rights Commission 2021, *Review of Queensland's Anti-Discrimination Act: Discussion Paper*, viewed 23 February 2022: <https://www.qhrc.qld.gov.au/law-reform/have-your-say/discussion-paper>

- 5.15 The Council also calls for the re-introduction of the specialists' division⁸ so non-legal concepts such as social construction and psychological and medical reports can be included in the decision making processes. This can mean that specialists including people of diverse backgrounds can be recruited by the Queensland Civil and Administrative Tribunal (QCAT), for example, to bring their lived experiences to the hearing process⁹.
- 5.16 The Council also notes that these recommendations have financial implications and calls for the need to better resource the different parts of the legal system to ensure people are adequately supported so people affected by discrimination can access justice.

⁸ Community Legal Centres Queensland 2022, *Reviewing the Anti-Discrimination Act*, Community Legal Centres Queensland, viewed 23 February 2022, <https://www.communitylegalqld.org.au/reviewofantidiscrimination/#easier>

⁹ Community Legal Centres Queensland 2022, *Reviewing the Anti-Discrimination Act*, Community Legal Centres Queensland, viewed 23 February 2022, <https://www.communitylegalqld.org.au/reviewofantidiscrimination/#easier>