

Building belonging

Review of Queensland's
Anti-Discrimination Act 1991

July 2022



Queensland
Human Rights
Commission





Queensland
**Human Rights
Commission**

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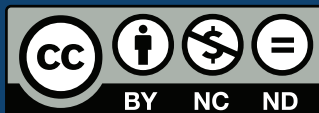
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Scott McDougall

Queensland Human Rights Commissioner



Commissioner's foreword

'Sticks and stones may break my bones but names will never hurt me'. It is a refrain of self-defence and defiance in the face of attack that has been used by generations of children to get by. While it has probably helped some people survive the rough-and-tumble of the playground, the age-old adage belies what we now know about the deeply corrosive impacts of exclusion based on discrimination – of not knowing, and feeling, that you belong.

In 1991, the introduction of the Anti-Discrimination Act was an important plank in the Goss Government's agenda to modernise Queensland laws, and offered the promise of equal and effective protection against discrimination to a range of historically disadvantaged groups.

A lot has changed in 30 years.

A long-awaited international instrument changed attitudes, approaches, and rights of people living with disability, and the United Nations adopted the most comprehensive instrument on the rights of Indigenous peoples. Landmark High Court decisions, most notably *Mabo v State of Queensland No 2*, have highlighted the fundamental importance of equality laws. Struggles to achieve true equity and justice have been brought into focus by the international *Black Lives Matter* and *Me Too* movements. Closer to home, the Respect@Work report and the Queensland Women's Safety and Justice Taskforce have made strong demands for progressing gender equity.

An increasing body of academic research has heightened our understanding of the prevalence and impact of discrimination and sexual harassment on psychological health, wellbeing, and workforce productivity; while judicial decisions have demonstrated the complexity of this area of law and the inherent limitations of a reactive legal system to provide redress for discrimination, let alone prevent discrimination from occurring in the first place.

After 30 years, it is time to review whether the Act continues, in the words of its preamble, to 'reflect the aspirations and needs of contemporary society'. One particular need is to belong.

The Terms of Reference for the Review are far-reaching and comprehensive. Within the constraints of time and resources, and the additional complication of the COVID pandemic, the Review consulted widely and yielded a rich source of information from members of the public and key organisations, from which two clear themes quickly emerged.

Firstly, that the stigma, hurt, and harm caused by discrimination and sexual harassment can have severe consequences for individuals, particularly people with multiple protected attributes, who experience intersectional disadvantage.

Secondly, there is a compelling need to shift to a preventative focus to eliminate discrimination, rather than relying on individuals to carry the burden as complainants, particularly to effect systemic change.

This report makes 46 recommendations directed at modernising and strengthening Queensland's discrimination protections.

Central to these is the introduction of a positive duty on organisations to take reasonable and proportionate measures to eliminate discrimination and other objectionable conduct. This gives effect to the overwhelming calls from the community for the Commission to take a more proactive role in preventing discrimination.

Other recommendations aim to make the law easier to understand and apply, to improve the complaints system by providing greater flexibility in the process, and increase access to justice.

With a greater appreciation of the harm caused by discrimination, the circumstances in which the law should permit discrimination and the attributes requiring the law's protection have been carefully considered and are also the subject of recommendations.

The voluminous nature of the *Building Belonging* report reflects the complexity of the issues and depth of analysis of materials, including the many written submissions received by the Review and the consultations we held. I sincerely thank all the organisations who took the time to prepare detailed and considered submissions, the more than 1,100 individuals who shared their personal experiences through our online *Have your say* survey, and everyone who participated in stakeholder consultations. Throughout this report the Review has endeavoured to give voice to these valuable contributions and provide a fair representation of the range of views expressed.

I wish to thank the members of the Reference Group who provided input at the initial stages of the Review. The value of their contribution is reflected in the quality of the submissions we received.

The *Building Belonging* Report would not have been possible without the extraordinary effort, knowledge, and skills of the Review Team. I am deeply grateful to the team and staff of the Commission for their dedication in completing a report of this significance within a 14-month timeframe.

Finally, realising the aims of the *Building Belonging* report will only be achieved through awareness, education, resourcing, and careful monitoring of progress. Through these foundational steps we can build a Queensland where everyone belongs.



Scott McDougall
Queensland Human Rights Commissioner

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Glossary

Term	Explanation
Anti-Discrimination Act or the Act	<i>Anti-Discrimination Act 1991 (Qld)</i>
the Commission	The Queensland Human Rights Commission, including its predecessor, the Anti-Discrimination Commission Queensland. To distinguish the work of the Review team from the broader work of the Commission, we refer to 'the Review' and 'the Commission' deliberately, and not interchangeably.
disability or impairment	<p>We use the term 'disability' rather than the word 'impairment.' This is different from the language of the current Act. We make recommendations to change this terminology in this report.</p> <p>When referring to another Act or quoting from a submission we use the terminology of the original source.</p>
discrimination	<p>We use the words 'discrimination' to describe the experiences conveyed to the Review. Those experiences may not always amount to conduct that could or would be considered an unlawful contravention of the Act. We use the term 'experiences of discrimination' and not the words 'conduct that may amount to unlawful discrimination' or 'alleged discrimination'.</p> <p>Our intention is not to infer that all instances described in the report would amount to discrimination that is unlawful. At the same time, we do not intend to suggest those experiences described to us are not unlawful, or to minimise the experience in any way.</p> <p>When discussing legal tests or thresholds, we have referred to discrimination within its legal meaning.</p>
exemption or exception	<p>We use the term 'exception' to refer to provisions that allow discrimination in certain circumstances, and the term 'exemption' to refer to applications to the tribunal for exemptions from the Act for a fixed period.</p> <p>This is different from the language of the current Act. We make recommendations to change this terminology in this report. When referring to another Act or quoting from a submission we use the terminology of the original source.</p>
First Nations peoples	<p>The words 'First Nations' and 'Aboriginal and Torres Strait Islander' are used interchangeably to refer to the Aboriginal peoples and Torres Strait Islander peoples of Australia.</p> <p>We understand that some Aboriginal peoples and Torres Strait Islander peoples are not comfortable with some of these words. Only respect is meant when these words are used.</p>
Human Rights Act	<i>Human Rights Act 2019 (Qld)</i>

Term	Explanation
human rights agencies	We use the term 'human rights agencies' to describe state and federal anti-discrimination, human rights, and equal opportunities agencies – that is, statutory bodies equivalent to the Commission in other states and territories, and the Australian Human Rights Commission.
LGBTIQ+ or LGBTQ+	<p>Lesbian, gay, bisexual, transgender, intersex, queer or questioning. The plus signifies all of the other gender identities and sexual orientations not covered by the other initials. We recognise that intersex is distinct, and refer to LGBTQ+ deliberately when the issue is not relevant to the intersex community in the context.</p> <p>When quoting from a submission or providing the name of an organisation we use the terminology of the original source.</p>
QCAT	the Queensland Civil and Administrative Tribunal
QIRC	the Queensland Industrial Relations Commission
the Reference Group	the Reference Group established by the Commission to represent key stakeholder streams we were required to consult during the Review.
Respect@Work	<i>Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces</i> , Report (2020) conducted by the Australian Human Rights Commission.
the Review	<p>the team within the Commission tasked with undertaking the Commission's review of the Anti-Discrimination Act.</p> <p>To distinguish the work of the Review from the broader work of the Queensland Human Rights Commission, we refer to 'the Review' and 'the Commission' deliberately, and not interchangeably.</p>
systemic discrimination	systemic discrimination has been described as policies, practices or patterns of behaviour that are part of the structures of an organisation, and which create or perpetuate disadvantage for people with an attribute or attributes.

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Summary



...I am Indigenous, I've had a care and out of home care experience, I come from a background of trauma and abuse, I'm queer, I'm gender diverse, and I'm mentally ill, and have a disability. And I think kind of what you're talking about [discrimination] – it's cumulative. And it has an ongoing effect. And, and I think it just layers on top of each other. You know, it's something that you carry with you all the time...

And it brings so much like fatigue, and exhaustion, and frustration that even if you're presented with the opportunity of, 'Hey, do you want to try and get some justice? Do you want to speak up about your discrimination?' You don't have the energy and you don't have the resources to do that...



– Participant from roundtable with young people

About the review

In May 2021, Queensland's Attorney-General asked the Queensland Human Rights Commission (the Commission) to undertake a review of the *Anti-Discrimination Act 1991* (Qld).

The Anti-Discrimination Act plays a central role in protecting and promoting equality and belonging in Queensland. This Review, which marks the thirtieth anniversary of the Act, provides an opportunity to undertake a holistic re-evaluation of all aspects of Queensland's discrimination law.

The Terms of Reference are comprehensive and ask us to consider whether there is a need for any reform to enhance and update the Act to best protect and promote equality. One of the central questions we were asked to consider is whether a more positive approach is required to eliminate discrimination and sexual harassment.

How we approached our task

The Review gathered information through three key activities – consultations, submissions, and research. We aimed to consult widely to ensure that as many people as possible could have input into the future of Queensland's discrimination law.

We sought direct input from people who have experienced discrimination and sexual harassment, and took steps to proactively engage with people and communities who don't usually report their experiences.

Across the course of the Review, we conducted more than 120 stakeholder consultations, held four public consultations, and hosted a series of six roundtables.

In November 2021, we published a Discussion Paper outlining priority topics, and including 56 questions about options for reform. We received 159 written submissions, most of which are published on our website. We conducted an online survey and received 1,109 responses.

We also undertook extensive analysis of Australian and international discrimination and human rights law and academic literature.

Throughout the Review, we were informed by our guiding principles – comprehensive and consultative, transparent and inclusive, evidence-based and independent.

Summary of key points

In this report, we present reforms to ensure the law is effective in protecting people from discrimination and sexual harassment.

We recommend five key reforms:

- **Eliminate discrimination.** Introduce a new Act to protect and promote the right to equality and eliminate discrimination and sexual harassment to the greatest extent possible.
- **Refine the key concepts.** Ensure the legal tests for discrimination respond effectively to the problems they are seeking to address and are easy to understand and apply.
- **Shift the focus to prevention.** Promote compliance by shifting the focus to preventing discrimination and sexual harassment before it happens.
- **Improve the complaints system.** Reorientate the dispute resolution process to ensure it is flexible and efficient, and to enhance access to justice.
- **Increase protection.** Ensure all people who require protection under the Act are included, and that coverage of the law extends to all contexts and settings where unfair discrimination occurs, subject to reasonable exceptions.

The need for reform

During the Review, we were repeatedly told that people and communities continue to experience discrimination in Queensland, even where the conduct is unlawful.

The impact of discrimination and sexual harassment can be profound and devastating at an individual and societal level. It can damage psychological health and wellbeing, create social exclusion, and have financial and economic consequences for the person themselves as well as for organisations, businesses, and industry.

People who experience discrimination because they have a combination of protected attributes are at greater risk of experiencing discrimination and find it harder to bring and prove a claim, but are not adequately covered by the Act.

We also heard that discrimination can be deeper, wider, and more structurally embedded than one-off individual experiences. However, systemic discrimination is more difficult to identify, report and prove.

Through our consultations and submissions, we identified a complex relationship between ongoing or perpetual discrimination and social and economic disadvantage.

Key issues we identified

Limitations of a reactive system

Throughout our Review, the consistent theme that emerged is that the current system lacks a preventative focus.

The primary way the Act is enforced is through resolving individual complaints about conduct that has already occurred. This creates a reactive system that places the burden on people who have experienced discrimination and sexual harassment.

Most experiences of discrimination and sexual harassment are not reported. We heard a strong message about the barriers people face to making a complaint. These barriers can be compounding, and can have a disproportionate impact on people who face social and economic disadvantage.

Some people may not realise they are experiencing unlawful treatment because the behaviour happens so regularly it has been normalised. If a person does recognise the treatment as discriminatory, they may not be aware that the law protects them. People can also fear negative consequences of making a complaint, or may find it hard to trust in government systems because of past treatment. Power differentials that contribute to discrimination and sexual harassment occurring in the first place can also operate to prevent people from reporting it.

Even if a person decides to make a complaint, the process can be long and complex. Often, people feel that the outcomes don't justify the involvement. For those facing challenges in other areas of their lives, immediate priorities like food and housing insecurity can mean that engaging with the process is not an option.

Fixing problems with the law

We identified a disconnect between what we heard about experiences of discrimination and what is covered by the legal tests in the Act. Changes are required to ensure the law is effectively responding to the problems it is seeking to address.

Because discrimination may be caused by unconscious bias, stigma associated with certain conditions and communities and underlying attitudes, it can be very difficult to prove. Many people feel it is just 'my word against theirs,' and that they could easily be discredited. Sometimes,

the person who is alleged to have discriminated may not have recognised or articulated the reason for the treatment, or may not even be aware that they have acted for a discriminatory reason.

Often we were told that the current law is too complex and can be hard to understand and apply, particularly when there are differences between the federal and state law. The difficulties are magnified for under-resourced small business owners, who already feel the weight of having to comply with other industrial and work health and safety laws, as well as running their business. As far as possible, we have aimed to minimise inconsistency between state and federal laws.

Most duty holders want to 'do the right thing' and actively support the elimination of discrimination, but don't always know what they are required to do or not do. Further mechanisms to support and guide organisations in their obligations are required to ensure that preventing and responding to discrimination is a shared responsibility, and becomes 'everyone's business'.

Addressing gaps in protection

Some people experience discrimination but are not protected by the current law, because the context in which the discrimination is occurring is not unlawful, or they fall outside the current definition. The current Act therefore creates gaps in protection that are exposing some people to ongoing discrimination that should be unlawful.

In some areas, the Act no longer achieves the right balance between providing protection from discrimination and allowing for differential treatment for a genuine reason. This is usually because the needs and aspirations of our society have changed.

We also identified that some parts of the Act may be incompatible with the *Human Rights Act 2019* (Qld).

The scope of changes required

Laying the foundations

A new Act is required to ensure the intent and purpose of our recommendations are fully realised.

Creating a new Act will not only simplify the structure, language, and content of the law, but will hold symbolic significance – it will mark the point in time when we committed to strengthening Queensland's discrimination law and ensuring that the legislation is in step with today's society.

The new Act should contain an objects clause that states the purpose of the legislation and assists in its interpretation. The overall purpose of the law should extend beyond the current objectives to include a positive approach to eliminating discrimination.

The objectives of the new Act should reflect the key objectives we identified during the Review, including to prevent and eliminate discrimination to the greatest extent possible. We also recommend the well-established principle of beneficial interpretation be explicitly incorporated, to ensure the Act is interpreted in a way that best achieves its objectives.

Refining key concepts

Defining discrimination

For the Act to be effective, the definition of discrimination should be easy to understand and should avoid unnecessary technicalities that dilute the effectiveness of the law. Although discrimination law is technically complex, our recommendations simplify key definitions and make the Act more accessible.

The test for direct discrimination should be redefined as a test of ‘unfavourable treatment’, with the requirement to prove that discrimination was ‘one of the reasons’ for the treatment. This will remove challenges associated with creating a hypothetical comparator.

For indirect discrimination, the Act should adopt a simplified ‘disadvantage test’. This will remove complex, impractical, and technical aspects of the current test, and provide further guidance through an expanded, non-exhaustive list of factors to determine whether or not the conduct was reasonable.

The Act should clearly recognise that people may experience discrimination on the basis of combined grounds, and this can have a cumulative and compounding impact.

Affirmative measures

Anti-discrimination laws have long endorsed taking proactive steps to address disadvantage through measures such as affirmative action, and policies and programs to support target groups.

Affirmative measures aim to correct or compensate for past or present discrimination, and prevent discrimination from recurring in the future. This can include measures such as travel concessions for pensioners, accommodation reserved for women who experience domestic violence, or initiatives to support women in male dominated professions.

We recommend updating the Act’s language and the examples of affirmative measure it includes. The Act should be aligned with the approach in the Human Rights Act, and no longer frame these measures as ‘exceptions’ to discrimination, but as a key way to promote and realise substantive equality. Affirmative measures will need to be undertaken in good faith, be reasonably likely to achieve their purpose, be proportionate, and be justifiable because the particular group have a need for advancement or assistance.

The Act needs to make it clear and simple when affirmative measures can be used, but a careful and considered approach is required to avoid entrenching disadvantage for minority racial groups. Our recommendations balance those considerations.

A positive duty to make reasonable accommodations

‘Reasonable accommodation’ is a core concept in discrimination law, which requires organisations to make adjustments to accommodate people with disability and avoid discrimination. It is one way of working towards substantive equality. While the Act implicitly provides for reasonable accommodations in the definition of indirect discrimination and in current exceptions based on ‘special services or facilities’, the law is difficult to explain, understand, and enforce.

An express, positive obligation is required to provide clarity and greater certainty, including through providing a non-exhaustive list of criteria for assessing whether an accommodation is reasonable.

Sexual harassment

Sexual harassment is still happening, and the effects can be devastating. Pervasive workplace cultures that allow or encourage sexual harassment are the hardest to address, with women and young people at greatest risk. When sexual harassment happens at work, it can be very hard to speak out because of fear, stigma, and concerns about career progression.

Despite the prevalence of sexual harassment, we found that the sexual harassment provisions in the Act are working well and might even be the best in Australia. Unlike other jurisdictions, in Queensland sexual harassment is unlawful wherever it happens.

Having carefully analysed possible reforms, including those recommended in the federal context by the Australian Human Rights Commission’s Respect@Work report. We also recommend

retaining the current test and, rather than introducing new prohibitions, we recommend greater awareness raising and education to promote cultural change.

Improving the complaint system

A new approach to dispute resolution

Under the current legislation, one of the main roles of the Commission is to resolve complaints. The Commission attempts to resolve complaints through conciliation, which is a free, confidential, and informal process of alternative dispute resolution that aims to avoid litigation.

The current process is prescriptive and rigid procedural timeframes and notification requirements limit the ability to deal with complaints efficiently and effectively. The Commission's process should be reshaped to be more flexible, responsive, and tailored to the nature of the complaint.

The Commission should retain its filtering role to ensure all complaints that proceed to dispute resolution fall within the jurisdiction of the Act. However, enhancing the flexibility of the process will allow the Commission to engage in early intervention or decline to provide dispute resolution in certain circumstances, allowing people who want their matter to be determined by a tribunal to fast track the process.

Changes should also be made to make the process more accessible, including to allow verbal complaints, or for the Commission to give reasonable help if exceptional circumstances exist. We have also recommended extending the time limit for making a complaint from one year to two, and by allowing reviews of decisions by the Commission about whether to offer dispute resolution to proceed to the Tribunal, instead of the Supreme Court.

We also recommend specific changes to ensure the Act can offer real protection for children, including to ensure the time limit on making a complaint doesn't start running until they turn 18, unless there is substantial prejudice to the respondent.

Increasing access to justice

Under the current law, a complaint must be made by the person who experienced discrimination, or by someone who has been authorised to make a complaint on their behalf.

The Act allows a relevant entity to bring a complaint, but only for vilification complaints. Allowing organisations to bring complaints on behalf of affected communities will reduce the burden on people who have experienced discrimination and sexual harassment, and help to boost the capacity to address systemic issues, particularly where issues are in the public interest.

While representative complaints on behalf of a class of people are currently allowed, very few have been successful because the legislative criteria are complex and create too high a threshold. As representative complaints produce efficiencies, enhance access to justice, and create opportunities to address systemic discrimination, changes are required to make these provisions more accessible, including by providing an option of direct access to the Supreme Court. After the law is changed, a community awareness campaign and additional resourcing will be needed to support greater use of these provisions.

People serving a term of imprisonment or who are on remand in prison can be at greater risk of experiencing discrimination, but face specific legislative barriers to making a complaint. This high bar, introduced through legislative amendments to the Act in 2008, limits rights protected by the Human Rights Act and creates inefficiencies in the process. We recommend changes to the Corrective Services Act to allow prisoners the same complaint process as everyone else.

The hearing process

Complaints that are not resolved in the Commission may be referred to the relevant tribunal for hearing and determination. In the hearing, the complainant has the responsibility of proving that the respondent discriminated against them.

This can be difficult when evidence about the reason for the treatment rests with the respondent, or where the cause is unconscious bias. Taking account of the challenges associated with proving discrimination, particularly for disadvantaged and marginalised groups, and considering power imbalances often inherent in discrimination cases, we recommend a shared burden of proof based on a well-established model from the United Kingdom. The requirement of a respondent to prove reasonableness in indirect discrimination, or that an exception applies, would remain unchanged.

The tribunals

Two tribunals deal with matters under the Act – the Queensland Industrial Relations Commission for work-related matters, and the Queensland Civil and Administrative Tribunal for all other matters.

During consultations, including with the tribunals, we did not identify issues with the powers and functions of either of the tribunals. In fact, existing remedy provisions have the capacity to promote outcomes to address systemic discrimination, and it is important to retain these options.

Because matters under the Anti-Discrimination Act are a small part of the tribunals' workloads, wherever possible, members who deal with discrimination and sexual harassment should have demonstrated knowledge and experience in this area of law, and reflect the community's diversity.

Written reasons for decisions of the tribunal provides vital guidance to duty holders, the Commission, and the broader community on how the law is to be interpreted and should be routinely published.

Eliminating discrimination

The consistent theme that emerged through our consultations and submissions was that the current system lacks a preventative focus.

The Act currently relies on resolving complaints about conduct that has already happened, and systemic discrimination has remained largely unaddressed. Given the barriers that many people face to reporting their experiences, this has limited the ability of the Act to protect people from discrimination.

Positive duties are an emerging feature of discrimination and sexual harassment laws. A positive duty is a legal obligation on a person or organisation to take active steps to prevent discrimination and sexual harassment before it happens.

Across the Review, there was strong support for introducing a positive duty into the Act, and we conclude that introducing a positive duty into the Act is required to best protect and promote equality, non-discrimination, and the realisation of human rights in Queensland.

Key benefits of a positive duty include:

- **Prevention.** A positive duty aims to stop discrimination and sexual harassment before it happens, rather addressing conduct that has already happened.
- **Shared responsibility.** Requiring employers and organisations to take steps to prevent discrimination and sexual harassment shares the responsibility for enforcement of the Act with duty holders, rather resting largely with the people the Act is designed to protect.

- **Education and awareness.** Encouraging and supporting organisations to meet their obligations promotes a better understanding of the causes and impacts of discrimination, as well as increasing awareness about the Act.
- **Systemic focus.** Requiring a proactive approach provides better protection from discrimination because it aims to achieve systemic change.

In determining whether a measure is reasonable and proportionate, the Act should prescribe a non-exhaustive list of the factors to allow the duty to be scaled depending on the size and structure of an organisation and any industry-specific considerations including risk profiles.

We recommend a regulatory approach that focuses on supporting and guiding compliance to ensure meaningful engagement and minimise the regulatory burden.

A mix of tools are necessary to ensure the complex factors that contribute to discrimination and sexual harassment are addressed. Primarily, these will focus on education and awareness and will include tools for working with duty holders to increase awareness of, and willingness to comply with, Queensland's discrimination law and, as a last resort, mechanisms to enforce compliance.

Updating protected attributes

Some people experience discrimination but are not protected by the current law.

Discrimination is only unlawful if it happens because a person has a protected attribute. Throughout the Review, we were told that existing attributes need to be updated to ensure the Act reflects contemporary values and best practice, removes outdated language and definitions, and addresses gaps in protection. We recommend updates to ensure people are protected on the basis of disability, gender identity, sexual orientation, sex workers, migration/immigration status, and family, carer and kinship responsibilities.

As the effectiveness of the Act may be diluted by a long list of attributes, particularly if they overlap, we identified objective criteria to determine whether protections should be expanded. This included considering whether there is sufficient evidence of a gap in protection, and whether the proposed attribute is of a comparable nature to those already included.

We recommend protecting five additional attributes – sex characteristics, irrelevant criminal record, physical features, subjection to domestic or family violence, and homelessness.

Adjusting the coverage of the Act

We consider whether the coverage of the Act, as determined by the areas of activity and the exceptions that apply, achieves the right balance between providing protection from discrimination and allowing for differential treatment for a genuine reason, where it is reasonable, necessary, and proportionate.

Some exceptions and areas of activity require adjustment to meet current community needs and expectations, and to ensure that the Act is compatible with human rights obligations under the *Human Rights Act 2019* (Qld).

As well as updating terminology used in the Act, we recommend changes to the scope of exceptions for non-profit organisations that deliver goods or services, clubs, sport, religious bodies, superannuation, and insurance.

We recommend removing two exceptions that are redundant and do not meet current community standards in the context of working with children and accessing assisted reproductive technology such as IVF.

Implementing reforms

In setting out a suite of recommendations to reform and enhance the Anti-Discrimination Act, we recognise that legislative change alone will not eliminate discrimination and sexual harassment to the greatest extent possible, or better protect and promote equality – only people can do that.

We consider that the following three strategies are required:

- **Awareness and education.** The Commission should work to improve awareness of the Anti-Discrimination Act and protections available, and changes to the law should be communicated effectively. People and organisations who have new obligations should be supported to make positive change.
- **Resourcing reforms.** Key stakeholders that play a role in enforcing the Act or providing legal and advocacy services to support people to access protections require adequate funding to ensure the law is effective for people who experience discrimination and sexual harassment.
- **Monitoring the changes.** Reforms are more likely to succeed if an oversight committee is established to implement reforms and evaluate the effectiveness of the changes over time.

Hope for the future

As well hearing about experiences of discrimination throughout the Review, we also heard that people have the strength to hope for a better future. People who generously shared their experiences with us did so in the hope of strengthening the law to achieve a fairer, safer and more inclusive Queensland.

There was a general acceptance that while change is not always quick to achieve, it is worth working towards. The recommendations of this report aim to give voice to these aspirations, and to refocus Queensland's path to building belonging for everyone.

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Recommendations

A new anti-discrimination Act for Queensland

Recommendation 1

- 1.1 The *Anti-Discrimination Act 1991* (Qld) should be replaced with a new Act to come into force by 1 July 2023.
- 1.2 The Commission should be involved in providing instructions to the Office of the Parliamentary Counsel to prepare a draft Bill.

Objects, purpose, and beneficial interpretation

Recommendation 2

- 2.1 The new Act should be called the Anti-Discrimination Act and contain a long title that reflects the updated purpose of the legislation.
- 2.2 The preamble should be retained but should only include the considerations by Parliament currently set out in section 6.
- 2.3 The objects of the Act should include:
 - to prevent and eliminate discrimination, sexual harassment, and other objectionable conduct to the greatest extent possible
 - to further promote and protect the right to equality as set out in section 15 of the *Human Rights Act 2019* (Qld)
 - to encourage identification and elimination of systemic causes of discrimination
 - to recognise that discrimination and other objectionable conduct can cause serious personal, social, and economic harm, and that discrimination based on a combination of attributes can have a cumulative harmful effect
 - to promote and facilitate the progressive realisation of substantive equality as far as reasonably practicable by recognising that:
 - discrimination can cause social and economic disadvantage

and that access to opportunities are not equitably distributed throughout society; and

- equal application of a rule to different groups can have unequal results or outcomes; and
- the achievement of substantive equality may require making reasonable accommodations, and implementing affirmative measures.

- 2.4 The Act should contain a provision to require the Act be interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so, consistently with the objects of the Act and the *Human Rights Act 2019* (Qld).

Defining discrimination

Recommendation 3

- 3.1 The Act should adopt the approach of the *Discrimination Act 1991* (ACT) by creating a legislative provision entitled ‘meaning of discrimination’ which:
 - explains that discrimination occurs when a person discriminates either directly or indirectly, or both directly and indirectly, against another person
 - defines direct discrimination
 - defines indirect discrimination
- 3.2 The definition of direct and indirect discrimination should expressly provide that discrimination can occur on the basis of one or more attributes, or because of the effect of a combination of attributes, and the Act should not use the singular language of ‘an attribute’.
- 3.3 Direct discrimination should be defined to mean where a person treats, or proposes to treat, another person unfavourably because of one or more attributes, or because of the effect of a combination of attributes.
- 3.4 The Act should clarify that the protected attribute or combination of attributes need only be one of the reasons, rather than a substantial reason, for the treatment.

- 3.5** The definition of indirect discrimination should include the following aspects:
- a person imposes a condition, requirement, or practice
 - which has or is likely to have the effect of disadvantaging the other person
 - because the person has one or more protected attributes, or because of the effect of a combination of attributes, and
 - the condition, requirement, or practice is not reasonable.
- 3.6** The Act should incorporate a non-exhaustive list of factors to determine reasonableness based on the *Equal Opportunity Act 2010* (Vic).

Affirmative measures

Recommendation 4

- 4.1** The Act should include a new provision called affirmative measures, contained within the part of the Act that explains the meaning of discrimination rather than in general exceptions, defined as per section 12 of the *Equal Opportunity Act 2010* (Vic). The Act should include contemporary examples to demonstrate how affirmative measures may apply in practice.
- 4.2** The Act should impose a different and higher standard for measures that apply to government plans, policies, or programs in relation to minority racial groups, requiring that they are reasonable and proportionate to the scope and impact of the measures on the affected group. The Act should confirm that such measures be designed and implemented after prior consultation with affected communities, and with the active participation of the communities.
- 4.3** Prior to the enactment of legislation, the Queensland Government should ensure that Aboriginal and Torres Strait Islander peoples are genuinely consulted about this proposed approach.

A positive duty to make reasonable accommodations

Recommendation 5

- 5.1** The Act should replace unjustifiable hardship exceptions with a positive, standalone duty to make reasonable accommodations for a person with disability which applies to all areas of activity in which the Act operates.
- 5.2** A non-exhaustive list of criteria for assessing whether an accommodation is reasonable should be included in the Act, including:
- the person's circumstances, including the nature of the disability
 - the nature of the accommodation
 - the consequences for the person with a disability if the accommodation is not made
 - the financial circumstances of the person required to provide the accommodation
 - the consequences for the person required to provide the accommodation, including any financial impact
 - the consequences for other people affected by the accommodation, including numbers of people advantaged or disadvantaged
 - balancing the consequences of providing the accommodation against the disadvantage that would be imposed upon the person with disability and others if the accommodation is not made.

Sexual harassment, sex-based harassment and hostile environments

Recommendation 6

- 6.1** The current test for sexual harassment should be retained.
- 6.2** The Act should not introduce new prohibitions against sex-based harassment or creating an intimidating, hostile, humiliating or offensive environment on

the basis of sex. An example of indirect discrimination should be included to demonstrate that creating or facilitating an environment where people with particular attributes are disadvantaged is a form of indirect discrimination.

- 6.3** The Commission should undertake engagement with stakeholders to promote a greater understanding about the protections in the Act that prohibit sexual harassment and develop targeted resources for particular industries and groups, including for sex workers.

Making a complaint

Recommendation 7

- 7.1** The Act should provide that if the Commission is satisfied that the complainant needs help to put their complaint in writing, the Commission must give reasonable help to them to do so.
- 7.2** If the Commission is satisfied on reasonable grounds that exceptional circumstances justify the complaint being made orally, the Act should allow the Commission to receive the complaint orally and transcribe into written form.
- 7.3** The Commission should ensure that if help is given to a person to put their complaint in writing, it should be given by a staff member who will not be responsible for providing dispute resolution services to that party.

Time limit to make a complaint

Recommendation 8

- 8.1** The Commission should have discretion to decline to provide or continue to provide dispute resolution if the alleged contravention occurred more than 2 years before the complaint was lodged. The Act should frame the time limit by way of giving the Commissioner discretion to provide dispute resolution.
- 8.2** The Act should explicitly provide that a child can bring a complaint. If a complaint is brought in relation to allegations that occurred when the person was a child, the

Act should allow that the 2 years referred to in the discretion only starts once the child turns 18, unless the respondent can show substantial prejudice.

- 8.3** The Act should give the Tribunal the jurisdiction to make a merits review of decisions by the Commission in relation to the discretion to provide dispute resolution, and discretion to be able to award costs if an application is frivolous or vexatious.
- 8.4** The Act should require that an application for review must not be made unless the tribunal has granted leave to make the application.

A new approach to dispute resolution

Recommendation 9

- 9.1** The Commission's complaints process should remain compulsory but be reshaped into a more flexible and responsive dispute resolution process.
- 9.2** The Commission's function to inquire into complaints and, where possible, to effect conciliation should be replaced with a function to offer services designed to facilitate resolution of disputes.
- 9.3** Principles of dispute resolution should be enshrined in the Act. Those principles should include:
- Dispute resolution should be provided as early as possible.
 - The type of dispute resolution offered should be appropriate to the nature of the complaint.
 - The dispute resolution process should be fair to all parties.
 - Dispute resolution should be consistent with the objectives of the Act.
- 9.4** The Commission should have power to make preliminary enquiries about a complaint to decide whether or not to provide dispute resolution, or if necessary for dispute resolution processes.

- 9.5** The Commission must decline to provide dispute resolution if the Commissioner considers the complaint is frivolous, trivial, vexatious, misconceived or lacking in substance.
- 9.6** The Commission should have discretion to decline to provide or continue to provide dispute resolution for the following reasons:
- the alleged contravention occurred more than 2 years before the complaint was lodged
 - there are insufficient details to indicate an alleged contravention of the Anti-Discrimination Act
 - having regard to all the circumstances, the Commission considers it is not appropriate to provide or to continue to provide dispute resolution
- 9.7** The Act should give the tribunal:
- the jurisdiction to make a merits review of decisions by the Commissioner to decline to provide or continue to provide dispute resolution
 - discretion to be able to award costs if an application is frivolous or vexatious.
- 9.8** The Act should require that an application for review must not be made unless the tribunal has granted leave to make the application.
- 9.9** Once the Commission has decided to offer dispute resolution to parties for a complaint, the Commission should be able to take reasonable and appropriate action to resolve the dispute, including:
- Asking any respondent to make written submissions to be shared with the person bringing the complaint
 - Asking any party to give the Commission information relevant to the complaint
 - Making enquiries or discussing the complaint with either or both parties
 - Facilitating a conciliation conference
- 9.10** If a conciliation conference is convened, all parties must be given the opportunity to attend, but the Commission should have discretion to decide which parties are directed to attend.
- 9.11** The Act should not require the Commission to take certain steps within specified timeframes during the dispute resolution process. Instead, the Commission must use its best endeavours to finish dealing with a complaint within 12 months of its lodgement.
- 9.12** For matters that have met the threshold to proceed to dispute resolution, the Commission should give a notice to all parties to allow a complainant to elect to proceed to the tribunal once dispute resolution processes have finalised without an agreement, or if the Commission declines to provide, or continue to provide, dispute resolution.
- 9.13** Once the notice has been given to parties, the person bringing the complaint should retain the right to request referral to the tribunal for determination and this request must be made within the existing timeframe of 28 days.
- 9.14** If these recommendations are implemented, there should not be a direct right of access to the tribunal or court.
- 9.15** Once the new Act is in effect, the Commission should:
- develop a guideline to inform decision making about which dispute resolution actions to take in a particular complaint
 - publish information at least annually about timeframes within which it has finalised complaints.

Organisation and representative complaints

Recommendation 10

- 10.1** The Act should allow organisations to make complaints in relation to any unlawful conduct under the Act, rather than only in relation to vilification. Organisation complaints should have the same options and outcomes as individual complaints.

Recommendation 11

- 11.1** The Act should replace the criteria for bringing a representative complaint to the Commission or tribunal with criteria similar to section 46PB of the *Australian Human Rights Commission Act 1986* (Cth).
- 11.2** The existence of a prior representative complaint should not prevent another person from commencing a non-representative complaint.
- 11.3** Organisations should be able to have their complaint dealt with as a representative complaint, provided they are able to bring the complaint on their own behalf.
- 11.4** Where the complaint cannot be resolved through the Commission's dispute resolution processes, the complainant in a representative complaint may elect to lodge their complaint either in:
- the tribunal, a no costs jurisdiction, or
 - the Supreme Court, a costs jurisdiction.

Complaints by prisoners

Recommendation 12

- 12.1** Section 319E of the *Corrective Services Act 2006* (Qld), that requires a person detained in a corrective services facility who is making a complaint against a 'protected defendant' to first make a complaint to the chief executive before lodging a complaint with the Commission, should be repealed.
- 12.2** In the alternative, if an internal complaint mechanism is retained for complaints about protected defendants, the process should be made consistent with the Human Rights Act by:
- requiring an internal complaint be made prior to complaining to the Commission
 - allowing the complainant to lodge a complaint with the Commission after 45 days have elapsed
 - providing the Commission with a discretion to defer dealing with a complaint if the protected defendant

did not have an adequate opportunity to deal with the complaint

- providing the Commission with a discretion to waive the internal complaint requirement if there are exceptional circumstances.

Proving discrimination

Recommendation 13

- 13.1** The Act should introduce a shared burden of proof in which the burden shifts to the respondent once the complainant has established a prima facie case. The provision should be based on section 136 of the *Equality Act 2010* (UK), and informed by the guide in the Annex to the UK case of *Igen Ltd & Ors v Wong* [2005] EWCA Civ 142.

The tribunals

Recommendation 14

- 14.1** The Act should enable the Commissioner to intervene as of right in a proceeding before a court or tribunal in which a question of law arises that relates to the application of the Act, and the Commission should publicly report annually on the number and type of interventions it has conducted. The definition of human rights should reflect the Human Rights Act.
- 14.2** The tribunals should ensure that, wherever possible, members who deal with matters under the Act have demonstrated knowledge and experience in discrimination law.
- 14.3** When considering appointments to the tribunals, the Queensland Government should have regard to the benefits associated with tribunal membership reflecting the diversity of the community that comes before them.
- 14.4** The Tribunals should ensure that members undertake regular training on cultural competency.
- 14.5** Tribunals should provide written reasons for all final decisions and significant

interlocutory decisions, and should publish those decisions and reasons.

- 14.6** The Commission and tribunals should publicly report annually on the number, type, and outcomes of matters they have dealt with under the Act. The type of matter should include the attribute and area, if an allegation of discrimination was made.

A positive duty to eliminate discrimination and sexual harassment

Recommendation 15

- 15.1** The Act should include a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, and other prohibited conduct as far possible.
- 15.2** The duty should apply to anyone who has a legal obligation under the Act, and for all attributes and areas covered by the Act.
- 15.3** Drawing on the Victorian approach and the additional criteria recommended by the Respect@Work report, in determining whether a measure is reasonable and proportionate, the Act should prescribe that the factors that must be considered are:
- the size of the person's business or operations
 - the nature and circumstances of the person's business or operations
 - the person's resources
 - the person's business and operational exigencies
 - the practicability and the costs of the measures
 - all other relevant facts and circumstances.

Supporting compliance

Recommendation 16

- 16.1** The Act should create a function for the Commission to promote and advance the objectives of the Act,

and to be an advocate for the Act. This should include taking a proactive role in eliminating discrimination, including systemic discrimination.

- 16.2** The Commission should ensure structural separation between its dispute resolution function and its role in proactively eliminating discrimination, and this should include reviewing information management and governance structures.
- 16.3** If a complaint is made to the Commission that gives rise to an actual or perceived conflict of interest that arises from the Commission's exercise of its functions, the views of the parties about the appropriateness of the Commission to resolve the dispute should inform the decision about whether dispute resolution can be offered.
- 16.4** The Commission's funding to undertake proactive work to eliminate discrimination, including systemic discrimination, should be separate from its funding for dispute resolution functions, and both should be subject to annual public reporting.

Tools to promote and enforce compliance

Recommendation 17

- 17.1** The Commission's educative and research functions should be retained, and their scope should be expanded to ensure they can meet the new objectives of the Act.
- 17.2** The Commission should have a legislative basis for:
- Developing and publishing guidelines in consultation with relevant duty holders and people affected by discrimination and sexual harassment to whom the practice guidelines will affect or relate.
 - Conducting independent reviews that allow the Commission to, on request by a duty holder, enter an agreement to review an organisation's programs and practices to promote compliance with the Act. An agreement may provide for the payment of

the Commission's reasonable costs of undertaking the review.

- Providing advice about action plans. An action plan should not be legally binding but may be considered by a tribunal or court if relevant to a matter before the court or tribunal under this Act.
- Conducting investigations on its own initiative if certain criteria apply. The criteria should be based on section 127 of the *Equal Opportunity Act 2010* (Vic), and include whether the matter raises a serious issue, relates to a class or group of people, cannot reasonably be expected to be resolved through dispute resolution, there are reasonable grounds to suspect one or more contraventions of the Act have occurred and the investigation would advance the objectives of the Act.

Outcomes of investigations

Recommendation 18

- 18.1** At the conclusion of an investigation, the Commission should have the legislative basis to make findings and recommendations.
- 18.2** The Act should ensure that the outcome of an investigation conducted under these provisions can include:
- taking no further action by the Commission
 - providing a public report that contains recommendations to the Attorney-General or Parliament
 - entering into an enforceable undertaking with the duty holder
 - issuing a compliance notice and, if breached, applying to a tribunal or court to seek civil penalties.

Powers to compel

Recommendation 19

- 19.1** The Commission should retain its investigation powers to compel the production of information and documents,

including data. These powers should be for the following purposes:

- undertaking research
- conducting inquiries into complaints received by the Commission
- conducting own-initiative investigations.

- 19.2** The Act should allow the Commission to require a person to attend before the Commission at a reasonable place and time for the purposes of giving information or answering questions relevant to an investigation.

- 19.3** The Act should update the penalty provisions that apply to a person for failure to comply with a requirement to produce, provide or attend.

Staged implementation of enforcement provisions

Recommendation 20

- 20.1** All of the above provisions should be introduced into the new Act. However, to allow time for duty holders to take reasonable and proportionate steps to comply with any new obligations, provisions relating to enforceable undertakings, compliance notices, and civil penalties should come into effect after a period of two years.

Updating protected attributes

Recommendation 21

- 21.1** The term 'impairment' should be replaced with 'disability'.
- 21.2** The definition of disability should be aligned with the federal *Disability Discrimination Act 1992* (Cth) but should remove references to outdated or inappropriate language such as 'disfigurement', 'malformation' or 'malfunction'.
- 21.3** The Act should provide express protection for assistance animals, not limited to dogs, using a model that is consistent with the Disability Discrimination Act.

21.4 To remove any doubt, the Act should confirm that people with addiction are covered by the attribute of disability.

21.5 The Commission should continue to undertake engagement with stakeholders to promote a greater understanding about the scope of the disability attribute and who it protects.

Recommendation 22

22.1 The definition of gender identity should be based on the definition in the *Yogyakarta Principles*.

22.2 The Act should make reference to sex and/or gender in a way that is complementary with Queensland's birth registration laws.

22.3 The Act and its Explanatory Notes should clarify that all references to 'sex', or a 'particular sex' include both people of a sex that was assigned to them at birth, and people whose gender identity aligns with that sex.

Recommendation 23

23.1 The Act should rename the sexuality attribute to sexual orientation, and define it to mean a person's emotional, affectional, or sexual attraction to, or intimate or sexual relations with:

- persons of a different gender; or
- persons of the same gender; or
- persons of more than one gender.

23.2 The section should include a legislative note that explains that sexual orientation includes not having attraction to or intimate or sexual relations with a person.

Recommendation 24

24.1 The Act should include 'sex worker' as an attribute and the attribute should be defined to mean 'being a sex worker or engaging in sex work.'

24.2 The Queensland Government should consider introducing an exception to permit discrimination on the basis of this attribute when an act is in compliance with a law that regulates the sex work industry.

24.3 Following the outcome of the Queensland Law Reform Commission's review of the regulatory framework for the sex work industry, the Queensland Government should:

- include a definition of sex work in the Act to align with any reforms to the sex work industry
- repeal the sex worker accommodation exception in section 106C of the Act.

Recommendation 25

25.1 The Act should add the further terms 'immigration or migration status' to the non-exhaustive definition of race.

25.2 A general exception should be included in the Act to permit discrimination on the basis of immigration or migration status when an act is done in direct compliance with a law of the state or Commonwealth regarding the regulation of immigration to Australia, and related matters.

25.3 The existing citizenship or visa requirements exception should be retained in the same terms with an additional sub-section that requires that decisions and actions made under it are to be compatible with the Human Rights Act.

Recommendation 26

26.1 The current attribute of family responsibilities should be renamed 'family, carer, or kinship responsibilities' and should not be defined.

Protecting additional attributes

Recommendation 27

27.1 The Commission's functions should include the ability to recommend to the Attorney-General that additional grounds of discrimination be included in the Act.

27.2 The Commission should establish an internal process to monitor and evaluate information it obtains, including through its education, engagement, and dispute resolution functions, to identify when the threshold for adding a new attribute is met.

Recommendation 28

- 28.1** The Act should include a new attribute of sex characteristics, defined consistently with the *Yogyakarta Principles plus 10*.

Recommendation 29

- 29.1** The Act should include a new attribute of irrelevant criminal record and it should be defined as in the *Discrimination Act 1991* (ACT) Dictionary definition. The definition should expressly include:

- convictions under the *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017*
- spent convictions under the *Criminal Law (Rehabilitation of Offenders) Act 1986*; and
- the imputation of a record relating to arrest, interrogation or criminal proceedings of any sort.

Recommendation 30

- 30.1** The Act should include a new attribute of physical features. Physical features should be defined to mean weight, size, height, birth marks, scars, and bodily characteristics other than chosen alterations to a person's physical appearance such as cosmetic procedures, tattoos, piercings, hair styles, and other modifications, unless they are characteristics of other attributes.

Recommendation 31

- 31.1** The Act should include a new attribute of 'subjection to domestic or family violence', and it should be defined as in section 8 of the *Domestic and Family Violence Protection Act 2012* (Qld).

Recommendation 32

- 32.1** The Act should include a new attribute of 'homelessness', and it should not be defined.

Changes to terminology

Recommendation 33

- 33.1** The Act should use the term 'exceptions' for provisions that allow discrimination in certain circumstances and use the term 'exemptions' for applications to the tribunal for an exemption from the operation of specific provisions for a fixed period.

Non-profit goods and services

Recommendation 34

- 34.1** The Act should not include the provision that excludes from the operation of the Act those associations established for social, literary, cultural, political, sporting, athletic, recreational, community service or other similar lawful purposes which do not carry out their purposes for the purpose of making a profit.
- 34.2** The Act should include a voluntary body exception based on the exception in the *Sex Discrimination Act 1984* (Cth) s 39, which is defined in s 4 of that Act.

Clubs

Recommendation 35

- 35.1** The Act should define a 'club' as per the definition in the *Disability Discrimination Act 1992* (Cth) s 4.
- 35.2** The Queensland Government should consider if any additional exceptions in the area of Club membership and affairs are required, for example on the basis of age or political affiliation.

Sport

Recommendation 36

- 36.1** The Act should retain a sport exception in the same form as the current version.
- 36.2** The exception should change the wording that refers to restricting participation 'to either males or females' to neutral language such as 'on the basis of sex'.

36.3 The exception should additionally explain that in determining what is a ‘reasonable’ restriction, a person must have regard to:

- the nature and purpose of the activity; and
- the consequences of the restriction for people of the restricted sex or gender identity; and
- whether there are other opportunities for people of the restricted sex or gender identity to participate in the activity.

Religious bodies

Recommendation 37

37.1 The Act should retain an exception from discrimination for the ordination, training and selection of religious leaders and this be broadened to include lay people who have a role which is the same as, or is similar to, the role of a priest, minister of religion or member of a religious order or where the person otherwise has a role that involves the propagation of that faith.

Recommendation 38

38.1 A general religious bodies exception and religious accommodation exception should be retained, but should only apply to the attribute of religious belief or activity where the conduct by an organisation or related entity established for religious purposes (‘religious organisation’) is:

- to conform to the religious doctrines, tenets or beliefs of the body; and
- reasonable and proportionate in all the circumstances.

38.2 The Act should include a non-exhaustive list of factors to guide whether it is reasonable and proportionate, such as:

- the importance of the relevant conduct in protecting the ethos of the religious organisation and the religious susceptibilities of adherents of that religion

- whether the religious organisation is a public entity under the Human Rights Act when engaging in the conduct
- if the religious organisation operates in a commercial manner when engaging in the conduct
- the reasonable availability of alternative services
- whether the services are essential services
- the rights and interests of the person receiving, or proposed to receive, goods and services or accommodation.

Recommendation 39

39.1 The current genuine occupational requirements exceptions relating to work in educational institutions or other bodies established for religious purposes (s 25 (2)-(8)) should be repealed, along with a legislative note in s 25(1) which indicates that discrimination on the basis of religion will always be a ‘genuine occupational requirement’ at a religious school.

39.2 A new exception should be created to allow discrimination on the ground of religious belief or religious activity in relation to work for an organisation or related entity established for religious purposes (‘religious organisation’) if reasonable and proportionate in the circumstances and the participation of the person in the teaching, observance or practice of a particular religion is a genuine occupational requirement. This should not provide an exception from unnecessary questions that may be asked for a discriminatory purpose.

39.3 The Act should include a non-exhaustive list of factors to guide whether it is reasonable and proportionate, such as:

- the importance of the relevant conduct in protecting the ethos of the religious organisation and the religious susceptibilities of adherents to that religion

- the proximity between the person's actions and the religious organisation's proclamatory mission
- whether the religious organisation is a public entity under the Human Rights Act when engaging in the conduct
- whether the religious organisation operates in a commercial manner when engaging in the conduct
- the reasonable availability of alternative employment
- the rights and interests of the employee.

39.4 The Act should include examples to demonstrate that the exception does not permit discrimination against employees who are not involved in the teaching, observance or practice of a religion, such as a science teacher in a religious educational institution.

Recommendation 40

40.1 The exception allowing discrimination on enrolment on the basis of sex or religion should be retained with the addition of a legislative note to clarify that this section applies to students enrolling for the first time and is on the basis of 'religion' not 'religious belief or activity'.

Superannuation and insurance

Recommendation 41

41.1 The insurance and superannuation exception should be included in the Act in relation to age and disability, and be updated to include a non-exhaustive list of factors which provide guidance on whether it is reasonable to rely on actuarial or statistical data or other relevant factors.

41.2 These factors may include whether the data source:

- is up to date
- is relevant to the type and terms or conditions of the policy
- indicates that the person poses an 'unacceptable risk'

- is a reasonable source
- is from an Australian data source, or if from overseas, how it is applicable in the local context.

41.3 The provisions should also require that, on request, the data on which the service provider is relying is provided to a consumer within a reasonable timeframe.

41.4 The Act should provide the Commission the power to compel an insurance or superannuation provider to disclose the source of actuarial or statistical data on which discrimination was based.

Prisoners

Recommendation 42

42.1 Sections 319G, 319H and 319I of the *Corrective Services Act 2006* (Qld), which alter the tests for direct and indirect discrimination, and create restrictions on compensation orders should be repealed.

Work with children

Recommendation 43

43.1 That the Act should repeal the 'work with children' exception which allows discrimination on the basis of lawful sexuality activity or gender identity in the area of work.

Assisted reproductive technology

Recommendation 44

44.1 The Act should repeal the assisted reproductive technology provision which allows discrimination on the basis of sexuality or relationship status in the area of goods and services.

Resourcing reforms

Recommendation 45

45.1 The Queensland Government should ensure adequate resourcing is provided to:

- legal and advocacy services, including Legal Aid Queensland, community legal centres, and Aboriginal and Torres Strait Islander legal services

- community groups that undertake individual and systemic advocacy about the Anti-Discrimination Act
- tribunals to ensure that any expansion of their jurisdiction is properly resourced
- the Commission to ensure that it can give effect to its expanded role and functions.

Monitoring the changes

Recommendation 46

46.1 The Queensland Government should issue a formal response to this Report within three months of being tabled indicating whether the recommendations are accepted, accepted in principle, rejected, or subject to further consideration.

46.2 A Parliamentary Committee should oversee implementation of the new Act.

46.3 The Attorney-General should establish an interdepartmental 'Building Belonging' working group to oversee the reforms contemplated by this report. The working group should include representation from the Queensland Government, the Queensland Human Rights Commission, and may include representatives from key stakeholder streams.



Chapter 1:

About the Review

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About the Review

In May 2021, Queensland's Attorney-General, the Honourable Shannon Fentiman, asked the Queensland Human Rights Commission (the Commission) to undertake a comprehensive review of Queensland's discrimination law, the *Anti-Discrimination Act 1991* (Qld) (the Anti-Discrimination Act). That year marked the thirtieth anniversary of the Act.

In announcing the Review, the Attorney-General said that making sure our laws protect and promote equality for our diverse communities is a key priority for the Queensland government, and commented:

The anniversary provides a timely opportunity to conduct this holistic review of our anti-discrimination laws to ensure they continue to provide those protections in a contemporary setting.¹

Following the announcement, Terms of Reference were provided to the Commission and made public.

Terms of Reference

The Commission's Review of the Anti-Discrimination Act is conducted pursuant to section 61(b) of the *Human Rights Act 2019* (the Human Rights Act) and section 235(k) of the Anti-Discrimination Act.

Those provisions give the Commission the following functions:

- if asked by the Attorney-General, to review the effect of Acts, statutory instruments and the common law on human rights and give the Attorney-General a written report about the outcome of the review²
- such other functions as the Minister determines.³

The Terms of Reference ask the Commission to review the Anti-Discrimination Act and consider whether there is a need for any reform to enhance and update the Act to best protect and promote equality, non-discrimination and the realisation of human rights.

In undertaking the Review, the Commission is to consider the scope of reform regarding:

- a) the compatibility of the Anti-Discrimination Act with the *Human Rights Act 2019* (Qld)
- b) the preamble and preliminary provisions, including whether a more positive approach is required to eliminate discrimination and other objectionable conduct prohibited in the Anti-Discrimination Act
- c) the attributes of discrimination, including , but not limited to:
 - i. whether the current definitions given to protected attributes best promote the rights to equality and non-discrimination; and
 - ii. whether additional attributes of discrimination should be introduced to section 7 of the Act including (but not limited to) spent criminal conviction or irrelevant criminal record;

1 The Honourable Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family violence, 'Review to ensure Queenslanders protected against discrimination' (Media Statement, 4 May 2021).

2 *Human Rights Act 2019* (Qld) s 61(b). Pursuant to s 94, the Attorney-General must table a copy of the report in the Legislative Assembly within 6 sitting days after receiving the report.

3 *Anti-Discrimination Act 1991* (Qld) s 235(k).

expunged homosexual conviction; irrelevant medical record; immigration status; employment activity; and physical features

- d) the areas of activity in which discrimination is prohibited
- e) the definitions in the Anti-Discrimination Act (other than vilification), including discrimination, unjustifiable hardship, genuine occupational requirements, sexual harassment, and victimisation
- f) whether the Anti-Discrimination Act should contain a positive duty on organisations to eliminate discrimination and other objectionable conduct prohibited by the Anti-Discrimination Act, similar to the duty contained in section 15 of the *Equal Opportunity Act 2010* (Vic)
- g) whether the Anti-Discrimination Act should reflect protections, processes and enforcement mechanisms that exist in other Australian discrimination laws
- h) exemptions and other legislative barriers that apply to the prohibition on discrimination
- i) whether the requirement for less favourable treatment, as imported by the concept of the comparator, remains an appropriate requirement to establish discrimination or whether there are other contemporary responses that would be appropriate
- j) 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 Anti-Discrimination Act, to the greatest possible extent
- k) the functions, processes, powers and outcomes of the Queensland Civil and Administrative Tribunal and the Queensland Industrial Relations Commission under the Anti-Discrimination Act
- l) ways to improve the process and accessibility for bringing and defending a complaint of discrimination, including how the complaints process should be enhanced to improve access to justice for victims of discrimination
- m) options for more tailored approaches towards, or alternatives to existing frameworks for, dispute resolution that enable systemic discrimination to be addressed as well as discrimination complaints that raise public interest issues
- n) any other matters the Commission considers relevant to the review.

The Commission is also asked to consider the ongoing efforts by the Queensland Government and relevant work in other Australian jurisdictions in implementing the recommendations from the Australian Human Rights Commission's *Respect@Work: Sexual Harassment National Inquiry Report* (2020) and include options for legislating for a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment, and victimisation as far as possible. At the time of announcing the Review, the Queensland Parliament's Legal Affairs and Safety Committee⁴ was conducting the Inquiry into Serious Vilification and Hate Crimes, and the Terms of Reference direct us not to review vilification or serious vilification.⁵

⁴ Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into Serious Vilification and Hate Crimes* (Report No. 22, 31 January 2022).

⁵ Review of the *Anti-Discrimination Act 1991 (Qld)*, *Terms of Reference* 4.

In conducting the Review, the Commission was asked to consult with:

- the public generally, including people with experience of discrimination, and/or people who have initiated complaints under the Act
- legal stakeholders
- community advocacy groups and organisations
- the tribunals, which include the Queensland Civil and Administrative Tribunal and the Queensland Industrial Relations Commission
- any other body the Commission considers relevant, having regard to the issues relating to the review.

The Commission is also to consider all submissions made during the Review, including any made about the impact of the Anti-Discrimination Act on human rights, and the nature and scope of those rights that are relevant to the Anti-Discrimination Act.

The Commission was required to provide a report to the Attorney-General by 30 June 2022. On 16 March 2022, we formally requested a four-week extension of time because of delays in receiving submissions due to COVID-19 and flooding events in South-East Queensland. This extension was granted by the Attorney-General on 31 March 2022.

The date the Commission was required to provide the report was therefore extended to 30 July 2022.

Our approach

The Commission is an independent statutory body established under the Anti-Discrimination Act with functions under that Act and the Human Rights Act.

When asked to undertake this Review, the Commissioner established a team within the Commission to conduct the Review. The Review team commenced its work on 21 June 2021.

Guiding principles

We developed a set of principles to guide and inform the Review's methodology and decision-making, and these were published on the Commission's website in July 2021.⁶

Those principles have guided us in making decisions about our consultation and submissions process and how to form the conclusions set out in this report.

Comprehensive and consultative – We aim to consult as widely as possible on issues within the Terms of Reference. We will take measures to ensure that a broad range of people and organisations, including stakeholder groups identified by the Terms of Reference, are actively invited to contribute to the Review. We are committed to listening to all views, experiences, and suggestions for change.

Transparent and inclusive – We are committed to providing a transparent process throughout the Review, and to encouraging public scrutiny and input. We aim to hear a diverse range of views and will consider all perspectives. We will adopt a community-wide perspective to promoting equality, non-discrimination, and the realisation of human rights.

⁶ Since publication on our website, we have made minor updates to the wording of these principles to align with the language of this report.

Evidence based – The Review findings and recommendations will be based on rigorous analysis of information gathered by the Review through submissions, consultations, legal and policy analysis, and research.

Independent – As the Commission is an independent statutory body and is committed to this independence, we will conduct the Review consistent with the Commission’s statutory obligations and vision, purpose, and values.⁷

Reference Group

The Review established a Reference Group with nine key stakeholder streams, including employer groups, unions, religious organisations, community groups, and legal practitioners, and convened three times in the course of the Review.

The role of the Reference Group was to identify priority issues for the stakeholder groups represented, and to support engagement with their communities and members.⁸

The Reference Group was chaired by Commissioner Scott McDougall, and included CEO-level engagement from the following organisations:

- Chamber of Commerce and Industry Queensland
- Community Legal Centres Queensland
- Multicultural Australia
- Queensland Churches Together
- Queensland Council for LGBTI Health
- Queensland Council of Social Service
- Queensland Council of Unions
- Queensland Law Society
- Queenslanders with Disability Network.

While the Reference Group provided input on issues under consideration, it did not have any decision-making function, or formulate, deliberate, or decide on recommendations.

Methodology

To inform the findings and recommendations of this report, the Review gathered information through three key activities: consultations, submissions, and research.

We aimed to consult as widely as possible about issues within the Terms of Reference to ensure that as many people as possible could have input into the future of Queensland’s discrimination law. We also sought direct input from people who have experienced discrimination and sexual harassment.

To ensure an accessible process, we took active steps to promote awareness of the Review and created alternative ways for people to engage with us, including:

- providing a webpage with information about the Review that included our schedule of events, an open call for organisations to request consultations, and ways to participate

⁷ As reflected in the Queensland Human Rights Commission *Strategic Plan 2020–2024*.

⁸ Queensland Human Rights Commission, ‘Review Reference Group: Terms of Reference’, *Our Reference Group* (Web Page, 15 July 2021) < <https://www.qhrc.qld.gov.au/law-reform/about-the-review/our-reference-group> >.

- issuing regular updates and alerts through a subscription-based e-newsletter, social media posts, and press releases
- distributing information for the Reference Group to share through their networks
- designing our consultation and submission processes to be as accessible and transparent as possible.

People and organisations could share their contributions by requesting a consultation, making a submission about issues they identified or responding to questions in the Discussion Paper, sharing their experience through our Have Your Say guided submission form, or by participating in public conversations, roundtables, or smaller specialised face-to-face and virtual roundtables.

We published information about our schedule of events to give as much notice as possible about the time available to engage with the Review.

Consultations

During the course of the Review, we conducted over 120 consultations, either face-to-face or online. A list of our consultations undertaken by the Review is available at Appendix A.

Consultations were held with:

- people with experience of discrimination and sexual harassment
- non-government organisations that provide direct support to people who experience, or are at risk of experiencing, discrimination or sexual harassment
- employers and business representatives, including industry and professional bodies, and peak bodies
- legal representatives for people who make or respond to complaints about discrimination and sexual harassment
- academics, legal and policy experts, including specialists in anti-discrimination law and policy
- staff of the Commission,
- government departments and agencies, including interstate human rights agencies, statutory bodies, and tribunals.

Consultations

Between August and November 2021, we conducted a series of initial stakeholder consultations. The purpose of this phase was to identify whether the Anti-Discrimination Act is effective in eliminating discrimination in Queensland, and to establish priority issues the Review should address.

To inform decisions about who should participate in the consultations, we conducted stakeholder analysis based on the attributes and areas currently covered by the Act, plus additional stakeholders mentioned in the Terms of Reference. This stakeholder analysis included people with protected attributes, as well as organisations and entities who have obligations under the Act.

We also focused on groups who are underrepresented in the Commission's complaints data. This ensured that people who do not currently access the available protections were given a voice, and the Review heard about issues that may be limiting the effectiveness of the Act.

We invited key stakeholders to participate in the consultation process and share their views, experiences, and suggestions for change. To enhance transparency and inclusivity of this process, we allowed organisations to request a meeting with the Review team at any stage of the Review.

Our process resulted in rich and diverse conversations that allowed us to undertake a holistic re-consideration of how discrimination and sexual harassment are experienced. From this, our approach turned to considering how to reorientate the system towards a more proactive, flexible approach. Our analysis of themes and issues that emerged from consultations was distilled into the key topics and questions set out in the Discussion Paper which was released in November 2021.

Between January and May 2022, we conducted a second round of consultations. This phase focused on hearing from legal and policy experts, government departments and agencies, interstate human rights agencies, statutory bodies, and tribunals about options for reform. This phase also tested reactions to potential recommendations, identified possible unintended consequences of reform, and what constitutes best practice.

Public engagement

The Review held four public consultations in regional Queensland during November and December 2021 – in Rockhampton, Townsville, Yarrabah, and Cairns. Over 170 people attended the events which were open to registration by members of the public and organisations. Additional scheduled consultations in South-East Queensland were cancelled due to the impacts of the COVID-19 pandemic.

The purpose of these public consultations was to hear from people living in regional areas about the local issues that affect them, to identify community perceptions about barriers to equality, and to explore what changes are needed to improve Queensland's discrimination law. Attendees were asked to reflect on what needs to change to achieve equality for everyone in their community.

During these discussions, we identified that the law must be practical and easy to understand if it is to be effective in protecting people from discrimination. We also sensed an awareness of discrimination and its impact on the community.

Roundtables

The Review conducted a series of six roundtables in February and March 2022, with over 100 people participating.

In deciding on roundtable topics, we considered the extent to which the discussion could elicit expertise that would assist the Review to rigorously test possible recommendations, including to identify any unintended consequences, or provide an opportunity to hear from a group of stakeholders who face barriers to participating in the Review by the other means provided.

We held roundtables with the following groups:

- people with disability
- children and young people – aged under 18, and aged 18 to 25
- small business and industry
- legal practitioners who provide advice and representation to both complainants and respondents
- Queensland Government departments.

We drew on the knowledge and expertise of our Reference Group members and other organisations to design the format and presentation of roundtables, as well as to co-design community surveys focused on a selection of questions from the Discussion Paper for target audiences.

Submissions

There were three ways to make submissions to the Review – completing a guided online survey, responding to the Discussion Paper, or making a submission about issues within the Terms of Reference.

The submissions process was open from early August 2021 and the Discussion Paper was published on 30 November 2021. All submissions closed on 1 March 2022. This allowed seven months to make a submission, and three months to respond to the specific questions raised in the Discussion Paper.

Submissions could be completed using the online form, sending an electronic or written submission, or by sharing audio or video content, images, or artworks.

Discussion paper

On 30 November 2021, we published a Discussion Paper outlining priority topics and including 56 questions about options for reform.

In response, the Review received 130 submissions. Of those, 117 submissions were published on the Commission website. Thirteen were classified as confidential submissions and not made public.

The Review also received an additional 29 general submissions, which did not respond to the Discussion Paper but raised issues relevant to the Terms of Reference.

A list of submissions received by the Review is at Appendix B.

Online survey

The Review wanted to hear from people who have experienced discrimination and sexual harassment, especially from people who don't usually report their experiences, to understand the impact on them and their communities. We wanted to get a sense of how much discrimination occurs in Queensland that may not be captured by the current law.

We also wanted to hear from people who had direct experience of the complaint process, including people who were respondents to complaints, to consider whether the approach to making a complaint should change.

To receive input on these issues, we developed a guided submissions 'Have Your Say' form to survey people about their personal experiences. The form was available as an online survey or could be downloaded and completed at the user's convenience.

We allowed submissions to be made confidentially, and also allowed an option of anonymity. This meant that it was not compulsory to provide identifying information.

We asked people about:

- their experiences of discrimination and sexual harassment
- what impact the experience had
- whether they told anyone about what happened, and if so who they told
- whether they had ever made a formal report or complaint, and if so to whom
- what makes it difficult to bring a complaint
- how the complaint process could be improved
- their suggestions and ideas for change.

A different set of questions was supplied to people who told us they had been respondents to complaints of discrimination.

The Review received 1,109 responses to the Have Your Say survey. Of these, 1,084 were from individuals and 25 were from organisations.

Demographic questions were not mandatory and survey participants could choose to answer all, some, or none of the questions. Of the survey participants who responded to these questions, people from diverse backgrounds were well-represented. Responses to the online survey included:

- 40 people who identified as Aboriginal
- 10 people who identified as Torres Strait Islander
- 86 people who identified as being from a culturally or linguistically diverse background
- 62 people who identified as having a disability
- 78 people who identified as LGBTIQ+
- 21 people who identified as sex workers.

We discuss the key topics identified through submissions in Chapter 2.

Research and analysis

Research

The Review undertook extensive research of academic literature and analysis of Australian and international laws on discrimination and, where relevant, considered international human rights instruments and case law.

We conducted a comparative analysis of federal, state, and territory discrimination and equality laws, and considered other reviews of state and federal discrimination laws. The protections, processes, and enforcement mechanisms available in other discrimination laws were examined, and this allowed us to identify and consider Australian and international best practice.

Key sources that could tell us about the nature and prevalence of discrimination and sexual harassment and its social, psychological, and economic impacts were investigated. We describe the findings of this research in chapter 2.

Our analysis

Drawing on information gathered through consultations, submissions, and research, we have developed a rigorous and evidence-based process for arriving at our recommendations.

During the process of formulating recommendations, we have also considered key themes emphasised in the Terms of Reference and the guiding principles adopted by the Review.

The reforms recommended in this report have been shaped by the many contributions received by the Review, including from people who have experienced discrimination and sexual harassment.

Arriving at the final recommendations has been a process in which many different information sources have been balanced to achieve the best policy outcomes.



Chapter 2:

The context for reform

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The context for this review

Historical context

Introduction of the Anti-Discrimination Act

On 3 December 1991 the *Anti-Discrimination Act 1991* (Qld) passed through its final reading in the Queensland Parliament. On receiving assent, it gave Queensland specific, state-based anti-discrimination legislation for the first time.

While anti-discrimination legislation in Australia dates back to the mid-1960s,¹ Queensland was one of the last states to pass discrimination law. In the second reading speech, the then Attorney-General, the Hon Dean Wells MP, said that principles of dignity and equality for everyone were the foundations of the Act.²

To give a sense of the priority issues of the day, the Act had the most comprehensive sexual harassment protections reflecting the strong movement for women's rights, the definition of impairment extended to discrimination on the grounds of HIV status, and Queensland was the first state to prohibit discrimination on the grounds of breastfeeding. The second reading speech says:

No longer will Queensland women be forced to leave restaurants or the lobbies of movie theatres to breastfeed their children.³

The year the Act was introduced marked significant social change. In the same year, the Royal Commission into Aboriginal Deaths in Custody delivered its final report,⁴ and the High Court delivered its ground-breaking decision in *Mabo v Queensland* the following year.⁵

In introducing the Act, the Queensland Government stated that the Act aimed to promote equality of opportunity for everyone. The primary way the law was to be enforced was through prohibiting discrimination, sexual harassment, and other objectionable conduct on the grounds of protected attributes, and allowing people to make complaints. Initially, the Act established a two-tiered dispute resolution system where complaints were received by the then Anti-Discrimination Commission, and if they could not resolve, could be heard by the Anti-Discrimination Tribunal.

The second reading speech provides insights into the social norms and practices at the time the Anti-Discrimination Act was passed into law, and it is helpful to reflect on how those social attitudes have developed in the 30 years.

In introducing the Bill, the Queensland government considered that the passing of discrimination law at a state level provided legal protection against the most obvious sources of discrimination and signalled a new, normative standard of acceptable behaviour in Queensland.⁶

Legislative amendments

While there have been some amendments since introduction of the Act, there has not been substantial legislative reform.

1 *Prohibition of Discrimination Act 1966* (SA)

2 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 3193 (DM Wells, Attorney-General).

3 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 3194 (DM Wells, Attorney-General).

4 The Royal Commission into Aboriginal Deaths in Custody was appointed by the Australian Government in October 1987 to study and report on underlying social, cultural, and legal issues behind the high numbers of deaths in custody.

5 *Mabo v Queensland (No 2)* (1992) 175 CLR 1; [1992] HCA 23.

6 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 3194 (DM Wells, Attorney-General).

Amendments to address age discrimination were made in 1994 which had the effect of abolishing compulsory age retirement, except with respect to certain professions such as judges and police officers.⁷ In 2001, new provisions relating to racial and religious vilification commenced.⁸

In 2003, the most substantial amendments were made to the Act since its introduction. These amendments were to:

- introduce three new attributes (sexuality, gender identity, and family responsibilities) which acknowledged the changing nature of social and family relationships in contemporary society, and recognised de facto couples
- extend the attribute of breastfeeding so that discrimination on this basis was unlawful in all areas covered by the Act
- replace the attribute of 'marital status' with 'relationship status', and amend the definition of de facto partner to include same-sex couples
- narrow the meaning of lawful sexual activity to mean only a person's status as a lawfully employed sex worker
- extend the attribute of 'religion' to 'religious belief or activity' and narrow a general religious exception so that it no longer applied to education or work, but allow religious bodies to discriminate in certain circumstances in employment except on the basis of age, race or impairment.⁹
- create prescriptive requirements for notification and conferencing complaints within specified timeframes, which were aimed at 'expediting' the existing processes.¹⁰

These amendments made changes to the attributes protected by the Act and addressed discrete procedural matters, but maintained the original complaints system and functions and powers of the Commission. This Review therefore marks the first opportunity in 30 years to undertake a holistic reconsideration of Queensland's discrimination law.

Recent developments

In 2009 the work of the independent Anti-Discrimination Tribunal was taken over by the newly-created Queensland Civil and Administrative Tribunal, which was the result of the amalgamation of 23 separate tribunals and bodies.

In 2013 the jurisdiction was split between the Queensland Industrial Relations Commission – for all work-related matters – and the Queensland Civil and Administrative Tribunal – for all other matters under the Act.

In 2019, the *Human Rights Act 2019* (Qld) commenced, and the Anti-Discrimination Commission Queensland was renamed the Queensland Human Rights Commission (the Commission). From 1 January 2020, the Commission commenced managing human rights complaints in addition to its existing complaint handling functions under the Anti-Discrimination Act.

In 2022, the Queensland Parliament's Legal Affairs and Safety Committee delivered a report recommending updates to the law in relation to serious vilification and hate crimes.¹¹ The

7 Explanatory Notes, Anti-Discrimination Amendment Bill 1994 (Qld) 1.

8 *Anti-Discrimination Amendment Act 2001* (Qld).

9 *Discrimination Law Amendment Act 2002* (Qld).

10 Explanatory Notes, Discrimination Law Amendment Bill 2002 (Qld) 17.

11 Legal Affairs and Safety Committee, Queensland Parliament, *Inquiry into serious vilification and hate crimes* (Report No. 22, January 2022).

Queensland Government has published its response, which noted that some recommendations will be considered after the delivery of this report.¹²

While there is some overlap between the issues considered by the Legal Affairs and Safety Committee and those addressed by this Review with respect to the protected attributes and their definitions, the Terms of Reference for this Review specifically direct us not to consider the Act's vilification provisions.¹³

Related inquiries and reviews

Reviews of discrimination laws

Most Australian states and territories have conducted reviews of their discrimination laws since they were introduced.

New South Wales

The NSW Law Reform Commission reviewed the *Anti-Discrimination Act 1977* (NSW) over an eight-year period, and delivered its final report in 1999.¹⁴

The review was required to consider all aspects of the legislation, including enforcement issues and whether additional mechanisms were required to address systemic discrimination. In delivering its final report, the Law Reform Commission commented that the review had provided an opportunity to rewrite the Act to overcome some of its weaknesses and to ensure that it remains an important tool in protecting individual rights.¹⁵ However, not all of the Law Reform Commission's recommendations have been implemented.

Victoria

Julian Gardner was appointed by the Victorian Attorney-General to undertake an 8-month review of Victoria's *Equal Opportunity Act 1995* (Vic) in 2007.¹⁶ The Gardner report was delivered in June 2008.

The terms of reference included considering ways to ensure that discrimination is eliminated to the greatest extent possible; whether enforcement provisions should be strengthened; and whether the functions, powers and structure of the Victorian Commission remained appropriate. Gardner was also required to consider ways to improve the process of dispute resolution, and recommended additional attributes be introduced.

A separate review was later conducted by the Scrutiny of Acts and Regulations Committee to consider the exceptions and exemptions in the Equal Opportunity Act,¹⁷ which had not formed part of the terms of reference of the Gardner review.

12 Queensland Government, Response to Legal Affairs and Safety Committee Inquiry into serious vilification and hate crimes Report No 22 (2022) 2, Recommendation 4.

13 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 4; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A.

14 New South Wales Law Reform Commission, *Report 92: Review of the Anti-Discrimination Act 1977* (NSW) (November 1999).

15 John Basten QC, 'Commission launches report on the review of NSW Anti-Discrimination Laws' (Media Release, New South Wales Law Reform Commission, 17 December 1999).

16 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008).

17 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act 1995* (Final report, 2009).

Northern Territory

In 2017, the Northern Territory Department of Attorney-General and Justice commenced a review of the *Anti-Discrimination Act 1992* (NT). A discussion paper that outlined proposed reforms was published in 2017.¹⁸

In February 2022, the Northern Territory Government tabled a paper 'Achieving Equality in the Northern Territory',¹⁹ that commits to amending the Act this year, including to introduce a positive duty to eradicate discrimination and promote equal opportunity.

Western Australia

The Law Reform Commission of Western Australia commenced a review of the *Equal Opportunity Act 1984* (WA) in February 2019 and a discussion paper was published in August 2021.

The terms of reference are similar to this Review, and include considering the objects of the Act, functions and powers of the Western Australian Commission, whether a positive duty should be introduced, and any reforms needed to the attributes and exemptions. The final report has not yet been tabled in Parliament.

Australian Capital Territory

The ACT Law Reform Advisory Council, then chaired by Professor Simon Rice, conducted a review of the *Discrimination Act 1991* (ACT) over a period of three years, and produced a final report in 2015.²⁰

The report was in response to broad terms of reference and recommended a range of reforms, including the introduction of a positive duty to eliminate discrimination, additional attributes, and changes to exceptions. Some of the reforms were implemented soon after completion of the report²¹ and a second tranche of reforms is included in a recently-released exposure draft Bill.²²

South Australia

The South Australian Law Reform Institute conducted a review of the *Equal Opportunity Act 1984* (SA) over four years and delivered its final report in 2015.²³

This review was more limited in scope and confined to discrimination on the grounds of sexual orientation, gender, gender identity, and intersex status. The South Australian Act was subsequently amended to update the attributes.²⁴

Federal inquiries

As well as reform of state and territory discrimination laws, a number of federal inquiries have scrutinised Australia's discrimination laws.

Review of the Disability Discrimination Act

The Australian Government's Productivity Commission examined the social impacts of the *Disability Discrimination Act 1992* (Cth) on people with disability and the community. The terms

18 Department of the Attorney-General and Justice (NT), 'Modernisation of the Anti-Discrimination Act' (Discussion Paper, September 2017).
19 Northern Territory Government, *Achieving Equality in the Northern Territory* (February 2022).
20 ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015).
21 *Justice Legislation Amendment Act 2020* (ACT).
22 Exposure Draft, *Discrimination Amendment Bill 2022* (ACT).
23 South Australian Law Reform Institute, 'Lawful Discrimination': *The effect of exceptions under the Equal Opportunity Act 1984 (SA) on Lesbian, Gay, Bisexual, Trans, Intersex and Queer (LGBTIQ) South Australians* (Report, June 2016).
24 *Statutes Amendment (Gender Identity and Equity) Act 2016* (SA).

of reference included to assess the costs and benefits of the Disability Discrimination Act and consider whether it is effective in achieving its objectives, which include eliminating discrimination on the grounds of disability as far as possible.

The final report was published in 2004.²⁵

Consolidation of Acts

In 2011, the federal Attorney-General's Department released a discussion paper to investigate whether the five Commonwealth anti-discrimination laws should be consolidated into a single Act.²⁶ In undertaking the review, the Attorney-General's Department considered opportunities to improve the effectiveness of the Commonwealth legislation to address discrimination.

Following the consultation process, exposure draft legislation to consolidate the anti-discrimination acts was published and stakeholder views were obtained; however, the process did not result in a Bill.

Religious freedoms review

In 2017 an Expert Panel was appointed by the Prime Minister to examine whether Australian law adequately protects the human right to freedom of religion. The review was conducted in the context of Parliamentary debate about marriage equality and a nation-wide postal survey, which resulted in legislation that gave same-sex couples the right to marry.

The Expert Panel provided its report in 2018 and recommended that the Commonwealth should amend the *Racial Discrimination Act 1975* (Cth) or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief, and to consider appropriate exceptions and exemptions.²⁷

Between August 2019 and January 2020, the Australian Government invited submissions on two exposure drafts.²⁸ However, the Religious Discrimination Bill 2022 has not been passed.

Respect@Work

The Australian Human Rights Commission conducted an inquiry into sexual harassment in the workplace, which included reviewing the current federal legal framework with respect to sexual harassment.

The Respect@Work report was delivered in 2020, and made a series of recommendations, including to introduce a positive duty on employers to take reasonable and proportionate measures to eliminate sexual harassment and related forms of discrimination as far as possible.

The Terms of Reference for this Review require us to consider the implementation of relevant recommendations from the Respect@Work report, and we discuss this in chapters 4 and 6.

Respect@Work led to some legislative amendments to the federal Sex Discrimination Act and Fair Work Act,²⁹ and further changes are being considered by the federal Attorney-General's Department.³⁰

25 Productivity Commission (Cth), *Review of the Disability Discrimination Act 1992* (Inquiry Report No. 30, 30 April 2004).

26 Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011).

27 Expert Panel into Religious Freedom, *Religious Freedom Review* (Report, 18 May 2018) Recommendation 15.

28 Attorney-General's Department (Cth), *Religious Discrimination Bills – First Exposure Drafts* (Web Page); Attorney-General's Department (Cth), *Religious Discrimination Bills – Second Exposure Drafts* (Web Page).

29 *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth).

30 Attorney-General's Department (Cth), *Respect@Work – Options to progress further legislative recommendations* (Consultation Paper, February 2022).

Free and equal

In 2021 the Australian Human Rights Commission published a position paper, *Free and Equal*, that sets out a proposed reform agenda for federal discrimination laws.³¹ One of the key findings of the position paper is that the existing system of federal discrimination law is primarily geared towards the remedial aspects of legal obligations and falls short of realising effective remediation for discrimination.

It also found gaps in the protection provided by discrimination laws, as well as significant questions about how accessible the system is – particularly for marginalised or disadvantaged groups.

Nature, cause and impact

While undertaking a detailed academic inquiry into the body of empirical evidence that establishes the nature, cause, and impact of discrimination and sexual harassment was beyond the scope of this legislative review, information we received through submissions, consultations, and our online survey provided insights into personal experiences.

This section summarises those personal experiences and reflections, and refers to some of the key studies on these topics we identified through research.

How is discrimination experienced?

During the Review, we asked people about their experiences of discrimination and sexual harassment through our online survey,³² public consultations, and roundtables. We also learnt about direct experiences through consultations with organisations and case study examples included in written submissions.

It was clear that discrimination and sexual harassment are experienced differently by everyone, and that everyone's story is unique. However, we identified some consistent themes about how discrimination and sexual harassment are experienced.

We were told that that discrimination and sexual harassment can:

- feel like someone is trying to push you down or hold you back because of who you are, or that some doors are closed to you
- be related to and reinforce other experiences you have had, including negative experiences in your childhood
- limit your choices about where you work, how you are educated, and what services you access, in order to avoid discrimination or unfair treatment
- create feelings of shame and fear you carry with you throughout your whole life
- create a barrier to moving forward in your life, including when trying to move on from challenges caused by the initial discrimination
- have ripple effects that have an impact on your family members, workplaces, and communities.

Some groups report disproportionately high rates of discrimination that are often experienced through repeated experiences over time, rather than singular, one-off incidents.

³¹ Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021).

³² We received 1,109 responses to the Have Your Say survey. Of those, 952 survey responses included responses about the impact of COVID-19 (including vaccination mandates, mask wearing, and border restrictions) and a further 157 included experiences of discrimination on the basis of a range of attributes and sexual harassment.

This experience was exemplified by a First Nations woman who told the Review:

*Discrimination happens every day, whether it is at the place you work, or places you visit... sometimes it is discrete, sometimes not.*³³

We also found that people who experience ongoing or perpetual discrimination may live with greater levels of social and economic disadvantage and can experience discrimination because of more than one protected attribute, which has a cumulative impact.

Discrimination on combined grounds

Discrimination on combined grounds refers to the experience of discrimination because of multiple and intersecting grounds, for example based on combinations of gender, race, disability, or sexuality. This is a specific type of discrimination often referred to as intersectional discrimination, which recognises that discrimination such as racism and sexism may combine, overlap, or intersect.³⁴

One of the most frequently reported issues to the Review was that people who experience discrimination because of combined grounds are not adequately recognised or protected by the Act.

The Review was told that people who experience discrimination because of a cumulative effect of having more than one protected attribute are at greater risk of experiencing discrimination, but also find it harder to bring and prove a claim.

We heard that the current law:

- does not sufficiently recognise or protect people from this form of discrimination
- is structured on attributes that are conceptualised as being separate and distinct, which does not equate with the way discrimination is experienced
- does not recognise that discrimination based on multiple intersecting attributes can have a compounding and amplified impact.

Combined grounds discrimination has been recognised as one of the cultural and systemic drivers of discrimination and sexual harassment.³⁵

Karyn Walsh of Micah Projects, a large not-for-profit organisation that supports people experiencing adversity due to poverty, homelessness, mental illness, domestic violence, and discrimination, told the Review:

*So, you know, people do feel discriminated against, but they don't really know why. Which part of me is being discriminated, for example, by the fact I've got a mental illness, or I'm Indigenous, or I'm gay, or I'm not allowed a voice. It's that combination of things. And you have to get so specific and legal, that it's a very big deterrent. One of the issues we're grappling with is intersectionality, and how you do justice to someone who has been discriminated against.*³⁶

33 Name withheld (Form.542) survey response.

34 Merriam-Webster Dictionary (Online at 23 November 2021) 'intersectionality'.

35 Beth Goldblatt 'Intersectionality in International Anti-discrimination Law: Addressing Poverty in its Complexity' (2015) 21(1) *Australian Journal of Human Rights* 47.

36 Micah Projects (Karyn Walsh) consultation, 12 August 2021.



Jennifer's* story

Jennifer used the online survey to tell us about her experiences of discrimination in Queensland.

'As a person from a mixed-race background, I have experienced **discrimination based on my perceived racial difference**. I am also a female, so I have experienced harassment in a male-dominated world.

I have learned to build a thick skin and not bite back when I feel racially discriminated. However, it makes me feel very sad and frustrated that my perceived racial difference due to the colour of my skin and shape of my eyes means I get treated differently. And then it's just **very frustrating** as a female that I can't be an "equal" in the world and/or where I'll be treated like a piece of meat just because of my gender.

Jennifer told us that the discrimination and sexual harassment was ongoing, and not a one-off incident. She said that:

'It's so prevalent and happens almost daily, so **there's just no one to complain to**. In a business/education situation, you may have support from an institution support/leader, but realistically, when it happens outside of this (e.g. day-to-day life), there's no one to go to who can do anything about it.'

When describing her ideas for change, Jennifer told us that she felt addressing these issues would take more than legal change. She reflected that:

'It's a **bigger issue of societal change**. You need the government to make changes to pay inequality. You need the legislation to be changed to allow victims see their perpetrators punished. You need education institutions to teach equality, empathy and common decency.'

** Not their real name*



This disconnect between current legislation and the reality of experience for many people was repeatedly raised. In another example, Debbie Kilroy of Sisters Inside, said:

*We don't live in silos. So we've got to stop pretending that we're all living in silos and have one identity when we know the reality of life...*³⁷

Multicultural Australia provided a similar story. They told us about a prospective tenant who is Aboriginal and a sole parent. The person applied for a rental property but were refused the lease, and said that it was impossible to tell if the refusal was due to their Aboriginality, parental status, or family responsibilities, or a combination of these attributes.³⁸

This experience was also described by a person who participated in a survey by Respect Inc and DecrimQLD, and who said that:

It seemed pointless coz it's constant; also it's often due to multiple factors and many reporting methods fail to account for this and want it to be blamed on one specific thing when it's often hard to say - the worst discrimination I've faced is presumably on account of being a sex worker who uses drugs and is autistic and a woman and 'acting odd'.

People who experience discrimination on combined grounds may also be more likely to experience systemic discrimination, which happens repeatedly over time. In chapter 4 we consider the ways in which the Act should change to better protect people who experience discrimination based on combined grounds.

Systemic discrimination

Discrimination that is deeper, wider, and more structurally embedded than direct, individual experiences is another form of discrimination referred to us as systemic discrimination.

Systemic discrimination has been described as policies, practices or patterns of behaviour that are part of the structures of an organisation, and which create or perpetuate disadvantage for people with an attribute or attributes.³⁹

Other terms used to describe systemic discrimination include 'structural discrimination', 'institutional discrimination',⁴⁰ and 'institutional racism'. Systemic discrimination is closely associated with indirect discrimination, a type of discrimination that is currently prohibited by the Act. However, the Review has identified instances of systemic discrimination that would extend beyond the definition of indirect discrimination.

Drawing on common features often referred to in connection with systemic discrimination,⁴¹ we consider that systemic discrimination can include:

- legal rules, policies, practices, attitudes, or structures entrenched in organisations or broader community
- which are often seemingly neutral
- but create, perpetuate, or reinforce a pattern of relative disadvantage for some groups; and
- can be the result of multiple barriers across multiple systems.

³⁷ Sisters Inside (Debbie Kilroy) consultation, 9 February 2022.

³⁸ Multicultural Australia submission, 3.

³⁹ Ontario Human Rights Commission, 'Racism and racial discrimination: systemic discrimination (fact sheet)' (Web Page).

⁴⁰ Council of Europe, *Identifying and Preventing Systemic Discrimination at the Local Level* (Policy Study, October 2020).

⁴¹ For example: Council of Europe, *Identifying and Preventing Systemic Discrimination at the Local Level* (Policy Study, October 2020); Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 38.

In their submission, Professor Henrietta Marrie, Gimuy Walubara Yidinji Senior Elder, and Adrian Marrie suggest that the Anti-Discrimination Act should expressly prohibit institutional racism, which they define as:

... the ways in which racist beliefs, attitudes or values have arisen within, or are built into the governance, operations and/or policies of an institution in such a way that discriminates against, controls or oppresses, directly or indirectly, a certain group of people to limit their rights, causing and/or contributing to inherited disadvantage.⁴²

This definition recognises the relationship between systemic discrimination and social disadvantage, which we discuss below. It also reflects elements of the causes of discrimination such as beliefs, attitudes and values, and focuses on how these social views have influenced institutions over time.

This topic was the focus of a submission by the Australasian College of Emergency Medicine, which identified that institutional racism can lead to unequal health outcomes for First Nations people. They told us that it is essential to move beyond the current approach in which receiving protection of the Act relies on individual complaints, to one that identifies, acknowledges, and can respond to the structures, policies, and protocols that allow systemic discrimination to occur.⁴³

We were told that because systemic discrimination is difficult to identify, report, and prove, and that attempting to address this form of discrimination through individual complaints is inherently limited, different approaches are required.

Formal and substantive equality

The concept of systemic discrimination is connected to the concepts of formal and substantive equality.

Formal equality refers to the concept that all people should be treated the same. This encourages neutrality and asserts that people should be judged on the basis of merit and not their characteristics.⁴⁴ While formal equality is simple to understand and apply, it does not actively address the causes of inequality and can perpetuate structural disadvantages.

Substantive equality focuses on outcomes⁴⁵ instead of only ensuring that people have an equality of opportunity.⁴⁶ Rather than considering whether or not two people are treated in the same way, substantive equality requires correcting or equalising a person's position to move towards equal outcomes. Eliminating systemic discrimination as far as possible can be viewed as a way to work towards substantive equality, and practical ways to achieve this might include making reasonable accommodations to meet a person's needs, or by taking affirmative measures. We discuss these topics when considering the objectives of the Act in chapter 3 and in key concepts of the Act in chapter 4.

42 Prof Henrietta Marrie and Adrian Marrie submission, 1.

43 Australasian College for Emergency Medicine submission, 3.

44 Dominique Allen, 'An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, 461–462.

45 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 266, referring to S Fredman, 'Equality as a Proactive Duty' (2012) 60 *American Journal of Comparative Law* 12.

46 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 22.

What are some of the causes?

During the Review, we identified some common circumstances and conditions that contribute to discrimination.

We have kept these in mind to evaluate whether or not the law is effectively addressing the underlying causes of the problem it is seeking to prevent.

Three commonly reported causes of discrimination are:

- conscious and unconscious bias
- stigma, myths, and attitudes
- social and economic disadvantage.

Conscious and unconscious bias

Bias is a conscious or unconscious prejudice or partiality that affects a person's capacity to decide an issue on its merits alone,⁴⁷ and can result in unfair decisions or actions.

The Act has brought about an increased recognition that overt discrimination, identified through conscious bias, is unacceptable and unlawful. Overt discrimination often occurs because of conscious bias. This form of bias can be conscious if a person articulates an attitude, value, or belief, even if they don't think that view is discriminatory. For example, a statement such as 'Indian taxi drivers are really bad drivers' is an example of conscious bias.

In addition to conscious biases, a substantial amount of discrimination occurs because of unconscious bias. Unconscious bias includes the attitudes, values, and beliefs that people hold that they are not consciously aware of. They are beyond a person's conscious control and inform our unconscious attitudes.

This topic is linked to research conducted in the disciplines of social and cognitive psychology that has identified cognitive distortions or errors that influence our automatic judgment and decision-making.

Conscious and unconscious bias can lead to decision-making, conduct, and actions that are based on discriminatory attitudes. For example, recruitment decisions may be informed by conscious or unconscious biases about the capabilities of people with disability. In their submission to the Review, the Fibromyalgia ME/CFS Gold Coast Support Group Inc told us that unconscious bias can cause discrimination, but also makes it hard to prove.

Many [people with disability] face enormous difficulties in proving of 'unconscious bias.' For example, both employers and landlords unconsciously assume that [people with disability] are incapable and use other, more subtle tactics to deny [people with disability] equitable access and opportunities. Such unconscious bias results in both direct and indirect discrimination...⁴⁸

We consider whether the Act should change to better address the inherent challenges in proving discrimination that occurs because of unconscious bias in chapter 5.

47 See for example: *CCH Macquarie Dictionary of Law* (rev ed 1996) 'bias'; and *Macquarie Dictionary* online 25 July 2022) 'bias' (def 2).

48 Fibromyalgia ME/CFS Gold Coast Support Group Inc submission, 14. This submission augmented the author's feedback provided during the people with disability roundtable, 4 February 2022.

Stigma, myths, and negative attitudes

The Review was also told about the relationship between discrimination and stigma, myths, and negative attitudes about people and communities with protected attributes. This can include unfair negative associations, misunderstandings, and ignorance about people's experiences, or implicit negative associations.

Stigma, myths, and negative attitudes can lead to inaccurate or untrue assumptions about people and their communities. We heard that these assumptions are closely connected with experiences of discrimination and unconscious bias, because they can lead to judgments and actions that are unfair or misguided.

In their submission to the Review, the Australian Psychological Society said that despite increasing awareness about, and decreasing social acceptance of, discrimination, it is still pervasive and can be difficult to identify. They also noted growing empirical evidence that highlights the importance of subtle or 'ambiguous' forms of discrimination in predicting mental wellbeing.⁴⁹ A large meta-analysis found that covert discrimination was at least as damaging as overt discrimination in a range of psychological, physical, and work-related domains.⁵⁰

Outcomes of stigma

The Review was told about the cyclical and interconnected nature of experiences of discrimination and the impact of stigma, myths, and negative attitudes, which can mean people may:

- not realise they are experiencing discrimination or its impacts
- be less inclined to seek help
- be less likely to report their experiences.

The Women's Legal Service told us that their clients' experiences of domestic and sexual violence can cause mental health issues that in turn may become the reason for discrimination, rather than recognition of that they are a victim/survivor of family violence.⁵¹

Providing an example of these interconnected issues, they said that:

Gender based violence can also result in a chequered rental history, because the victim-survivor might need to leave premises suddenly and break tenancies; damage to property may be caused by the other party but the victim-survivor is often unable to pay for repairs, and the financial hardship that results from having to relocate with only one income – especially if it is a single parent benefit.⁵²

The complex relationship between stigma, discrimination, and poor mental health outcomes was also considered by the Queensland Council for LGBTIQ Health, who told us that a major contributor to the poor mental health of their communities is the ongoing impact of stigma and discrimination, and that this affects social and emotional wellbeing.⁵³ Some people may not self-identify as part of the LGBTIQ+ community due to social stigma and fear of discrimination.⁵⁴

49 Australian Psychological Society submission, 2.

50 Kristen P Jones et al, 'Not So Subtle: A Meta-Analytic Investigation of the Correlates of Subtle and Overt Discrimination' (2016) 42(6) *Journal of Management* 1588–1613.

51 Women's Legal Service submission, 30.

52 Women's Legal Service submission, 30.

53 Rainbow Families Queensland submission, 8 – citing Francisco Perales, 'The health and wellbeing of Australian lesbian, gay and bisexual people: a systematic assessment using a longitudinal national sample' (2019) 43(3) *Australian and New Zealand Journal of Public Health* 281–287; Queensland Council for LGBTI Health submission, 8; Intersex Human Rights Australia submission, 3.

54 Rainbow Families Queensland submission, 1.

We heard that for people with a lived experience of problematic alcohol and other drug use, experiences of stigma and discrimination create barriers to seeking help, which in turn compound social disadvantage and lead to social isolation, poor mental, and physical health outcomes.⁵⁵

The Review was told about the positive link between social inclusion and the promotion of acceptance, which can improve a person's wellbeing as well as their willingness and capacity to participate in society.⁵⁶

Relationship between stigma and unlawful discrimination

One stakeholder observed that at some point in our lives, most of us will experience some form of stigma, and provided perspectives about the circumstances that should apply in order for this type of stigma or unfair treatment to amount to unlawful conduct, and therefore be prohibited by the Act.⁵⁷ We have identified that more discrimination is occurring than is currently unlawful, and will discuss the threshold test that should apply before recommending additional attributes be protected by the Act in chapter 7.

In chapter 4, we consider whether the legal tests for discrimination are capturing the conduct they are designed to address. In chapters 7 and 8, we have considered whether new attributes should be protected by the Act, and whether the coverage of the Act – defined by areas in which the law operates and exceptions that may apply – remains appropriate and contemporary.

The role of the law in unlawful discrimination which results from stigma, myths, and negative attitudes was raised by the Joint Churches submission. They shared their view that while legal and regulatory measures can generate external and formal compliance, they are unable to address the underlying causes of prejudice and discrimination.⁵⁸

Other stakeholders felt the Act had an important symbolic role of recognising and addressing the varied forms of discrimination that people continue to experience.

During the Review, we heard about a range of complex social issues that demonstrate the interconnection between anti-discrimination laws and broader social policy, and that cannot be addressed solely through this Review.

While the law has a role in setting social norms, making changes to the law alone is not sufficient. Adequate awareness-raising, education, and resourcing are required to ensure that changes to the law make an impact. We discuss these in chapter 9.

Social and economic disadvantage

Another factor that contributes to the complex, multi-factorial relationship between unconscious bias, stigma, and negative attitudes, is the link between discrimination and disadvantage.

The way people discussed and described this link suggested that a two-way causal relationship exists between discrimination and disadvantage – that is, that discrimination can be a factor that contributes to disadvantage, and that disadvantage exposes a person to higher risk of experiencing discrimination.

This was reflected in a submission by the Queensland Council of Social Service, the peak body for the social service sector in Queensland, who commented that its members work with people

55 Queensland Mental Health Commission submission, Queensland Network of Alcohol and Other Drugs Agencies Ltd submission, 3 citing Queensland Mental Health Commission, *Changing attitudes, changing lives: options to reduce stigma and discrimination for people experiencing alcohol and other drug use* (2018).

56 PeakCare Queensland Inc, 3; Queensland Alliance for Mental Health, 5.

57 Queensland Council for Civil Liberties submission, 1.

58 Joint Churches submission, 2, 5.

experiencing significant disadvantage and marginalisation and can see how this disadvantage makes people more susceptible to discrimination.⁵⁹

Social and economic disadvantage, which may involve indicators of poverty, including housing and food insecurity, can be compounded for people whose identity is made up of multiple attributes, rather than a single attribute protected by the Act.⁶⁰ This can mean that people who experience disadvantage and discrimination are more likely to interact with child protection, youth detention, adult prisons, involuntary mental health treatment programs, and are less likely to complete formal education and obtain stable and meaningful employment.

This aligns with the findings of previous reviews of discrimination laws in Victorian and the Australian Capital Territory,⁶¹ and with research that shows how organisations, institutions, policies, and practices can create or perpetuate disadvantage.

As a result of reviews in Victoria and the Australian Capital Territory, addressing the link between discrimination and disadvantage is now incorporated into the objectives of those discrimination laws.⁶²

Recognising the link between disadvantage and discrimination is a first step to determining the mechanisms that are required to eliminate discrimination to the greatest extent possible.

What are some of the impacts?

During the Review, we asked people who reported experiencing discrimination and sexual harassment to tell us about the impact it had on their lives. This question was included in our online survey⁶³ and was explored in our public consultations.

We also learned about the impacts of discrimination through consultations, roundtables, and submissions that responded to the discussion paper.

One of the key messages was that the impacts of discrimination and sexual harassment can be profound and devastating at both an individual and societal level. Discrimination and sexual harassment often have negative impacts on a person's mental health and wellbeing. Experiencing discrimination and harassment can lead to social exclusion which is associated with feeling unsafe, being unable to access services, low self-esteem and confidence, poor physical health indicators, and few social supports.

Material provided to the Review about the impact of discrimination had three main themes:

- deteriorated psychological health and wellbeing
- social exclusion and isolation
- adverse economic impacts.

59 Queensland Council of Social Service submission, 5. This submission was based on a consultation with the Queensland Council of Social Services on 12 October 2021, in which over 200 people from across the service sector participated.

60 See for example: Australian Discrimination Law Experts Group submission, 25; Micah Projects (Karyn Walsh) consultation, 8 August 2021.

61 See for example: Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008), 20–36; ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015) 33–34.

62 We discuss these provisions in chapter 3.

63 We received 1,109 responses to the Have Your Say survey. Although 952 of responses included responses about the impact of COVID-19 (including vaccination mandates, mask wearing, and border restrictions) 157 included experiences of discrimination and sexual harassment.

Psychological health and wellbeing

One of the most frequently reported impacts of discrimination and sexual harassment was the impact on a person's mental health and wellbeing, which ranged from temporary changes to mental health and wellbeing, to long-term trauma.

Experiences of discrimination can affect a person's identity, including through internalised self-stigma and the way a person views themselves and their community. It can also influence the way that a person perceives others, both within and outside their community.

The following mental health outcomes were frequently mentioned in responses to the Have Your Say survey:⁶⁴

- reduced self-esteem and self-worth
- helplessness and disappointment
- loss of confidence
- depression
- anxiety and panic attacks
- suicidal ideation
- post-traumatic stress disorder
- hypervigilance.

We found that while discrimination and sexual harassment can lead to mental health conditions, for people who experience discrimination because of psychosocial disability or neurodiversity, a cyclical relationship between mental health and discrimination can have a reinforcing effect, as discrimination can be both the cause and the consequence of mental illness.

The Australian Psychological Society, the leading organisation for psychologists in Australia, pointed to the empirical evidence of psychological harm associated with discrimination, and stated:

It is well established in the scientific literature that discrimination is damaging both physically and psychologically. However, it is important to acknowledge that research investigating discrimination is likely to have underestimated its effects as they are typically cross-sectional, and relational in nature.⁶⁵

This Australian Psychological Society also explained that evidence from cognitive neuroscientific research shows that discrimination has neural sequelae which are akin to chronic social stress which impacts upon critical brain structures including the pre-frontal cortex.⁶⁶

In short, the Society emphasises the evidence that cumulative exposure to discrimination is particularly challenging and damaging to mental health and wellbeing.⁶⁷ This is consistent with what submissions and consultations revealed about the cumulative impact of discrimination because of combined attributes.

64 For this analysis, we excluded responses that focused on experiences of discrimination related to the COVID-19 pandemic from the sample.

65 Australian Psychological Society submission, 1–2.

66 Maximus Berger and Zoltán Samyai, "More than skin deep": stress neurobiology and mental health consequences of racial discrimination' (2015) 18(1) *Stress* 1–10.

67 Angeline S Ferdinand, Yin Paradies, and Margaret Kelaher, 'Mental health impacts of racial discrimination in Australian culturally and linguistically diverse communities: a cross-sectional survey' (2015) 15 (1) *BMC Public Health* 401; Stephanie Wallace, James Nazroo, and Laia Bécáres, 'Cumulative Effect of Racial Discrimination on the Mental Health of Ethnic Minorities in the United Kingdom' (2016) 106(7) *American Journal of Public Health* 1294–1300; Carrington CJ Shepherd et al, 'The impact of racial discrimination on the health of Australian Indigenous children aged 5–10 years: analysis of national longitudinal data' (2017) 16(1) *International Journal for Equity in Health* 116.

We also heard about experiences where stigma had been so internalised that discrimination may be normalised and therefore hard to identify by those who experience it. Material published by the Queensland Mental Health Commission stated that First Nations Elders felt that the experience of racism since birth complicates the ability of people to understand which aspects of their lives are impacted by this discrimination, and being discriminated against becomes linked to an individual or community's racial or cultural identity at an intrinsic level.⁶⁸

Social exclusion

Another impact of discrimination includes the breakdown of social bonds, leading to social isolation or exclusion. Participants in our online survey provided the following responses:

- 'Find it hard to trust others.'
- 'I have struggled to trust those in a position of power - I am unwilling to take initiative - I prefer to be invisible in the workplace.'
- 'Unable to participate with my friends and family.'
- 'Greatly discourages me from going out into public socially, which severely limits my life experiences.'
- 'Feeling of alienation and unable to trust others.'
- 'Not being able to trust people, causing anxiety in workplaces where men are my line managers or customers. Tend to stay isolated.'

One of the most common spaces where discrimination takes place is within services provided by public entities, and this can be particularly destructive because the person may have little choice about whether to access the service. This can have an impact on the way that people and their communities view government services, which in turn can erode trust and reliance on essential services. For example, it can influence whether people access healthcare, which can then lead to a decline in living standards and life expectancy. This ripple effect of stigma and discrimination highlights the challenges of a complaint system that relies on individual complaints to resolve wider systemic discrimination.

The Australian Psychological Society observed that discrimination in 'public' settings, such as shops or in government services, is associated with high psychological distress.⁶⁹ This was reflected in information shared with us by participants in our online survey, and what we heard from organisations that provide services to people who interact with government agencies.

Financial and economic impacts

Discrimination and sexual harassment can have adverse financial impacts on individuals and their communities, including reduced economic security, loss of employment, and loss of opportunities for professional advancement.

In describing the impacts of discrimination on their lives, people frequently reported negative financial impacts. A sample of responses include:

- 'Affected work – capacity to continue in paid employment, leaving a job, finding it hard to find another job, and challenges in retaining employment.'
- 'Affected my ability to work at high level as I was used to. Affected people's attitude toward me and possibilities of employment.'

68 ACIL Allen Consulting & The Seedling Group, *"Don't judge, and listen": experiences of stigma and discrimination related to problematic alcohol and other drug use* (Queensland Mental Health Commission, 2020).

69 Australian Psychological Society submission, 1–2.

- ‘It is causing me a great deal of stress and I worry about my financial future and not being able to provide for my child.’
- ‘I have lost my income and my livelihood which will impact my financial situation, including the ability to support my family and pay my mortgage.’
- ‘I have missed opportunities in my career to progress further whereby I have lost opportunities to candidates who are more evidently less meritorious than me as even corroborated by some of my ex-colleagues.’

Some studies have considered the broader economic costs of discrimination and sexual harassment to organisations, business, and the economy. During the Respect@Work inquiry, Deloitte Access Economics was engaged to estimate the economic costs of sexual harassment in the workplace, and found that in 2018, workplace sexual harassment cost \$2.6 billion in lost productivity and \$0.9 billion in other financial costs. Each case of harassment represents around 4 working days of lost output. Deloitte also found that employers bore 70% of the financial costs, government 23% and individuals 7%. Lost wellbeing for victims was an additional \$250m, or nearly \$5,000 per victim on average.⁷⁰

What we heard about sexual harassment

Respect@Work reported that sexual harassment in the workplace is prevalent and increasing,⁷¹ with 33% of people having experienced harassment in the last 5 years. It also found that women and young workers are at the greatest risk.

Despite the prevalence of sexual harassment, compared with discrimination and human rights complaints, the Commission receives comparatively few complaints.⁷²

The Review heard that sexual harassment is occurring in a variety of settings, including:

- within the Muslim community women were experiencing harassment, which was encouraged by existing power structures, and was sometimes happening behind people’s backs as gossip and rumors from which they were unable to defend themselves⁷³
- sexual harassment can be a real issue in the real estate industry, particularly because the leadership roles are male dominated with agencies often staffed with mostly younger, female employees.⁷⁴

Young people aged 16 – 24 who participated in our roundtables told us that sexual harassment was a serious problem for their age group. Young people indicated that sexual harassment was most likely to happen at school and in the workplace.

Children and young people also told us that in some culturally and linguistically diverse communities, sexual harassment is a taboo subject, and they felt that education across communities and in schools would open up conversations and topics that have never been explored by some young people.

⁷⁰ Deloitte Access Economics, ‘The economic costs of sexual harassment in the workplace’ (Final report, March 2019).

⁷¹ Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) 98. The rates of sexual harassment reported by survey respondents has increased significantly from 21% in 2012, but this may be the effect of increased community awareness.

⁷² Queensland Human Rights Commission, *Annual Snapshot 2020-21*. Of the 457 complaints accepted over the relevant period, 52 included allegations of sexual harassment.

⁷³ Islamic Women’s Association in Australia consultation, 16 September 2021.

⁷⁴ Real Estate Institute of Queensland consultation, 31 August 2018.

They suggested that sexual harassment could be reduced by:

- focusing on workplace culture to help change the mentality
- providing young people with more information about sexual harassment and what to do if it happens
- taking it more seriously, including by providing more education about sexual harassment at school
- strengthening the law to allow agencies such as the Commission to proactively eliminate sexual harassment from the workplace for young people.⁷⁵

Consistent with the findings of Respect@Work, we heard that the impact of harassment was compounded for those who experience intersectional disadvantage, and at the same time the law was harder to access.⁷⁶ In speaking with a women's group we were told that:

Harassment complaints are hard to make, sometimes you have to make them while you are being employed, which is problematic and deeply scary. So having to take steps, it is too much, and it's much easier and safer to walk away... There are groups, who are the most vulnerable groups experiencing sexual harassment, the ones that the Act should focus on, are the ones that are the less equipped to do something about it⁷⁷

An older woman from a culturally and linguistically diverse background told us through the Have your Say survey:

I have experienced discrimination at work, sexual harassment from colleagues, and unfair treatment when I refused unwanted advances. I have experienced this many times at different companies and social situations.

It has made me hesitant to step forward and has hindered career progression and my confidence... I have told friends who advised me not to take on a powerful older man as I would come out of it worse.⁷⁸

Another survey participant who identifies as LGBTIQ+ and is a sex worker told us that:

As a teenager and young adult I believed that even as the victim, that the unacceptable/non consensual behaviour was 'normal' and that I would be blamed for being sexually harassed and abused. I believe the lack of education and support makes it hard to make a complaint, as well as certain workplace cultures where you will be intimidated or threatened for making a complaint.⁷⁹

⁷⁵ Young peoples' roundtable, 17 February 2022.

⁷⁶ Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020), 171–172.

⁷⁷ YWCA consultation, 26 August 2021.

⁷⁸ Name withheld (Form.442) survey response.

⁷⁹ Name withheld (Form.042) survey response.

Key issues we identified

During the Review, we asked stakeholders if the Anti-Discrimination Act is effective in eliminating discrimination in Queensland, or whether the legislation needs to change.⁸⁰

This section introduces the key issues and problems we identified, which informed our focus during the Review. We expand on issues presented in this overview in later sections of this report.

Limitations of a reactive system

A system relying on individual enforcement

The primary way the Act's purpose is achieved is through resolving individual complaints made about conduct that has already occurred.

Stakeholders told us that given the multiple and compounding barriers people face to making a complaint, this is a major limitation and has limited the effectiveness of the Act to protect people from discrimination.

While conciliation agreements and tribunal decisions may result in policy change to improve overall systems and processes, the capacity of individual complaints to address systemic discrimination is limited.

We were told that the weight and responsibility should be shared with people and organisations who are better resourced, including the Commission and those who hold duties under the Act, rather than resting largely with individuals who have experienced discrimination and sexual harassment.⁸¹ This would shift the burden from individuals, who often face a range of barriers to reporting discrimination or sexual harassment, including fear of speaking up.

This issue relates to some of the fundamental questions in our Terms of Reference, including whether a more positive approach to eliminating discrimination to the greatest extent possible, and whether a positive duty to take steps to eliminate discrimination and sexual harassment is required. We address these issues in chapter 6.

Focus on prevention

Under the current reactive system, discrimination must have already occurred before it can be addressed. The clearest and most consistent theme that emerged in our initial consultations, research, and submissions was that while complaints play an important role in achieving outcomes for individuals, the current system lacks a preventative focus.

Given the barriers to accessing the complaints process, many stakeholders supported a positive or proactive approach in which the objective is to reduce the potential for discrimination.⁸² This was seen as an opportunity to prevent discrimination and sexual harassment occurring in the first place.⁸³

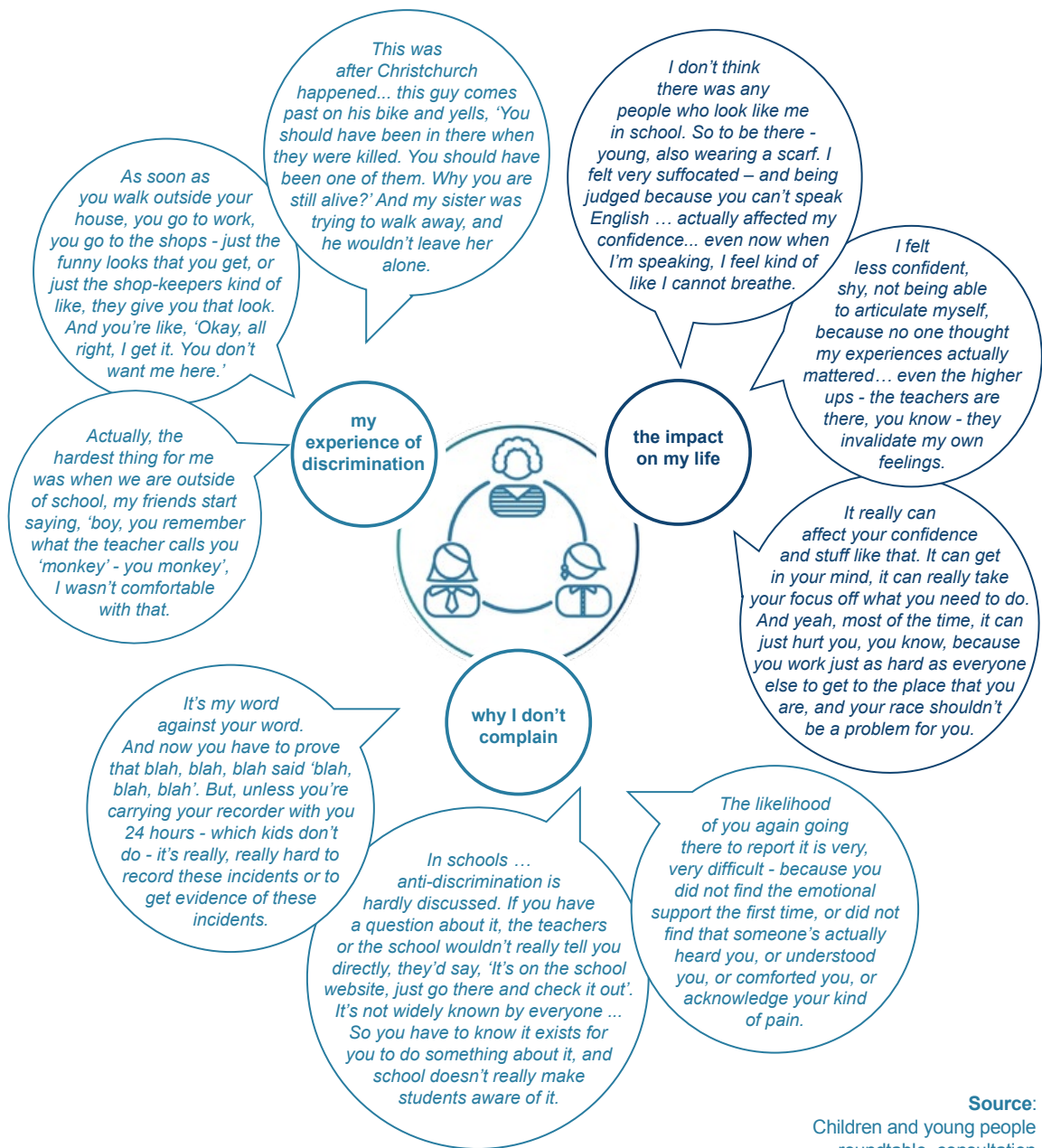
80 The Terms of Reference ask us to consider whether there is a need for any reform to enhance and update the *Anti-Discrimination Act 1991* (Qld) to best protect and promote equality and non-discrimination and the realisation of human rights.

81 Office of the Special Commissioner, Equity and Diversity (Qld) submission; Maurice Blackburn Lawyers submission; Queensland Nurses and Midwives submission; Australian Discrimination Law Experts Group submission; Equality Australia submission.

82 See for example: Public Advocate (Qld) submission; Australian Discrimination Law Experts Group submission; Equality Australia submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Vision Australia submission; Tenants Queensland submission; Queensland Council of Unions submission; Caxton Legal Centre submission.

83 See for example: Queensland Law Society submission; Queensland Nurses and Midwives Union submission.

What children and young people told us about discrimination



Source:

Children and young people
roundtable, consultation
for the Review of the
Anti-Discrimination Act,
17 February 2022

As well as helping to prevent individual cases of discrimination and sexual harassment, stakeholders also told us that focusing on prevention presented an opportunity to address systemic discrimination by informing and influencing the culture in organisations and creating safer environments that actively encourage diversity and seek to prevent mistreatment.

Achieving systemic outcomes

We heard that the Act may not be having a real impact on the daily lives of people the legislation seeks to protect, because it has limited capacity to create meaningful systemic change.

We were told that a complaints-based system, while important, is not sufficient to address systemic discrimination because it is difficult to prove when the experience of only one person is the focus of the discussion.

For many people who make a complaint, the focus of conciliation may be on resolution of their individual matter, rather than remedies that produce broader change for more people. However, the Commission regularly hears from complainants and people who call our enquiry line that the reason they want an issue addressed is to avoid the situation occurring again for another person.

Outcomes agreed through the conciliation process do not result in findings of unlawful treatment and are often subject to confidentiality and non-disclosure agreements. For those matters that do proceed to a tribunal, few result in a final hearing and a published decision, and this limits the capacity of the law to improve public awareness and understanding, and to encourage practices to address systemic discrimination. Whether awards of damages have a deterrent effect, or a broader impact on systemic discrimination, is difficult to measure.

The limitations of the complaints process were identified by former Anti-Discrimination Commissioner Kevin Cocks, who said that:

... where there's a successful complaint that's conciliated, [it] actually has quite systemic implications. But there's no public good. There's no avenue or means for public good to come out of their complaints to change laws, change regulations.⁸⁴

In evaluating the effectiveness of discrimination laws, researchers have repeatedly identified that the current approach is not meeting its aims because it is not focused on prevention or addressing systemic issues.⁸⁵ Associate Professor Belinda Smith, whose expertise is in the area of anti-discrimination law, comments that:

The imposition of a negative rule alone creates a fault-based system whereby an organisation is not required to do anything unless fault can be identified and attributed to it... The negative, tort-like rule enables redress but does not require preventative or positive measures to be taken.⁸⁶

Barriers to reporting

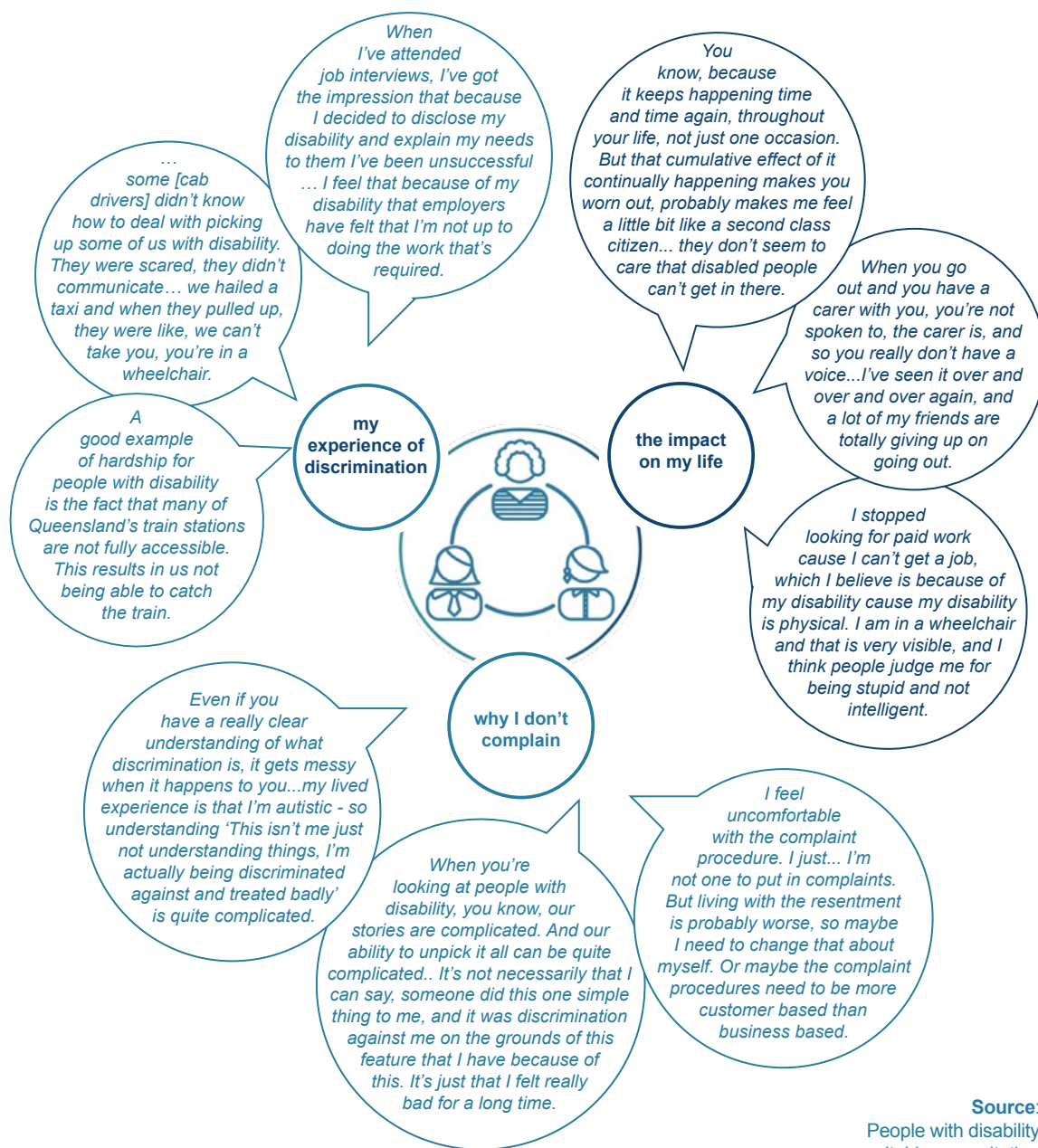
The Review frequently heard that people do not report incidents of discrimination or sexual harassment because of multiple overlapping barriers to making a complaint.

⁸⁴ Kevin Cocks consultation, 28 February 2022.

⁸⁵ See for example: Dominique Allen, 'Strategic enforcement of anti-discrimination law: A new role for Australia's equality commissions' (2011) *Monash University Law Review* 1–26; Dominique Allen, 'Barking and Biting: The equal opportunity commission as an enforcement agency' (2016) *Federal Law Review* 311–335; Therese MacDermott, 'The collective dimension of federal anti-discrimination proceedings in Australia: Shifting the burden from individual litigants' (2018) *International Journal of Discrimination and the Law* 22–39.

⁸⁶ Belinda Smith, 'It's About Time – For a New Regulatory Approach to Equality' (2008) 36 *Federal Law Review* 118.

What people with disability told us about discrimination



Source:

People with disability
roundtable, consultation
for the Review of the
Anti-Discrimination Act,
4 February 2022

We discuss the frequently reported barriers below.

Lack of awareness

People who are marginalised often experience discrimination or unfair treatment on a daily basis. Some people may not realise they are experiencing discrimination or sexual harassment because the behaviour has been normalised and/or it happens so regularly that it is not seen as unfair.⁸⁷

This theme was identified by a participant in our roundtable for people with disability, who told the Review:

I think it's hard to tell when things are all mixed in. But even if you have a really clear understanding of what discrimination is, it gets messy when it happens to you. But most of us don't have such a clear understanding. And so my lived experience is that I'm clearly autistic. And so understanding interpersonal stuff, and understanding 'this isn't me just not understanding things, I'm actually being discriminated against and treated badly'...it's quite complicated.⁸⁸

A lack of awareness about discrimination was linked to experiences of stigma where a person may have normalised attitudes that others hold about them. We heard about the effects of long-term stigma in our consultation with the Queensland Network of Alcohol and other Drug Agencies, who told us that:

...when you lived an experience like that of ongoing stigma and discrimination throughout your life, it never occurs to you that you should at some point, about some one thing that you've experienced, that you could have the option to make a complaint...⁸⁹

Other people may recognise that the treatment is unfair but may not be aware that the law protects them. There are many laws and regulations that affect aspects of life and it is difficult for people to be aware of all of them, including discrimination laws. One organisation that provides legal services to First Nations women told the Review:

...it's also like a knowledge-based issue where if people don't know that they're being discriminated against at the time, then they're not going to raise it or know what to do about it...⁹⁰

We also heard from a young person who is engaged with the Queensland Program of Assistance for Survivors of Torture and Trauma:

...until today I didn't even know what discrimination was... So schools, and places that have like teenagers, and kids, they should know about these type of things and it should be like a speech at schools, you know,

87 See for example: Queensland Indigenous Family Violence Legal Service consultation, 25 August 2021; Queensland Program of Assistance for Survivors of Torture and Trauma consultation, 23 August 2021; Queensland Network of Alcohol and Other Drug Agencies Ltd consultation, 1 September 2021; Young peoples' roundtable, 17 February 2022.

88 People with disability roundtable, 4 February 2022.

89 Queensland Network of Alcohol and other Drug Agencies (Rebecca Lang) consultation, 31 August 2021.

90 Queensland Indigenous Family Violence Legal Service consultation, 25 August 2021.

*about what anti-discrimination was. Just because I came to Australia in 2018 and still, I don't know anything about discrimination.*⁹¹

Cultural or social factors

There may also be cultural or social factors that mean a person is less likely to complain about discrimination or sexual harassment.

We heard that for many people who have experienced persecution in their countries of origin, it is very hard to trust government organisations like the Commission, and that often people don't have the means or resources to make a report. One community leader told the Review:

*There are psychological barriers for anything to do with government or being trouble, especially [for people] coming from South African apartheid, for example. It's hard to trust departments and officials. It takes a long time before you get to a level beyond all the government advice. So... some people coming from that don't complain because of the distrust of government.*⁹²

The existence of an extra layer of fear was emphasised in our consultation with Amparo Advocacy, who told us that most of the people they work with from a refugee background have experienced significant trauma and oppression by their own government, and many fear they will be punished or there will be other repercussions, including that they will lose relationships that have already been difficult to build, such as with government services or employers.⁹³

Even the word 'complaint' can carry negative connotations. One person from a culturally and linguistically diverse background said that:

*When you say the word 'complain' to people... the word complaint is very big for them... Where I come from complaining is a big thing, because that's how we grew up.*⁹⁴

These points were emphasised in our consultation with Queensland Program of Assistance for Survivors of Torture and Trauma. They told us that young people face further barriers to making a complaint because their age creates an additional vulnerability factor:

The first thing is they don't know where they're going to get support from, like you mentioned, they know, probably they are aware that you can complain, but the word complain is very big for them. Yeah, number one, they are afraid that if they complain, they've got to get, if they're young persons, their parent will say, 'It's you. Why you're complaining?' Second thing is, they are afraid that they're going to lose the job. The third thing would be, they're afraid that they will not get a good reference for the next job. That's right. So these are ongoing.

91 Queensland Program of Assistance for Survivors of Torture and Trauma consultation, 23 August 2021.

92 Islamic Council of Queensland (Habib Jamal) consultation, 20 August 2021.

93 AMPARO Advocacy Inc consultation, 8 September 2021.

94 Queensland Program of Assistance to Survivors of Torture and Trauma (Suan Muan Thang) consultation, 23 August 2021.

I think it's culture embedded for many of us. And if somebody's got courage to stand up and complain then the process is very long.⁹⁵

We heard that to obtain the trust of the community, it was important that the Commission actively seeks to partner with trusted members of the community. Some people talked about the impacts of the initial discrimination, stigma, and cultural factors working together to deter people to make a complaint.⁹⁶

Fear and power imbalance

Structural power differentials

We heard that the presence of power differentials – which may have contributed to the discrimination and sexual harassment occurring in the first place – also operate to prevent people from reporting discrimination.

When we asked about what makes it hard for people who have experienced discrimination, sexual harassment, and/or other unfair treatment, to make a complaint, a woman from a culturally and linguistically diverse background responded:

Power/level, age and gender imbalances. [It's] career limiting to speak up. No guarantee of resolution, humiliating to bring up and likely would still need to be in contact with the offender due to the nature of the work.⁹⁷

We also heard about power differences that cause significant and often insurmountable barriers for people who are subject to statutory interventions to make complaints, including people subject to involuntary treatment orders for psychosocial disability, parents whose children are in out-of-home care, and people who are subject to a guardianship order.

People subject to involuntary treatment orders under the *Mental Health Act 2016* (Qld) are unlikely to engage in the complaints process because of power differentials inherent in the involuntary nature of the orders. A person working in the mental health system told us that vulnerability of people detained or subject to involuntary treatment means that they are very unlikely to make a complaint, even if they experience discrimination on an ongoing basis.⁹⁸

Similar issues are experienced by people detained in prisons, who face additional statutory and practical barriers to making a complaint. We consider these issues in chapters 5 and 8.

Sisters Inside told us that the female prison population in Queensland are more vulnerable to discrimination and breaches of their human rights than the general population, and that this vulnerability is exacerbated because of the control exercised over an incarcerated person's life, both while a woman is incarcerated and after she is released.⁹⁹

People with disability who live in institutions or who require daily support are also deterred from raising concerns or reporting discrimination because of inherent power differentials. People reported being scared of coming forward to report their experiences because they were concerned that they may lose essential services, or damage relationships with services providers that they depend upon.

95 Queensland Program of Assistance to Survivors of Torture and Trauma consultation, 23 August 2021.

96 Bangladeshi Community consultation, 15 August 2021.

97 Name withheld (form. 60) survey response.

98 Confidential consultation, 5 August 2021.

99 Sisters Inside (Debbie Kilroy) consultation, 9 February 2022.

One person with disability told us:

*People with disabilities, they are so scared of making any form of complaint. Because they're afraid they are going to lose the services... And they're just really afraid in general.*¹⁰⁰

Fear of repercussions or reprisals

Structural power differentials are closely related to fear that making a complaint will have negative repercussions, such as shame and further stigma, loss of employment, or other services.

Results of our online survey found that only 6% of survey participants had complained to either the Queensland or Australian Human Rights Commission about their experience of discrimination or sexual harassment, and a further 15% of people had reported to other bodies such as an employer, police, or their union. Of the 79% who had not reported their experiences, the most common reason was that they were 'worried about negative consequences'.

Those who have the courage to speak out are often ignored, or worse still, find themselves in a situation where complaint resolution places them back in harm's way through mediation with the perpetrator. Because the current system of reporting can only respond to a complaint made against an individual, by an individual, if no-one speaks up, the discrimination is able to continue.¹⁰¹

The risk of reprisal was a concern for people in prison. Sisters Inside told the Review that they have directly witnessed women in prison avoid making a complaint about even very serious discrimination or breaches of their human rights for fear of punishment by correction officers and authorities.¹⁰²

Outcomes don't justify involvement

Even after deciding to make a complaint, while most matters are finalised within three months of the complaint being accepted by the Commission, the process can be long and complex.

From making a complaint to arriving at a final outcome can take several months, if resolved at the Commission. Matters that proceed to a tribunal may take around two years to proceed to a published decision from a final hearing. If the decision is appealed, the outcome is likely to take several years.

Across our public consultations and through our online survey, people told us that the length and complexity of the process are deterrents to making a complaint, particularly because there is often little support during the process.¹⁰³

Connected to this issue is that the time and mental or emotional effort to bring a complaint is significant. Particularly for people who are marginalised or disadvantaged, and who may be dealing with legal and other challenges in several areas of their lives, it is hard to justify going through a complaint process about discrimination.

¹⁰⁰ People with disability roundtable, 4 February 2022.

¹⁰¹ Australasian College for Emergency Medicine submission, 3.

¹⁰² Sisters Inside Inc submission, 5.

¹⁰³ See for example: Public consultation, Cairns, 3 December 2022; Public consultation, Townsville, 25 November 2022; Queensland Program of Assistance for Survivors of Torture and Trauma consultation, 23 August 2021.

The Queensland African Community Council told us:

And I think the complaint processes and all of that sometimes frustrates most people, and some would just give up along the way, it's too much. And at the end maybe, the outcome may be negative, what's the point in again wasting my time doing this when you know that it's not going to go anywhere, maybe they had previous negative experiences and all of that and they will say no to going to be the same thing again.¹⁰⁴

In our consultation with Open Doors Youth Service, an organisation that supports LGBTIQAP+ youth and their families, we heard a similar story for their clients:

... I think one of the challenges for us is that most of our young people are pretty under resourced so to go through a complaints process is not necessarily something that they're willing or able to engage in. We always let young people know that we can follow this up, but usually young people just need the thing to stop and need to be figuring out their next steps. Typically, we see quite high levels of homelessness and housing insecurities and then complex school issues ...and as that comes together, there's a lot of anger and rage, and those young people are not in a space to follow up complaints, they say 'I wish I could' but then they're like 'No'.¹⁰⁵

One person who spoke to us from the Bangladeshi community who had experienced sexual harassment and discrimination talked about the impacts this had on her, and the challenges in reporting what happened. She said that:

Nobody wants to stand up, do you know, because standing up takes a lot of courage, a lot of pressure. It's a financial pressure, it's a mental pressure... if there is no bread and butter on my table, who's gonna provide me that?¹⁰⁶

Because the outcomes often didn't justify the involvement, and because many people cannot navigate a long and difficult process, we were told that the Act should include more proactive ways the Commission could take action on systemic issues. We discuss this in chapter 6.

Fixing problems with the law

Legal tests are too complex

During the Review, we observed that there can be a disconnection between the experiences of discrimination described to us and the protections afforded by the Act.

In fact, there was often such a gap between people's lived experience of discrimination and what is captured by the law that we were told that key tests and thresholds need to change to ensure they were more effective at addressing discrimination.

The current test for direct discrimination requires identification of a hypothetical comparator in the same or similar circumstances to meet the legal test, and this creates technical challenges when applied to a real life situation. We were told these issues need to be resolved to ensure that the Act is fit for purpose.

104 Queensland African Community Council (Benny Bol) consultation, 8 September 2021.

105 Open Doors consultation, 13 September 2021.

106 Bangladeshi Community consultation, 13 October 2021.

A number of lawyers who specialise in discrimination law felt that the complexity of the legal tests has meant that the law can be almost impossible to understand and apply, especially for people without legal representation. In a consultation with Townsville Community Law, we were told:

*You know, the best lawyers I know struggle to understand that test themselves.*¹⁰⁷

Proving discrimination is difficult

Many stakeholders who provide legal, advocacy, or social supports to people who experience discrimination or sexual harassment referred to challenges for complainants to prove discrimination to the requisite standard.

People who experience disadvantage and marginalisation find proving discrimination especially difficult.¹⁰⁸ The current provisions, in effect, require the complainant to prove matters about the respondent's 'state of mind' at the time of the alleged discrimination, which is difficult, especially when the conduct may be caused by unconscious bias.¹⁰⁹

This may mean the individual respondent may not have recognised or clearly articulated the reason for the treatment,¹¹⁰ or may not even be aware that they hold a view that is discriminatory.

Other challenges in proving discrimination were outlined by stakeholders who felt that in many cases, it was just 'my word against theirs', and yet the person who experienced the discrimination was often in a structurally disempowered position or felt that they could easily be discredited.¹¹¹ One young person told us:

*... that evidence-based thing is so hard, because it's my word against your word. And now you have to prove that blah, blah, blah said 'blah, blah, blah'. But, unless you're carrying your recorder with you 24 hours - which kids don't do, and students aren't supposed to be turning their phones on in school - it's really, really hard to record these incidents or to get evidence of these incidents, you know. And it's - like the questions are: 'Actually, did they mean this?'; 'Did they say this?'; 'Were they possibly saying things like that?'*¹¹²

The law is hard to understand and apply

In our engagement with people and organisations required to comply with the Act, we were often told that the current law is too complex and fragmented between the federal and state systems, which means it is hard to understand and apply. This is particularly the case for under-resourced small business owners, who already feel the weight of compliance obligations for industrial and work health and safety laws, while running their business.

107 Townsville Community Law (Bill Mitchell) consultation, 17 August 2021.

108 See for example: Public Advocate (Qld) submission, 3; Queensland Nurses and Midwives Union submission, 13; Jenny King submission, 2.

109 Equality Australia submission, 30.

110 Queensland Advocacy Incorporated submission, 19. See also: Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579.

111 See for example: Young peoples' roundtable, 17 February 2022; Queensland Collective for Inclusive Education consultation, 19 August 2021.

112 Young peoples' roundtable, 17 February 2022.

We were told that most duty holders want to ‘do the right thing’ and actively support the elimination of discrimination, but that they don’t always know what they are required to do or not do.¹¹³

The Chamber of Commerce and Industry told us that regulatory compliance is a key element in business risk management but may impose a burden, especially on smaller businesses.¹¹⁴ One member of the Chamber of Commerce and Industry commented that they would like to see a simplified compliance framework, with provision for employers to dispute a vexatious or contrived claim. Another member suggested that small businesses needed to be given appropriate support to deal with issues.¹¹⁵

This complexity is exacerbated by overlapping laws and regulations that concurrently apply in certain settings, such as workplaces, shops and restaurants, and yet are different and seen as inconsistent. For example, the Australian Industry Group said:

*... from an employer’s perspective, it’s not complex in what it’s trying to do, but in terms of the specific differences between the different state pieces of legislation and in the federal law, that is something that’s raised continuously as a source of confusion and concern. So we’ve got a whole lot of... businesses who want to implement national standards to prevent discrimination, having to do that in a fairly complicated way. And we think that, you know, it is a barrier...*¹¹⁶

Addressing gaps in protection

Throughout the Review, we were told that some people are experiencing discrimination but are not protected. This was because:

- the way existing attributes are defined means that people who should be protected are not
- the language used to describe an attribute or its definition means that people don’t realise they are protected, even if they are
- new attributes should be added to the list to protect people from discrimination that should be unlawful.

We were told that a number of current exceptions in the Act – which mean discrimination in certain circumstances is not unlawful – no longer achieve the right balance, because of changes over time to how the community operates and because community expectations have evolved.

We also heard that some parts of the Act may be incompatible with the *Human Rights Act 2019* (Qld), and throughout this report we have identified key human rights considerations that apply.

The effect of these aspects in combination create gaps in the protections offered by the current Act, and expose some people to ongoing discrimination that should be unlawful. We consider these issues in chapters 7 and 8.

¹¹³ See for example: Real Estate Institute of Queensland consultation, 31 August 2021; Small business roundtable, 7 March 2022.

¹¹⁴ Chamber of Commerce and Industry submission, 10.

¹¹⁵ Chamber of Commerce and Industry submission, 10.

¹¹⁶ Australian Industry Group consultation, 9 September 2021.

Hope for the future

As well as telling us about the harmful impacts of discrimination, some people also reflected that they still have the strength to hope for a better future. This was echoed through all our consultation processes where people who generously shared their experiences with us did so in the hope that it would help strengthen the law and achieve a more equal Queensland where everyone belongs.

Some people spoke of recovering from their setbacks and identifying how resourceful and resilient they have been. One person told the Review that:

*In a career that has otherwise been very positive for me, this was a setback and made me go on to learn more about the injustices that exist.*¹¹⁷

There was a general acceptance that while change is not always quick to achieve, it is worth working towards. This was one of the reasons that many people responded to our survey or attended a consultation. One person said that:

*You are doing a great job at the Commission. However, change does not come easy or happen overnight.. yet it is something we can work towards to create a more free & equal society in time and future generations.*¹¹⁸

Another person reflected on how they had shown courage and resilience following an experience of discrimination. They said:

*For me it has made me more determined to show I'm able to do whatever I put my mind to, I have become very stubborn and always feel I need to prove my worth.*¹¹⁹

Throughout this report, we have endeavoured make the voices of people who have experienced discrimination and sexual harassment heard.

117 Name withheld (Form.037) survey response.

118 Benjamin Palmer (Form.005) survey response.

119 Name withheld (Form.059) survey response.



Chapter 3:

Laying the foundations

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A new Anti-Discrimination Act

In this report, we present reforms to enhance and update the Anti-Discrimination Act, and to ensure the law is effective in protecting people against discrimination and sexual harassment.

The Review recommends five key reforms:

- **Eliminate discrimination:** Introduce a new Act to protect and promote the right to equality and eliminate discrimination and sexual harassment to the greatest extent possible.
- **Refine the key concepts:** Ensure the legal tests for discrimination and sexual harassment and other key concepts in the Act respond effectively to the problems they are seeking to address and are easy to understand and apply.
- **Shift the focus to prevention:** Promote compliance by shifting the focus to preventing discrimination and sexual harassment before it happens.
- **Improve the complaints system:** Reorientate the dispute resolution process to ensure it is flexible and efficient, and to enhance access to justice.
- **Increase protections:** Ensure all people who require protection under the Act are included, and that coverage of the law extends to all contexts and settings where unfair discrimination occurs, subject to reasonable exceptions.

Introducing new legislation

A new Act is required to allow the intent and purpose of our recommendations to be implemented in full, even though some sections of the current Act remain appropriate for contemporary society.

A new Act that results from a holistic redraft will ensure the law reflects contemporary best practice and is not constrained by the structure and language of an Act first introduced in 1991.

It will ensure the Review's recommendations simplify rather than complicate the law, which may not be the case if the current Act were to be extensively amended.

The introduction of a new Act will also have symbolic significance – it will mark the point in time when we committed to strengthening Queensland's discrimination law and ensuring that legislation is in step with today's society.

The Review's position

The Review considers that:

- As this report makes recommendations that will fundamentally alter the scheme of Queensland's discrimination legislation, it is preferable to draft a new Act rather than amend the current Act.
- Extensive amendments may increase complexity or limit the capacity to fully implement proposed reforms.

Recommendation 1

1.1 The *Anti-Discrimination Act 1991* (Qld) should be replaced with a new Act to come into force by 1 July 2023.

1.2 The Commission should be involved in providing instructions to the Office of the Parliamentary Counsel to prepare a draft Bill.

Objectives of the Act

The Terms of Reference ask us to consider whether there is a need for reform of the preamble and preliminary provisions in the Anti-Discrimination Act, including whether a more positive approach is required to eliminate discrimination and sexual harassment.¹

We were also asked to consider a wide range of reforms to the Anti-Discrimination Act, including whether a positive duty to take reasonable and proportionate steps to eliminate discrimination and sexual harassment should be introduced.

The Review asked stakeholders whether the current law was effective in eliminating unlawful discrimination and sexual harassment, and whether the overarching purpose and objectives of the law need to change.

In the Discussion Paper, we invited submissions on what the overarching purposes of the Anti-Discrimination Act should be. We also asked whether an objects clause should be introduced, and if so, what the objects should be.

Should an objects clause be included?

The current Act contains a preamble and a purpose provision, but not a clause outlining the overall objectives of the Act.

An objects clause is a provision, usually located at the beginning of an Act, that outlines the intended purposes of the legislation and can be used to resolve uncertainty and ambiguity. Objects clauses have been described as a 'modern day variant on the use of a preamble to indicate the intended purpose of legislation'.²

An objects clause provides an explicit starting point to interpret legislation and assists courts and others with interpretation. The *Acts Interpretation Act 1954* (Qld) requires that, in interpreting a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred.³

Interpretative provisions can also help to:

- state the intention of the legislation simply, accurately, and unambiguously
- organise, orient, and explain the legislation
- establish the context, relevance, and meaning of the legislation.⁴

An objects clause would lay the foundation for how the Act seeks to eliminate discrimination.

Benefits of an objects clause

Overall, there was strong support for introducing an objects clause.⁵

The main reason that submissions supported a new objects clause was because it would assist the Commission, tribunals, and courts to interpret the Act.⁶

1 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(b).

2 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 6th ed, 2006) 154.

3 *Acts Interpretation Act 1954* (Qld) s 14A.

4 See Department of the Premier and Cabinet (Qld), *The Queensland Legislation Handbook: Governing Queensland* (2019).

5 See for example: Assoc Prof Dominique Allen submission; Vison Australia submission; Queensland Catholic Education Commission submission; Queensland Law Society submission; Multicultural Queensland Advisory Council submission.

6 See for example: Assoc Prof Dominique Allen submission; Queensland Law Society submission; Queensland Catholic Education Commission submission; Youth Advocacy Centre submission; Multicultural Queensland Advisory Council submission.

Submissions considered that the objects clause sets the tone for the legislation and can outline a purpose, or purposes, that every other provision in the legislation relates back to and supports.⁷ We were also told that an objects clause would be helpful to guide the Commission in carrying out its functions and allocating resources.⁸

Submissions recognised that, if the Review recommends substantial reform of the Act, an objects clause will be important to convey the intention and purpose of the changes.⁹

One submission observed that following a substantial review of discrimination laws in Victoria, the introduction of a new objects clause has reorientated the law towards its new aim of addressing systemic discrimination and promoting substantive equality.¹⁰

In their submission, the Queensland Civil and Administrative Tribunal observed that if the government policy position is that the aim of the Act is to prevent discrimination and to achieve substantive equality, then a clear legislative statement of that intended goal would assist the tribunal from an operational perspective, as it saves hearing and decision time to determine the meaning of the legislation.¹¹

Comparative approaches

Discrimination laws in Western Australia, the Australian Capital Territory, Northern Territory, and Victoria all contain objects clauses.

Those provisions refer to the following concepts:

- eliminating discrimination and sexual harassment to the greatest extent possible¹²
- promoting and protecting human rights¹³
- recognising the causes of discrimination¹⁴
- identifying and eliminating systemic causes of discrimination¹⁵
- progressing the aim of substantive equality¹⁶
- recognising that discrimination can cause social and economic disadvantage.¹⁷

What should the objectives be?

Feedback on draft provisions

In the Discussion Paper, we invited submissions on a set of draft objects provisions. These were developed from our research on equivalent provisions in other jurisdictions and stakeholder consultations about what the overall purpose of the Act should be, and included:

- to eliminate discrimination, sexual harassment, and other objectionable conduct to the greatest extent possible

7 Queensland Law Society submission, 3.

8 Queensland Catholic Education Commission submission, 6.

9 Queensland Law Society submission, 3.

10 Assoc Prof Dominique Allen submission, 3.

11 Queensland Civil and Administrative Tribunal submission, 13.

12 *Equal Opportunity Act 1984* (WA) s 3; *Discrimination Act 1991* (ACT) s 4; *Anti-Discrimination Act 1992* (NT) s 3; *Equal Opportunity Act 2010* (Vic) s 3.

13 *Discrimination Act 1991* (ACT) s 4; *Equal Opportunity Act 2010* (Vic) s 3.

14 *Discrimination Act 1991* (ACT) s 4; *Equal Opportunity Act 2010* (Vic) s 3.

15 *Discrimination Act 1991* (ACT) s 4; *Equal Opportunity Act 2010* (Vic) s 3.

16 *Discrimination Act 1991* (ACT) s 4; *Equal Opportunity Act 2010* (Vic) s 3.

17 *Discrimination Act 1991* (ACT) s 4; *Equal Opportunity Act 2010* (Vic) s 3.

- to further promote and protect the right to equality set out in the Human Rights Act
- to encourage identification and elimination of systemic causes of discrimination
- to recognise the cumulative effect of discrimination based on a combination of attributes
- to promote and facilitate the progressive realisation of equality, as far as reasonably practicable
- to progress the aim of substantive equality.

Of the submissions that addressed the draft objects provisions, most supported or endorsed our draft provisions.¹⁸ Two stakeholders did not support the proposed approach.¹⁹

Some submissions emphasised the need to refer to the meaning and impact of systemic discrimination in the objects provision,²⁰ as well as incorporating a reference to discrimination that is experienced based on combined grounds.²¹

Some stakeholders considered that the provisions should include more detail on how the aim of substantive equality is to be achieved, and that the objects should expressly recognise that it may be necessary to take positive measures, such as reasonable accommodations and affirmative measures, to achieve substantive equality.²²

As discussed in chapter 2, the Review identified a need for greater recognition of the individual and societal harm caused by discrimination, including where discrimination is based on a combination of attributes. One submission suggested that discrimination based on a combination of attributes should be explicitly recognised by the objects provision.²³

Should other concepts be included?

Some submissions recommended that the draft objects should be supplemented with additional concepts, including:

- recognising that discrimination causes disadvantage²⁴ and that equal or same treatment can lead to unequal outcomes²⁵
- ensuring the current equality of opportunity approach is shifted towards a commitment to promoting substantive equality²⁶
- acknowledging historical and ongoing oppression and systemic injustices, and to refer specifically to discrimination against First Nations peoples²⁷
- stating that all forms of behaviour resulting from prejudice and stereotyping undermines the right to equality and damages social cohesion.²⁸

18 These include: Assoc Prof Dominique Allen submission; Vision Australia submission; Multicultural Australia submission; Queensland Nurses and Midwives Union submission; Youth Advocacy Centre Inc submission.

19 Australian Christian Lobby submission, Human Rights Law Alliance submission. Note: these two submissions explicitly stated this position in their submission. A number of other submissions discussed below provided commentary that raised general concerns, but did not specifically provide a position on the draft provisions.

20 See for example: Queensland Council of Social Service submission; Multicultural Queensland Advisory Council submission.

21 Queensland Law Society submission.

22 See for example: Assoc Prof Dominique Allen submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Caxton Legal Centre submission.

23 Queensland Law Society submission, 6-7.

24 As we discuss in Chapter 2, submissions appear to refer to the relationship between discrimination and disadvantage as having a two-way causal direction – that is, that discrimination can be a causal factor in disadvantage, and that disadvantage can mean a person is at higher risk of experiencing discrimination.

25 Assoc Prof Dominique Allen submission, 3; Australian Discrimination Law Experts Group submission, 11; Queensland Council of Unions submission, 15.

26 Queensland Nurses and Midwives Union submission, 7.

27 Caxton Legal Centre submission, 17.

28 Australian Discrimination Law Experts Group submission, 39.

Concept of religious freedom

Submissions on behalf of religious institutions and faith-based schools that did not support the draft objects recommended that the objects should implement the recommendations of the Ruddock Review and:

- include a clause that requires the Act to be interpreted in line with the *International Covenant on Civil and Political Rights*
- include a statement reflecting the equal status of all human rights
- refer expressly to freedom of religion, expression, assembly and association; the rights of parents to educate their children in accordance with their own religious and moral conditions, the rights of minorities to enjoy their own culture, and to profess and practice their own religion as a community.²⁹

Two submissions considered that the draft objects placed the right to equality and non-discrimination above other human rights, and that this would undermine their equal status.³⁰

The Review's position

The Review considers that:

- The new Act should contain an objects clause that states the purpose of the legislation and assists in its interpretation.
- Referring to substantive equality in the objects clause will encompass the additional concepts put forward in submissions, which may also be considered for inclusion in an updated preamble.
- A reference to religious freedom in the objects clause is not justified. This may lead to an interpretation that requires elevating one of the rights protected by the Human Rights Act above others. The Anti-Discrimination Act currently protects people from discrimination that occurs because of religious belief or activity and the whole Act must be interpreted consistently with the Human Rights Act.³¹
- The objects clause should recognise that serious harm can be caused by discrimination and sexual harassment and acknowledge the unique form of discrimination experienced by people because of combined grounds.

Other interpretive provisions

As well as objects and purpose clauses, legislation may contain other provisions that assist with interpretation of the Act.

Beneficial interpretation

It is a well-established principle of statutory interpretation that as anti-discrimination legislation is beneficial in character, any ambiguity in interpretation should be resolved in a way that is most favourable to the people the legislation is intended to benefit.³² This was settled in the case of *AB v WA*, when the High Court affirmed a rule of statutory construction that remedial and

29 Joint Churches submission; Australian Christian Higher Education Alliance submission; Human Rights Law Alliance submission; Qld Catholic Education Commission submission; Christian Schools Australia submission; Australian Christian Lobby submission; Australian Association of Christian Schools submission.

30 Christian Schools Australia submission; Human Rights Law Alliance submission.

31 *Human Rights Act 2019* (Qld) s 48.

32 *IW v City of Perth* (1997) 191 CLR 1, 11 (Brennan CJ and McHugh J), 27 (Toohey), [1997] HCA 30; *Waters v Public Transport Corporation* (1991) 173 CLR 349, 394 (Dawson and Toohey JJ) and 407 (McHugh J).

beneficial legislation should be given a ‘fair, large and liberal’ interpretation, but not one that is unreasonable or unnatural.³³

Two submissions suggested an express provision requiring the Act to be interpreted in a way that is beneficial to a person who has a protected attribute.³⁴

The Discrimination Act in the Australian Capital Territory has incorporated this principle into legislation, and states that the Act must be interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so consistently with the objects of the Act and the *Human Rights Act 2004* (ACT).³⁵

In interpreting this provision, the recent tribunal decision in *Phillips v Australian Capital Territory*³⁶ confirmed that the section obliges anyone interpreting the Discrimination Act to do so in a way that is beneficial to a person with a protected attribute, consistent with the objects of the Discrimination Act and the ACT Human Rights Act.³⁷

The Australian Discrimination Law Experts Group supported the introduction of a similar provision, but said that it should refer to human rights under international human rights law, rather than domestic legislation.³⁸

Other interpretive provisions

The Act currently includes provisions that assist with interpretation.³⁹

For example, the Act states that one of the purposes of the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education, and accommodation;⁴⁰ and that this purpose is to be achieved by prohibiting discrimination, and providing for enforcement through a complaints process.⁴¹

These provisions will need to be updated to reflect the new objects, which change the emphasis from equality of opportunity to promoting and facilitating the progressive realisation of substantive equality, as far as reasonably practicable.

The preamble

The Anti-Discrimination Act currently contains a preamble outlining Parliament’s reasons for enacting the legislation in 1991, and supporting the Commonwealth’s ratification of international human rights instruments, which it lists. However, that list of human rights instruments is now out of date.⁴²

In Australian discrimination legislation, Queensland’s Act is the only one to contain a preamble. In the absence of an objects clause the preamble has been relied upon by the judiciary to guide the interpretation of the Act.⁴³

The long title and preamble affirm the right to equality and equal protection and benefit of the law without discrimination, the protection of fragile freedoms in a contemporary society, and that the

33 *AB v Western Australia* [2011] HCA 42, [24].

34 Australian Discrimination Law Experts Group submission, 11; Youth Advocacy Centre Inc submission, 2.

35 *Discrimination Act 1991* (ACT) s 4AA.

36 *Phillips v Australian Capital Territory* [2021] ACAT 22 [69].

37 *Cornwall v Aerial Capital Group Pty Ltd trading as Canberra Elite Taxis* [2022] ACAT 32 [45].

38 Australian Discrimination Law Experts Group submission, 39.

39 See for example *Anti-Discrimination Act 1991* (Qld) ss 6, 117, 125, 132.

40 *Anti-Discrimination Act 1991* (Qld) s 6(1).

41 *Anti-Discrimination Act 1991* (Qld) s 6(2).

42 For example, the *Declaration on the Rights of Mentally Retarded Persons* and the *Declaration on the Rights of Disabled People* have now been replaced by the *Convention on the Rights of Persons with Disability*.

43 *Anglo Coal (Moranbah North Management) Pty Ltd* [2018] QIRC 52.

quality of democratic life is improved by respect for the dignity and worth of everyone. The second reading speech of the Anti-Discrimination Bill noted that the 'principles of dignity and equality for everyone are the foundations of the Bill.'⁴⁴

However, Queensland's Human Rights Act that came into force in 2020 now expressly protects the right to equality before the law as well as other human rights derived from the *International Covenant on Civil and Political Rights* and other United Nations instruments.

Therefore, only provisions outlining Parliament's considerations about the broader context of the legislation are of continued benefit.⁴⁵ These provisions state that:

- everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination
- the protection of fragile freedoms is best effected by legislation that reflects the aspirations and needs of contemporary society
- the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone.

Should the name of the Act change?

In considering whether the overall objectives of the Act should be enhanced and updated, we also considered whether the name of the legislation remains appropriate.

In the Discussion Paper, we asked for submissions about the name of the Act, and six submissions addressed this question.⁴⁶

Of those, three submissions recommended the name of the Act be changed to the 'Equality Act'.⁴⁷ The other three submissions⁴⁸ recommended that the name remain the same on the basis that:

- other names, such as 'Equal Opportunity Act', would only capture one purpose of the legislation and so would misname the Act⁴⁹
- a new name is unnecessary and may cause confusion⁵⁰
- all resources about the Act would require updating and this would be costly.⁵¹

The Review's position

The Review considers that:

- Incorporating the statutory interpretation principle of beneficial interpretation of legislation into the Act would oblige an interpretation favourable to people that the Act is intended to benefit. This is consistent with the objects of the Act as well as the Human Rights Act and would remove any ambiguity.
- The preamble should be reduced to remove reference to international human rights instruments because an objects clause, which refers to the Queensland Human Rights Act, is to be included. The Queensland Human Rights Act is modelled on the *International*

44 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 3193 (DM Wells, Attorney-General).

45 *Anti-Discrimination Act 1991* (Qld) preamble, s 6(2)(a)-(c).

46 Assoc Prof Dominique Allen submission; Queensland Council of Unions submission; Equality Australia submission; Jenny King submission; Queensland Council for Civil Liberties submission; Legal Aid Queensland submission.

47 Assoc Prof Dominique Allen submission; Queensland Council of Unions submission; Equality Australia submission.

48 Jenny King submission; Queensland Council for Civil Liberties submission; Legal Aid Queensland submission.

49 Queensland Council for Civil Liberties submission, 10.

50 Legal Aid Queensland submission, 58.

51 Legal Aid Queensland submission, 58.

Covenant on Civil and Political Rights and other international instruments. This approach will ensure the references to international human rights instruments will not become outdated. Section 6 of the preamble remains relevant and is a useful starting point for the legislation, and should be retained.

- The name of the Anti-Discrimination Act is recognised and well understood, and no alternative name that more accurately captures the new objects of the Act has been presented. The benefits of retaining the current name outweigh those associated with a new name.
- A new Act that includes the year of enactment is required, rather than incorporating extensive amendments in the existing 1991 Act. The enactment year will promote recognition and awareness of the contemporary status of Queensland's discrimination Act.

Recommendation 2

- 2.1** The new Act should be called the Anti-Discrimination Act and contain a long title that reflects the updated purpose of the legislation.
 - 2.2** The preamble should be retained but should only include the considerations by Parliament currently set out in section 6.
 - 2.3** The objects of the Act should include:
 - to prevent and eliminate discrimination, sexual harassment, and other objectionable conduct to the greatest extent possible
 - to further promote and protect the right to equality as set out in section 15 of the *Human Rights Act 2019* (Qld)
 - to encourage identification and elimination of systemic causes of discrimination
 - to recognise that discrimination and other objectionable conduct can cause serious personal, social, and economic harm, and that discrimination based on a combination of attributes can have a cumulative harmful effect
 - to promote and facilitate the progressive realisation of substantive equality as far as reasonably practicable by recognising that:
 - discrimination can cause social and economic disadvantage and that access to opportunities are not equitably distributed throughout society; and
 - equal application of a rule to different groups can have unequal results or outcomes; and
 - the achievement of substantive equality may require making reasonable accommodations, and implementing affirmative measures.
 - 2.4** The Act should contain a provision to require the Act to be interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so consistently with the objects of the Act and the *Human Rights Act 2019* (Qld).
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Chapter 4:

Refining key concepts

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Defining discrimination

The Terms of Reference for this Review¹ ask us to consider:

- whether there is a need to amend the definition of discrimination
- whether the requirement for less favourable treatment, as imported by the concept of the comparator, remains an appropriate requirement to establish discrimination or whether there are other contemporary responses that would be appropriate.

Our approach in this section has considered reforms to enhance and update the Act, including by considering Australian and international best practice approaches. We have also considered how the objectives of the Act can be best achieved.²

For the Act to be effective, the definition of discrimination should be easy to understand. It should avoid unnecessary technicalities that dilute the effectiveness of the law and increase the time and resources expended by complaint parties, the Commission, and tribunals. Although the area of discrimination law is technically complex, we have recommended an approach that simplifies the core definitions and makes the Act more accessible.

Types of discrimination

Current approach

In all Australian jurisdictions, including Queensland, there are two types of discrimination – direct and indirect.³

Direct and indirect discrimination can arise from the same set of facts. For example, a school policy that bans all headwear except for the approved school hat may be indirectly discriminatory, but the application of the policy (telling a person to stop wearing a Sikh turban) is directly discriminatory.

While the Act refers to types of discrimination, it does not explicitly state whether conduct can amount to both direct and indirect discrimination, leaving the matter in doubt.⁴

Comparative approach

Australian Capital Territory

The Australian Capital Territory (ACT) has maintained separate concepts of direct and indirect discrimination but clarified that conduct can be both direct and indirect by including the words ‘when a person discriminates either directly or indirectly or both...’.⁵ This clarification was recommended by a review of Australian Capital Territory discrimination laws.⁶

International jurisdictions – unified test

Some international approaches have adopted a single, unified test.⁷ This option was considered in the 2011 review of Commonwealth discrimination laws, which considered whether having two different types of discrimination was artificial and has created unnecessary complexity.⁸

1 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(e) and (i).

2 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 2.

3 *Anti-Discrimination Act 1991* (Qld) ss 10, 11.

4 *Anti-Discrimination Act 1991* (Qld) s 9.

5 *Discrimination Act 1991* (ACT) s 8.

6 ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991* (ACT) (Final Report, 2015) 31.

7 For example – Canada, South Africa, United States of America, and New Zealand have done so.

8 Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011) 13.

Retaining the concepts, making it clearer

In the Discussion Paper, we asked whether there should be a unified test for both direct and indirect discrimination. We also discussed this question during our consultations, including in a roundtable for legal practitioners.⁹

Twenty-eight submissions addressed this topic. A broad range of legal and community stakeholders supported replicating the approach of the ACT.¹⁰ Two submissions did not support taking this approach.¹¹

The Queensland Law Society commented that ‘direct and indirect are part of a continuum and may occur together’ and should not be mutually exclusive concepts.¹² The Queensland Catholic Education Commission agreed that the Act should clarify that direct and indirect discrimination are not mutually exclusive, and in instances where both are evident, they should be able to be dealt with at the same time.¹³ The Queensland Civil and Administrative Tribunal commented that if it was intended that claims may arise in both direct and indirect discrimination based on the same facts, then the legislation should clarify this ‘so that the point does not need to be litigated’ in the Tribunal.¹⁴

One stakeholder considered that the concepts of direct and indirect might become conflated and that the ACT wording might lead some people to believe that they need to demonstrate both forms of discrimination.¹⁵ Another submission also considered that taking this step might be premature given that most other jurisdictions have not made this clarification.¹⁶

With respect to combining direct and indirect discrimination into a single definition, most submissions were not in favour of such an approach, however a small number of submissions indicated support for such a change.¹⁷

The Queensland Law Society commented that some of their members thought a unified test would benefit practitioners and their clients on both sides of the complaint.¹⁸ The Public Advocate (Qld) was in favour because having two separate tests may be ‘confusing and arbitrary’.¹⁹ PeakCare Queensland Inc and Multicultural Australia could also see some merit in considering a unified approach as a way to address systemic discrimination.²⁰

9 Legal practitioners’ roundtable, 10 February 2022.

10 Youth Advocacy Centre Inc submission; Public Advocate (Qld) submission; Caxton Legal Centre submission; Aged and Disability Advocacy Australia submission; Legal Aid Queensland submission; Queensland Law Society submission; Name withheld (Sub.135) submission; Respect Inc and DecrimQLD submission; Legal Aid Queensland submission; Queensland Catholic Education Commission submission; Queensland Council of Social Service submission; Rainbow Families Queensland submission; Queensland Council for Civil Liberties submission; Christian Schools Australia submission; Australian Industry Group submission; Associated Christian Schools submission; Caxton Legal Centre submission; PeakCare Queensland Inc submission; Vision Australia submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Equality Australia submission; Australian Lawyers Alliance submission; Department of Education (Qld) submission; Queensland Civil and Administrative Tribunal submission; Australian Association of Christian Schools submission; Jenny King submission.

11 Christian Schools Australia submission; Australian Industry Group submission.

12 Queensland Law Society submission, 2.

13 Queensland Catholic Education Commission submission, 3.

14 Queensland Civil and Administrative Tribunal submission, 16.

15 Australian Industry Group submission, 3.

16 Christian Schools Australia submission, 8.

17 Queensland Law Society submission; Public Advocate (Qld) submission; PeakCare Queensland Inc. submission; Multicultural Australia submission; Australian Discrimination Law Experts Group submission.

18 Queensland Law Society submission, 3; Vision Australia submission, 3-4;

19 Public Advocate (Qld) submission, 2.

20 Multicultural Australia submission, 6; PeakCare Queensland Inc submission, 4.

Of those that did not support the change, most stakeholders raised the following concerns:

- that a major departure from other Australian jurisdictions would lead to inconsistency²¹
- that it may be unnecessary²² and could create even more confusion,²³ particularly if it means discarding decades of Australian jurisprudence²⁴
- that it may be impractical to find a single test to achieve an appropriate explanation of both concepts²⁵
- that retaining separate tests has a strong educative value, particularly because indirect discrimination is not well understood.²⁶

The Review's position

The Review considers that:

- direct and indirect discrimination should remain distinct and separate concepts
- clarifying that both concepts may apply to the same set of facts is beneficial, to remove any doubt on the matter
- including the two concepts in a single provision will simplify the drafting and aid understanding
- drafting should avoid conflating the two concepts, to make it clear that 'direct' or 'indirect' or both 'direct and indirect' may be argued, and any potential confusion may be mitigated by clear explanatory notes.

Direct discrimination

Current approach

Direct discrimination under the Act is where a person treats a person with an attribute less favourably than another person without the attribute in circumstances that are the same or not materially different.²⁷ This approach requires comparison between the treatment of a person because of a protected attribute, and treatment that is or would be afforded to a real or hypothetical person – the 'comparator'.²⁸

In the Discussion Paper we asked for submissions on whether the test for direct discrimination should remain unchanged, whether an 'unfavourable treatment' or another approach be adopted, and received 45 submissions on this question.²⁹ The vast majority recommended changes to

21 See for example: Australian Association of Christian Schools submission, 8; Legal Aid Queensland submission 10; Australian Lawyers Alliance submission, 7.

22 Caxton Legal Centre submission 4.

23 Legal Aid Queensland submission, 10.

24 Equality Australia submission, 12.

25 Aged and Disability Advocacy Australia submission, 3.

26 Queensland Catholic Education Commission submission 4; Department of Education (Qld) submission, 3.

27 *Anti-Discrimination Act 1991* (Qld) s 10.

28 This is the situation in Queensland, Western Australia, New South Wales, Tasmania, South Australia, and the Northern Territory.

29 Youth Advocacy Centre Inc submission; Queensland Law Society submission; Caxton Legal Centre submission; Queensland Nurses and Midwives Union submission; Legal Aid Queensland submission; Queensland Advocacy Incorporated submission; LGBTI Legal Service Inc submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia (NAPWHA) submission; Respect Inc and DecrimQLD submission; Name withheld (sub.069) submission; Queensland Catholic Education Commission submission; Australian Discrimination Law Experts Group submission; Australian Industry Group submission; Queensland Council of Social Service submission; Queensland Council of Unions submission; Aged and Disability Advocacy Australia submission; Rainbow Families Queensland submission; Queensland Council for Civil Liberties submission; PeakCare Queensland Inc; Name withheld (sub.135) submission; Life Without Barriers submission; Women's Legal Service submission;

the current approach. Similar views were echoed in consultations with stakeholders.³⁰ Only three submissions suggested that we maintain the status quo.³¹ Another submission commented generally that modification of legal tests could lead to ‘unfair obligations and unfair burdens’ on Queensland health carers.³²

Reflecting the views of many stakeholders that the current Act is not meeting its objectives, one member of the Australian Discrimination Law Experts Group told us:

*We have defined it so tightly that we’ve forgotten that it’s about behaviour that is either motivated by prejudice or had a prejudicial effect... We have this law because people are discriminated against because of prejudiced attitudes... we forget that that’s the underlying issue.*³³

Challenges created by the comparator

The primary issue identified with the current direct discrimination test by submissions to this Review, and by previous Australian inquiries regarding discrimination laws,³⁴ is the element of proving the comparator.

Some of the concerns we identified about the comparator include:

- The current test is technical, uncertain, hard to understand and apply for parties, the Commission, courts, and tribunals.³⁵
- This is particularly so when it comes to complex factual scenarios³⁶ and when argued in combination with ‘characteristics’ of attributes.³⁷
- Constructing a hypothetical comparator is artificial, contrived, and creates barriers to accessing justice particularly for unrepresented parties.³⁸
- Placing emphasis on identifying a comparator takes the focus away from the subject of the complaint – whether there was unfair treatment because of an attribute.³⁹

Australian Lawyers Alliance submission; Christian Schools Australia submission; Associated Christian Schools submission; Multicultural Australia submission; Equality Australia submission; Vision Australia submission; Department of Education (Qld) submission; Community Legal Centre Queensland submission; Human Rights Law Alliance submission; Name withheld (sub.026) submission; Assoc Prof Dominique Allen submission; Joint Churches submission; Dr Nicky Jones submission; Australian Psychological Society submission; Jenny King submission; Maternity Choices Australia submission; Scarlett Alliance submission; Australian Association of Christian Schools submission; Queensland Disability Network submission; Queensland Civil and Administrative Tribunal submission; Royal Australian and New Zealand College of Psychiatrists submission; Medical Insurance Group Australia submission.

30 For example: Aboriginal and Torres Strait Islander Women’s Legal Service North Queensland consultation, 15 September 2021; Townsville Community Law consultation, 17 August 2021; Kevin Cocks consultation, 28 February 2022.

31 Australian Industry Group submission, 3; Australian Associated Christian Schools submission, 6-7; Christian Schools Australia submission, 8.

32 Medical Insurance Group Australia submission, 3.

33 Australian Discrimination Law Experts Group (Robin Banks), Consultation with the Review of the Anti-Discrimination Act, Consultation, 14 September 2021.

34 See for example: New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999), 82; ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015) 33–34; Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008), 85; Attorney-General’s Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011), 13.

35 See for example: Youth Advocacy Centre Inc submission, 2; Caxton Legal Centre submission, 3; Equality Australia submission, 9-10.

36 Legal Aid Queensland submission, 8.

37 Queensland Civil and Administrative Tribunal submission, 15-16.

38 See for example: Respect Inc and DecrimQLD submission, 14; Life without Barriers submission, 1.

39 See for example: Queensland Law Society submission, 3; Assoc Prof Dominique Allen submission, 2; Women’s Legal Service submission, 3.

- Because of unconscious biases, fair comparisons can never be made about matters involving historical disadvantage e.g. First Nations peoples and people with cognitive disability.⁴⁰
- The current test makes it unfeasible to argue discrimination complaints based on combined attributes.⁴¹
- It leads to protracted and costly legal proceedings, draining the resources of the tribunals.⁴²

The Alliance of Queensland Lawyers and Advocates referred to this example to illustrate how the comparator approach is causing challenges:

A Māori man might have moko (a cultural tattoo) on his face, but some other people who are not Māori also have face tattoos. If a Māori man is asked to leave a restaurant because of his tattoo, clearly you should compare the treatment of him to someone who is not Māori. But if he brings a complaint under the current law, he might have to deal with a lengthy argument about whether that other non-Māori person (the comparator) also had a tattoo on their face and if so, would that other person have been treated the same way.⁴³

Specific concerns were raised about how the requirement to identify a hypothetical comparator disadvantages people with disability,⁴⁴ and people of faith.⁴⁵

Disability discrimination

For people whose behaviours form part of their disability, the challenge of constructing a real or hypothetical comparator can be insurmountable. Where the manifestation of an attribute is the reason for discrimination, cases heard before tribunals and courts have often been unsuccessful, with a finding that a hypothetical person would have been treated in the same way.⁴⁶ This has become a complex and controversial area of discrimination law that some stakeholders consider has significantly reduced the effectiveness of the Act for people with disability.

Queensland Advocacy Incorporated commented that removing the comparator would address an ‘artificial separation of disability and its characteristics which has been ingrained in the law since *Purvis*’, and ‘fails to appreciate the complex and interactive nature of disability as understood by the social model’.⁴⁷

The Department of Education already adopts the unfavourable treatment test in relation to students, and ‘acknowledges that constructing a hypothetical comparator when multiple overlapping factors may be involved is problematic’ because it distracts from the intention of the law.⁴⁸ This view was also shared by the Queensland Catholic Education Commission

40 See for example: Caxton Legal Centre submission, 2; Aged and Disability Advocacy Australia submission, 2.

41 See for example: Legal Aid Queensland submission, 7; LGBTI Legal Service Inc submission, 8; Queensland Advocacy Incorporated submission, 18; Queensland Positive People submission, 7; Australian Discrimination Law Experts Group submission, 20. See also – Discrimination on combined grounds, in this chapter.

42 See for example: Queensland Nurses and Midwives Union submission, 8; Queensland Civil and Administrative Tribunal submission, 15-16.

43 Community Legal Centers Queensland, ‘Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland’, (Web page) <<https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>>.

44 See for example: Aged and Disability Advocacy Australia submission, 2; Public Advocate (Qld) submission, 1; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia (NAPWAH) submission, 7; Queensland Advocacy Incorporated submission, 15-16.

45 Human Rights Law Alliance submission, 14.

46 This is a line of reasoning based on the High Court case of *Purvis v New South Wales* (2003) 217 CLR 92; [2003] HCA 62. But this case was distinguished in Queensland by *Woodforth v State of Queensland* [2018] 1 Qd R 289; [2017] QCA 100 because of the different provisions in the Queensland Act (including section 8) and the irrelevance of the reasoning in *Purvis* to subject matter unrelated to ‘behaviour’.

47 Queensland Advocacy Incorporated submission, 16.

48 Department of Education (Qld) submission, 3.

because of the ‘complexity and highly individualised nature of the manifestation of the impact of disability’.⁴⁹

Religious discrimination

Human Rights Law Alliance considered that the need to construct a hypothetical comparator can be ‘particularly destructive of religious freedom rights’ because ‘religious activities... are unlikely to be included in a hypothetical comparator’, rendering the Act ‘largely useless’ at present for religious complainants.⁵⁰

Concerns with changing the comparator

A minority of submissions seeking to maintain the current approach were concerned that changing the definition would involve unfairly lowering the threshold required to prove discrimination. We explore these points below.

Fairness and objectivity

Some submissions put forward a view that retaining the comparator test is important to maintaining an objective approach.⁵¹

Cases decided in Victoria after their Act was changed from the ‘less favourable’ to the ‘unfavourable’ approach have indicated that the unfavourable treatment test remains an objective one.⁵²

Consistency

Two submissions raised concerns that changing the approach may create confusion or inconsistency for employers and organisations by departing from the approach of most other jurisdictions.⁵³

While most jurisdictions retain the comparator test, consistency is not assured, because three definitions for direct discrimination are operating in Australia and there is further inconsistency between individual federal Act definitions.⁵⁴ This has led the Australian Human Rights Commission to recently recommended simplifying the law by removing the existing comparator test in the federal sex, disability, and age discrimination laws.⁵⁵ The Review notes that the Western Australian review of their equality legislation is also considering the same change.⁵⁶

A fundamental element

While most of their members were in favour of removing the comparator and simplifying the test, the Queensland Law Society noted that some of their members thought it was ‘fundamental to determining whether discrimination occurred’ because it allows for the consideration of different

49 Queensland Catholic Education Commission submission, 3.

50 Human Rights Law Alliance submission, 14.

51 Australian Industry Group submission, 3; Australian Associated Christian Schools submission, 6-7.

52 *Aitken v The State of Victoria Department of Education & Early Childhood Development* [2012] VCAT 1547, 156; *Wilson v Western Health (Human Rights)* [2014] VCAT 771; *Perera v Warehouse Solutions Pty Ltd (Human Rights)* [2017] VCAT 1267.

53 Australian Industry Group submission, 3; Christian Schools Australia submission, 8.

54 Queensland Human Rights Commission, *Review of Queensland’s Anti-Discrimination Act* (Discussion Paper, November 2021) 31 (see table). Note - the Racial Discrimination Act already takes a different approach from the sex, age and disability laws.

55 Australian Human Rights Commission, *Free and Equal – A reform agenda for federal discrimination laws* (December 2021) 279 – 283.

56 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Discussion Paper, August 2021) 137-140.

treatment.⁵⁷ This view was shared by a practitioner who attended the Review’s roundtable for legal practitioners, and commented:

Anti-discrimination laws aren’t just about treating someone badly... it’s about whether or not you can establish that the reason why that person was targeted or subjected to a detriment was because of a particular attribute they have... it’s very useful to show the nexus to the attribute.⁵⁸

On the other hand, the Queensland Catholic Education Commission supported a simplified, unfavourable treatment approach because:

In practical terms, the comparative exercise often necessitates consideration of the unfavourable treatment approach. It requires consideration of two issues: was the relevant student treated unfavourably and, if so, was the reason a protected characteristic?⁵⁹

Comparison still a helpful tool

Some submissions expressed a view that even if the comparator is removed from the test for discrimination, the comparative analysis is likely to remain a feature of many cases. However, it would shift from being a mandatory element for the complainant to prove in every case to a discretionary tool to identify the reason for the treatment.⁶⁰

For example, one submission commented that:

Whilst a comparator may be helpful evidentially, sometimes it makes more sense to go straight to the “reason why” without tribunals tying themselves in knots attempting to identify an appropriate comparator. The real question should be “why was the complainant treated unfavourably”? Was it because of an attribute?⁶¹

Comparative approaches

Of the submissions that advocated for changing the test for direct discrimination, three approaches were suggested:

- Unfavourable treatment approach (ACT, Victoria)
- Racial Discrimination Act approach (section 9 RDA)
- Equality Act 2010 (UK) approach (UK approach)

Unfavourable treatment approach

The Australian Capital Territory and Victoria have moved away from a differential treatment test towards a test of ‘unfavourable treatment’. By removing the comparator as an essential element, considerations by a decision-maker about the comparator become part of their analysis only when it is a useful exercise, rather than an element that must be established to a particular standard.

The word ‘unfavourable’ seems to invite a comparison of treatment afforded to a person with and a person without the relevant attribute.⁶² Nonetheless, the Australian Capital Territory Administrative Appeals Tribunal has articulated the difference:

57 Queensland Law Society submission, 2.

58 Legal practitioners’ roundtable, 10 February 2022.

59 Queensland Catholic Education Commission submission, 3.

60 Australian Discrimination Law Experts Group submission, 20.

61 Name withheld (Sub.135) submission, 5-6.

62 The *Macquarie Dictionary* meaning of unfavourable includes ‘disadvantageous’ and ‘adverse’; and the *Oxford Dictionary* meaning of unfavourable includes ‘likely to lead to an adverse outcome.’

While the term ‘disadvantage’ might be thought to imply comparison, it does not necessarily do so. The context in which it is used may invite comparison, as where it is clear that what is in issue is comparative treatment, but it may also be used in a context where comparison is absent... The primary meaning of ‘advantage’ does not import comparison; the same dictionary gives it as ‘any state, circumstance, opportunity or means specially favourable to success, interest, or any desired end’. The Discrimination Act is therefore about unfavourable treatment of persons and subjecting persons to disadvantage because of the attributes they possess.⁶³

This reasoning has been confirmed by Victorian cases since that Act was amended to the ‘unfavourable’ approach.⁶⁴ For instance, a man was banned from all council buildings because of behaviour that was a manifestation of his mental health and cognitive disabilities. The tribunal found that this was discrimination, and confirmed that, while analysis may be informed by consideration of the treatment afforded to others, the ‘unfavourable’ approach only requires ‘an analysis of the impact of the treatment on the person complaining of it.’⁶⁵

An evaluation of the operation of this test in Victoria over 10 years found that there had been a positive and purposeful change in the approach of parties, tribunals, and courts, and that most stakeholders believed it to be simpler, cleaner, and more accessible, with fewer distractions from the main issues. Both complainant and respondent lawyers commented that it was easier to provide advice, with one respondent lawyer commenting that the comparator test was ‘tricky for everyone, not just applicants.’⁶⁶

The unfavourable treatment option was generally the preferred approach of those stakeholders that were in favour of a change to the definition. While some submissions stated a first preference for the Racial Discrimination Act approach (explored in the following section) almost all indicated support for the unfavourable treatment approach in the alternative.⁶⁷

The reasons offered in support of this approach include that it:

- is operating well in Victoria because simplifying the law has led to more certain and predictable outcomes for both complainants and respondents⁶⁸
- is an approach that produces more accessible and less technical case law⁶⁹
- places the focus on the key issues – the unfair treatment and reasons for it⁷⁰
- improves the capacity of the law to respond to disadvantage⁷¹
- reflects the approach of the *International Covenant on Civil and Political Rights* which frames discrimination in terms of impact on the affected group.⁷²

⁶³ *Re Prezzi and Discrimination Commissioner* [1996] ACTAAT 132, 22.

⁶⁴ *Kukeyn v Chief Commissioner of Police* [2015] VSC 204.

⁶⁵ *Slattery v Manningham City Council* (Human Rights) [2013] VCAT 1869.

⁶⁶ Assoc Prof Dominique Allen, ‘An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)’ (2020) 44(2) *Melbourne University Law Review* 459, 480-484.

⁶⁷ See for example: Caxton Legal Centre submission, 3; Public Advocate (Qld) submission, 3; Life without Barriers submission, 2; Multicultural Australia submission, 7.

⁶⁸ Caxton Legal Centre submission, 3; Legal Aid Queensland submission, 8. See also Assoc Prof 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* 485.

⁶⁹ Legal Aid Queensland submission, 8.

⁷⁰ Assoc Prof Dominique Allen submission 2; Women’s Legal Service submission 3; Vision Australia submission 2.

⁷¹ Queensland Council for Civil Liberties submission, 2.

⁷² Caxton Legal Centre submission, 3. See also *International Covenant on Civil and Political Rights* art 2(2) and United Nations Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37th sess (10 November 1989) 7.

Racial Discrimination Act approach

Some stakeholders in submissions and consultations⁷³ advocated for a definition of direct discrimination based on the following wording in the federal Racial Discrimination Act:

Distinction, exclusion, restriction or preference... which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.⁷⁴

An amended version of the above test, incorporating factors protecting the right to freedom of religion, was also recommended by Christian Schools Australia.⁷⁵

The test for discrimination in the Racial Discrimination Act is derived from the *International Convention on the Elimination of All Forms of Racial Discrimination*. In support of this approach, Caxton Legal Centre⁷⁶ referred to two cases decided under this provision: the landmark class action case of *Wotton v State of Queensland*,⁷⁷ and the successful underpayment of wages case, *Baird v Queensland*.⁷⁸ These two cases confirm that while neither an actual nor hypothetical comparator is needed, comparative analysis may nonetheless be part of the analysis of the words 'on an equal footing'.⁷⁹ However, the court in *Wotton* found that it did not need to be 'constrained by the complex comparator structure' found in other anti-discrimination laws.⁸⁰

But there may be limitations to this approach because:

- no other jurisdiction in Australia applies this definition of discrimination to all attributes
- the only available jurisprudence would be based on racial discrimination, removing the opportunity to rely on existing case law relevant to other attributes
- there is no obvious benefit in this option over the unfavourable treatment approach
- the drafting would be complex, and this may dilute its educative role.

UK Equality Act approach

Queensland Civil and Administrative Tribunal's submission refers to the definition of discrimination in the United Kingdom's *Equality Act 2010*.⁸¹

Like Queensland's current law, the UK definition includes the words 'less favourably'⁸² and another section clarifies that 'on a comparison of cases...there must be no material difference between the circumstances relating to each case'.⁸³ In interpreting these provisions, the courts have

73 See for example: Caxton Legal Centre submission, 5; Multicultural Australia submission 7; Community Legal Centres Queensland consultation, 6 October 2021. See also Community Legal Centres Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <<https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>>.

74 *Racial Discrimination Act 1975* (Cth) s 9.

75 Christian Schools Australia submission, 8. The drafted suggested was adopted from Prof Patrick Parkinson, and Prof Nicholas Aroney, Submission on the Consolidation of Commonwealth Anti-discrimination laws (2011), January 2012.

76 Caxton Legal Centre submission, 3.

77 *Wotton v State of Queensland (No 5)* [2016] FCA 1547 (*Wotton*)

78 *Baird v Queensland* [2006] FCAFC 162 (*Baird*)

79 *Wotton* at 539; *Baird* at 63.

80 *Wotton* at 540. However, the Review understands that a recent case may have thrown into doubt whether there is a need for a comparator. See Alan Zheng, 'Comparators and Comparison in the Racial Discrimination Act' (2022), *Australian Public Law* (Web page) <<https://www.auspublaw.org/blog/2022/03/campbell-v-northern-territory-the-lingering-uncertainty-over-comparators-and-comparisons-in-the-racial-discrimination-act>>.

81 Queensland Civil and Administrative Tribunal submission, 6.

82 *Equality Act 2010* (UK) s 13.

83 *Equality Act 2010* (UK) s 23.

determined that it is not necessary to identify a comparator with precision, except when it is helpful to do so to identify the reasons for the differential treatment.⁸⁴

The Review notes that more recent protections added for pregnancy and maternity attributes in the 2010 Act have shifted towards the ‘unfavourable treatment’ and away from the ‘less favourable treatment’ approach in the previous *Sex Discrimination Act 1975* (UK).⁸⁵

However, retaining the words ‘less favourably’ and continuing to refer to comparators may not have the intended effect of simplifying the law. While UK case law has reduced the focus on the comparator, this may not be immediately apparent, particularly to non-lawyers. The Review has also not been able to identify any additional benefit that could be derived from the UK approach over that of the ACT and Victoria.

The Review’s position

The Review considers that:

- The current approach is complex, technical and should be simplified, and in particular the requirement to establish a comparator should be removed.
- The inclusion of a comparator makes it unfeasible to argue discrimination based on combined grounds.
- Given the limitations identified with other potential approaches, the unfavourable treatment approach is preferred.
- The unfavourable treatment approach has not compromised objectivity or fairness in Victoria or the ACT.
- The unfavourable treatment approach has proven to be a simpler and more effective legal test which places focus on the key issues – unfair treatment and the reasons for it.
- There are likely to be real benefits for parties, the Commission, and the tribunals in creating a flexible approach that allows for comparison where necessary, but not where it is an unhelpful distraction from the more important question of why the treatment occurred.

Substantial reason

The Act currently provides that if there are two 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 if the attribute is ‘a substantial reason’ for the treatment.⁸⁶

Five submissions suggested that the evidential burden on complainants should be reduced by making it only necessary that the protected attribute(s) was ‘one of the reasons’ rather than a ‘substantial reason’.⁸⁷ However, one submission recommended retaining it, in the context of recognising discrimination on the ground of combined attributes.⁸⁸

Requiring courts to untangle multiple causes of discrimination can be a challenge as ‘discrimination can rarely be ascribed to a single ‘reason or ground’.⁸⁹

⁸⁴ *Shamoon v Chief Constable of Royal Ulster Constabulary* [2003] UKHL 11; *Law Society and Ors v Bahl* [2003] IRLR 640.

⁸⁵ *Equality Act 2010* (UK) ss 17 - 18.

⁸⁶ *Anti-Discrimination Act 1991* s10(4).

⁸⁷ Queensland Nurses and Midwives Union submission; Community Legal Centres Queensland submission; Respect Inc and DecrimQLD submission; Caxton Legal Service submission; Dr Nicky Jones submission.

⁸⁸ Christian Schools Australia submission.

⁸⁹ *IW v City of Perth* (1997) 191 CLR 1, 63; [1997] HCA 30 (Kirby J).

‘One of the reasons’

With the exception of Queensland, Victoria, and South Australia, federal and state discrimination laws in Australia only require the attribute to be ‘one of the reasons.’ Overall, many jurisdictions are moving away from requiring the attribute to be ‘a substantial reason’ for discrimination.

The recent Religious Discrimination Bill⁹⁰ also contained this wording and the Explanatory Memorandum noted that, ‘it would be very difficult for a complainant to prove that a discriminatory reason was the dominant or a substantial reason for the conduct’, and that the provisions are intended to ‘avoid situations in which a person is able to avoid liability for otherwise discriminatory conduct where they can prove that there were additional motivations for their conduct and the person’s religious belief or activity was only a secondary motivation.’⁹¹

The Review’s position

The Review considers that:

- Removing an unnecessarily technical barrier of needing to prove discrimination is ‘a substantial reason’ would simplify and improve the law.
- Consistency between Queensland and federal laws assists employers and businesses to apply the same standards in order to comply with both jurisdictions.
- Reference to ‘a substantial reason’ should be replaced with ‘one of the reasons’, based on the wording of the federal Acts.

Indirect discrimination

Indirect discrimination recognises that sometimes treating all people the same may unfairly or disproportionately disadvantage some groups of people over others.

For example, while a minimum height requirement for all workers seems a neutral standard, it may disadvantage women and people of some races. If the requirement is not needed to perform the work effectively, the discrimination will be unlawful because the requirement is unreasonable, there being no genuine occupational reason to justify it.

Indirect discrimination can be harder to recognise and define. However, indirect discrimination is an important feature of anti-discrimination laws because it has the potential to address systemic or structural barriers.

In our Discussion Paper, we asked whether the test for indirect discrimination should change, and if a ‘disadvantage’ approach should be adopted. We received 36 submissions that addressed indirect discrimination,⁹² with broad support among stakeholders to shift away from the current approach. Only three submissions suggested the current provisions be preserved.⁹³

90 Religious Discrimination Bill 2022 (Cth) cl 17. Note: this Bill did not pass into law.

91 Revised Explanatory Memorandum, Religious Discrimination Bill 2022 [271].

92 Name withheld (sub.026) submission; Public Advocate (Qld) submission; Medical Insurance Group Australia submission; Rainbow Families Queensland submission; PeakCare Queensland Inc submission; Christian Schools Australia submission; Life without Barriers submission; Associated Christian Schools submission; Name withheld (sub.060) submission; Dr Nicky Jones submission; Australian Lawyers Alliance submission; Vision Australia submission; Human Rights Law Alliance submission; Australian Discrimination Law Experts Group submission; Suncoast Community Legal Centre submission; Multicultural Australia submission; Queensland Nurses and Midwives Union submission; Jenny King submission; Queensland Council of Unions submission; Rita Jabri Markwell submission; Maternity Choices Australia submission; Queensland Council for Civil Liberties submission; Queensland Catholic Education Commission submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Name withheld (sub.135) submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission; Queensland Mental Health Commission submission; Australian Association of Christian Schools submission; Department of Transport and Main Roads (Qld) submission; Queensland Civil and Administrative Tribunal submission.

93 Australian Industry Group submission; Australian Association of Christian Schools submission; Medical Insurance Group Australia submission.

Current approach

Across Australian jurisdictions, indirect discrimination is generally expressed as imposing a requirement, condition, or practice (called ‘a term’ in the Queensland Act) that is not reasonable. However, in some states the person must establish their inability to comply with the term, with or without a proportionality test (that is, a higher proportion can comply). In other jurisdictions, the test is whether the term creates a disadvantage to a person with the attribute.⁹⁴

In Queensland, indirect discrimination is unlawful when an unreasonable requirement is imposed that a person cannot comply with because of their attribute, and more people without the attribute can comply with the requirement.⁹⁵

Key issues with the current provisions

Some of the reasons in support of changing the approach to indirect discrimination submitted were:

- The way that the indirect discrimination provisions are currently drafted is too complex and causes confusion for complaint parties.⁹⁶
- The complexity and impracticality of the test for indirect discrimination is a barrier to justice, particularly for groups who are most disadvantaged.⁹⁷
- In practice, some ‘terms’ put people with the attribute at a disadvantage rather than being something they ‘cannot comply with’.⁹⁸
- The need to present statistical evidence to determine the comparator pool in order to meet the proportionality requirement of the test creates practical challenges for parties and imposes unnecessary costs.⁹⁹
- Statistical information is difficult to obtain and establish (and is virtually unprocurable for some attributes).¹⁰⁰

Summing up the problems with the current indirect discrimination provisions, the Australian Discrimination Law Experts Group (ADLEG) commented that:

The definition tends to divert energy away into marginal questions such as the degree of disproportionate impact that must be proved, and whether it is substantial, and what is required for the claimant to prove non-compliance with the requirement.¹⁰¹

Inability to comply with a term

The current law in Queensland requires identification of a term or practice with which a person must comply, and why they are ‘not able to comply’.

94 Queensland Human Rights Commission, *Review of Queensland’s Anti-Discrimination Act 1991* Discussion Paper, November 2021) 34 Comparative experiences table.

95 *Anti-Discrimination Act 1991* (Qld) s 11.

96 Queensland Law Society submission, 3; Australian Lawyers Alliance submission, 7.

97 Legal Aid Queensland submission, 10.

98 Name withheld (Sub.135) submission, 9.

99 Australian Discrimination Law Experts Group consultation, 14 September 2021.

100 See for example: Legal Aid Queensland submission, 9 – e.g. with respect to cultural issues challenges having to obtain evidence of elders, anthropologists, or other experts; Human Rights Law Alliance submission, 14 – e.g. having to demonstrate evidence of proportion of adherence amongst religious people to particular doctrines; Vision Australia submission, 2 – e.g. challenges having to identify a comparative pool of people who are not blind or with low vision.

101 Australian Discrimination Law Experts Group submission, 20.

Although courts and tribunals have not interpreted an ability to comply in a literal way,¹⁰² few complaints ever proceed to a hearing. The indirect discrimination provision is hard to explain and understand, and can be problematic when the words 'is not able to comply' are interpreted literally.

In their submission, the Department of Education explained that they already consider indirect discrimination 'in the context of disadvantaging a person with an attribute' rather than identifying what the term is and whether the person can comply or not. The Department told us that the current test of 'is not able to comply' can lead to issues with literal interpretation, and provided the following example:

While a student who is assigned male sex at birth, but whose gender identity is female could use a male toilet, expecting a transgender student to go to a toilet based on their birth sex is considered unfair. The literal interpretation of 'can and cannot comply' does not reflect the true impact of complying, disadvantaging the individual, and in turn, exacerbating the discrimination it seeks to prevent.¹⁰³

Another education stakeholder, the Queensland Catholic Education Commission, agreed that the 'disadvantage' approach is easier to understand, interpret, and apply.¹⁰⁴

Disproportionate impact

Currently, the complainant must identify the relevant pool of people who do not have the attribute and who are able to comply with the term that is imposed or proposed to be imposed. We heard that addressing this requirement is oppressive and difficult and presents a significant evidentiary burden.

Like the challenges with the hypothetical comparator in direct discrimination, compiling the technical evidence needed to establish the 'higher proportion of people' requirement is difficult and time-consuming. Identifying the appropriate membership of the pool is easier for a sex discrimination claim,¹⁰⁵ but might require complex statistical evidence where it relates to race or disability.¹⁰⁶ This process shifts the focus away from the detrimental treatment experienced. In some cases the statistical evidence needed is unavailable to the complainant without orders being made by the tribunal.

The Queensland Mental Health Commission considered that the requirement to establish the evidence necessary to meet the current test was particularly challenging for people with a mental illness because:

Mental illness occurs on a spectrum from mild to severe and can be episodic in nature. Mental ill-health affects individuals in different ways in different circumstances.¹⁰⁷

The Human Rights Law Alliance submission pointed to the challenges for establishing indirect discrimination based on religious belief:

The test requires a very large amount of evidence to be adduced by the complainant on the nature of their religious belief and the comparative statistical situation of adherents to particular doctrines adhered to by the complainant. This is much more complex to establish than merely age, race or disability.¹⁰⁸

102 For example, while a person of Sikh faith *could* technically take off their turban, they cannot do so in practice - *Mandla v Dowell Lee* [1983] ICR 385; [1982] UKHL 7.

103 Department of Education (Qld) submission, 3.

104 Queensland Catholic Education Commission submission, 3.

105 *Australian Iron and Steel Pty Ltd v Banovic* (1989) 168 CLR 165; [1989] HCA 56.

106 Chris Ronalds and Elizabeth Raper, *Discrimination Law and Practice* (Federation Press, 5th ed, 2019) 47.

107 Queensland Mental Health Commission submission, 3.

108 Human Rights Law Alliance submission, 12.

Concerns with changing the law

Only three submissions preferred maintaining the status quo in relation to indirect discrimination. Australian Industry Group considered that the current threshold was appropriate and proportionate to ensure that businesses could manage operations ‘consistently, efficiently and with transparency.’¹⁰⁹ Two submissions thought that a shift to the disadvantage approach might lower the bar too far, or that objectivity may be compromised,¹¹⁰ and one commented generally on the impact on health service providers if the tests for discrimination are modified.¹¹¹

An evaluation of the first 10 years of the operation of an updated legal test in Victoria did not observe a sudden lowering of the threshold, and in fact indicated that to date there has not been much impact, in part because few indirect discrimination claims are heard.¹¹²

As we discuss in the following section, the Queensland Act is currently not consistent with federal laws – as there is a different standard applied under the Sex Discrimination Act and Age Discrimination Act that organisations operating in Queensland already need to comply with.¹¹³

Comparative approaches

Disadvantage test

The most common alternative approach to indirect discrimination adopted in Australia involves considering whether an unreasonable requirement, condition, or practice has, or is likely to have the effect of unreasonably disadvantaging the person.¹¹⁴

The disadvantage test does not require consideration of whether a person is able or is unable to comply, or who might be the appropriate comparator pool of people without the attribute who can comply. Instead, it focuses on the following key aspects:

- Has a condition, requirement, or practice been imposed, or is there a proposal to impose a condition, requirement, or practice?
- Does it have, or is it likely to have, the effect of disadvantage because of an attribute(s)?
- Is the condition, requirement, or practice reasonable?

Term, condition, requirement, practice

There are variations across jurisdictions in the words used to describe what is being imposed, including: term, condition, requirement, or practice.

In Queensland, indirect discrimination uses the word ‘term’, the meaning of which includes a ‘condition, requirement or practice, whether or not written’.¹¹⁵

Courts have applied a liberal approach to identifying the requirement or condition and have commented that the words should be given a ‘generous construction’¹¹⁶ and a ‘broad rather than

¹⁰⁹ Australian Industry Group submission, 4.

¹¹⁰ Australian Association of Christian Schools submission, 7; AI Group submission, 4.

¹¹¹ Medical Insurance Group Australia submission, 3.

¹¹² Assoc Prof Dominique Allen, ‘An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)’ (2020) 44(2) Melbourne University Law Review 459, 485–487.

¹¹³ *Sex Discrimination Act 1984* (Cth) s 5 and 7B; *Age Discrimination Act 2004* (Cth) s 15.

¹¹⁴ In Victoria, Tasmania, the Australian Capital Territory, and under the federal *Age Discrimination Act 2004* (Cth) s 15 and the *Sex Discrimination Act 1984* (Cth) s 7B.

¹¹⁵ *Anti-Discrimination Act 1991* (Qld) s 11(4).

¹¹⁶ *Waters v Public Transport Corporation* (1992) 173 CLR 349 [393]–[394]; [1991] HCA 49.

technical meaning',¹¹⁷ which should 'cover any form of qualification or prerequisite'.¹¹⁸ However, it is necessary to formulate the requirement or condition with some precision.¹¹⁹

Victorian cases have continued to apply this liberal approach following the update of the indirect discrimination provisions in 2010. For example, a requirement or condition was found to include the imposition of significant extra work, which caused disadvantage to a person with diabetes because he did not have the opportunity to take meal breaks and needed to work exceedingly long hours to the detriment of his health.¹²⁰

Meaning of disadvantage

The word 'disadvantage' is not defined by the legislation in any jurisdiction. However, the courts have stated that it should be interpreted using a 'common sense and practical approach' which takes into account the extent to which a measure diminishes a person's 'right to dignity and self-worth'.¹²¹

Disadvantage – to the group or the person?

An important difference between the ACT legislation and other jurisdictions is that the ACT Act only requires the disadvantage to be in relation to 'the person' with the attribute/s rather than 'persons with the attribute'.¹²²

Framing the disadvantage test around 'persons with the attribute' requires proof that the whole attribute group is affected, not just an individual with the attribute. This requirement introduces an additional layer of complexity about how an attribute group as a whole experiences disadvantage that courts and tribunals may feel compelled to explore.¹²³ For example, not everyone with a disability (even people with the same condition) has the same experience of disadvantage, or requires the same adjustments to meet their needs.

This issue was highlighted in the Victorian case of *Petrou*, in which the tribunal commented:

... 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.¹²⁴

In that case, it meant that the complainant was faced with the difficult task of proving that a requirement imposed by an aged care facility not to use bed poles (which the complainant used to assist with mobility) was a disadvantage not only to her but to 'persons with multiple sclerosis' generally.

Other alternative approaches

The Queensland Civil and Administrative Tribunal's submission suggested the addition of the words 'in practice' to the existing indirect discrimination test so that it would read:

with which a person with an attribute does not or is not, in practice, able to comply...

117 *State of New South Wales v Amery* (2006) 230 CLR 174 [63]–[64]; [2006] HCA 14.

118 *Waters v Public Transport Corporation* (1992) 173 CLR 349 [393], [406]–[407]; [1991] HCA 49.

119 *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 [10]; [1989] HCA 56.

120 *Ferris v Department of Justice and Regulation (Human Rights)* [2017] VCAT 1771.

121 *Petrou v Bupa Aged Care Australia Ltd* [2017] VCAT 1706 [78].

122 Discrimination Act 1991 (ACT) s 8.

123 See for example: Legal Aid Queensland, submission, 10; Caxton Legal Centre, submission, 4; Equality Australia submission, 10–11.

124 *Petrou v Bupa Aged Care Australia Ltd* [2017] VCAT 1706 [102–103]

This addition may create a clearer definition and assist with determinations under the Act.¹²⁵ While there may be some benefit in clarifying the ‘is not able to comply’ aspect, this could also be adequately addressed through the disadvantage approach.

We also received a submission that suggested the American ‘disparate impact’ approach. This approach states that any practice, policy, or rule that does not expressly discriminate against any protected class of people – but which has a disparate impact on the protected class of people – is unlawful if no objective justification for it can be shown to exist.¹²⁶

Caution should be exercised if adopting an approach from international jurisprudence that is reasonably similar to Australian formulations of indirect discrimination. Precedents already established in Australian case law could be shelved, and inconsistency between Queensland and federal laws created.

The Review’s position

The Review considers that:

- The test for indirect discrimination should not include a requirement to show that a person is not able to comply with a term, thereby eliminating the problem of literal interpretation.
- The prohibitively difficult requirement to establish the comparator pool (the higher proportion of people without the attribute who can comply) should be removed.
- The focus of the test for indirect discrimination should be on the complainant and not the group of persons with the same attribute.
- The test for indirect discrimination should recognise that people may experience indirect discrimination on combined grounds (see Discrimination on combined grounds below in this chapter).
- The ACT test for indirect discrimination is the preferred model because it frames the disadvantage test around the person with the attribute, rather than the whole group, and allows for an approach that considers combined grounds.
- Adopting the ACT approach will also improve consistency between Queensland and federal sex and age discrimination laws.
- Any updated legal test should require objective consideration of the impact on the complainant rather than be based on a subjective test. In any future amendment to the Act, the Explanatory Notes should be sufficiently detailed to avoid confusion about the legal test for indirect discrimination.

Reasonableness

All Australian jurisdictions, including those that have adopted the ‘disadvantage approach’, incorporate an element of reasonableness in the test for indirect discrimination. This means that even if a condition or requirement causes disadvantage, if the respondent can prove that it is reasonable, it will not be unlawful discrimination.

In determining reasonableness, courts in Australia have determined that a respondent does not need to show that it was ‘necessary’ to discriminate. Rather, they need to show that they were more than ‘inconvenienced’. The criteria must be objective and require the court to weigh the

¹²⁵ Queensland Civil and Administrative Tribunal submission, 21-22.

¹²⁶ Queensland Council for Civil Liberties submission, 2.

nature and extent of the discriminatory effect on the complainant against the reasons provided by the respondent.¹²⁷

Current approach

The Act currently contains a non-exhaustive list of factors to provide guidance on whether a term is reasonable. They are:

- the consequences of failure to comply with the term; and
- the cost of alternative terms; and
- the financial circumstances of the person who imposes, or proposes to impose, the term.¹²⁸

Some stakeholders maintained that retaining the ‘reasonableness’ aspect of the test is vital.¹²⁹ However, some submissions raised concerns with the current reasonableness factors because of their focus being primarily on financial terms rather than equity principles.¹³⁰

A participant in our roundtable with people with disability told us that:

*My main concern is that the defendants typically do this cost benefit analysis, where they assume we are equal with people who are able bodied... The equity principle is typically missing in these types of cost benefits analysis. And because we're still such a minority, we'll never win in this cost benefit analysis, because usually it comes down to money. And also social norms about what's reasonable.*¹³¹

Alternative approaches

Human rights approach

Two submissions advocated changing from a ‘reasonableness’ test to a ‘proportionality’ test based on the principles of the *Human Rights Act 2019* (Qld).¹³² It was said that this would be less affected by subjective views because of the requirement for logical and systematic analysis inherent in that approach.¹³³ The Queensland Civil and Administrative Tribunal noted that in any case, their decision-makers are required to interpret reasonableness in a way that is compatible with human rights through consideration of the proportionality test in the *Human Rights Act*.¹³⁴

Sex Discrimination Act and ACT approach

Another suggestion¹³⁵ was to incorporate the reasonableness factors under the Sex Discrimination Act (which is similar to the ACT Act) that include:

- the nature and extent of disadvantage
- the feasibility of overcoming the disadvantage, and

¹²⁷ *Secretary, Department of Foreign Affairs v Styles* (1989) 23 FCR 251; *Waters v Public Transport Corporation* (1991) 173 CLR 349; *JM v QFG & GK* [2000] 1 Qd R 373.

¹²⁸ *Anti-Discrimination Act 1991* (Qld) s 11(2).

¹²⁹ See for example: Associated Christian Schools submission 2; Legal practitioners' roundtable, 10 February 2022.

¹³⁰ Name withheld (Sub.135) submission 10; Queensland Advocacy Incorporated submission 11; Life without Barriers submission 1; Rita Jabri Markwell submission 2.

¹³¹ People with disability roundtable, 4 February 2022.

¹³² *Human Rights Act 2019* (Qld) s 13.

¹³³ See for example: Queensland Advocacy Incorporated submission, 11; Name withheld (Sub.135) submission, 10.

¹³⁴ Queensland Civil and Administrative Tribunal submission, 21.

¹³⁵ Australian Discrimination Law Experts Group submission, 6 and 20.

- whether the disadvantage is disproportionate to the result sought by the respondent.¹³⁶

In this test, financial circumstances are not mentioned specifically, but could be implied by the feasibility factor.

Victorian approach

The Victorian model provides a comprehensive list of factors and incorporates an element of proportionality balanced with cost and feasibility factors. The list also includes whether alternatives could be taken.¹³⁷

Associate Professor Dominique Allen described this test as containing ‘clear guidance about what constitutes reasonableness’ and based on her evaluation of the Victorian Equal Opportunity Act considers that it has ‘proved to be useful for lawyers, their clients, the Victorian Equal Opportunity and Human Rights Commission and the tribunal.’¹³⁸

The Review’s position

The Review considers that:

- Retaining the objective element of reasonableness is critical for a fair and balanced outcome.
- Given that few matters proceed to tribunal hearing, a proportionality test based on the Human Rights Act might be too onerous and complex for respondents to understand and apply. The bar for all duty holders (including individuals, private enterprise, public sector, and non-profit organisations) would be raised to the level expected of public entities under the Human Rights Act when acting and making decisions compatibly with human rights.
- The non-exhaustive list of factors to determine reasonableness should be expanded and updated, with the preferred model being the Victorian approach.

Discrimination on combined grounds

Currently, the Anti-Discrimination Act is based on separate and distinct grounds of discrimination (attributes), and the definitions of discrimination presume that discrimination occurs because of an attribute.¹³⁹

Across the course of the Review, we were told that the ‘single attribute’ approach does not adequately protect people who experience discrimination because of multiple attributes, and this creates a gap in protection for people who are at heightened risk of discrimination.¹⁴⁰ This issue was repeatedly identified by numerous stakeholders.¹⁴¹

In the Discussion Paper, we asked whether there is a need to protect people from discrimination because of the effect of a combination of attributes, and if so, how this should be framed in the Act.

We asked stakeholders about these issues throughout our consultation process, including in our engagements with non-government organisations that provide support to people who experience

¹³⁶ *Sex Discrimination Act 1984* (Cth) s 7B. Similar factors are incorporated into the *Discrimination Act 1991* (ACT) s 8(5), noting that the ACT Act refers to either ‘overcoming’ or ‘mitigating’ the disadvantage.

¹³⁷ This ensures consistency with section 13(d) *Human Rights Act 2019* that requires consideration of whether there are any less restrictive and reasonably available ways to achieve a legitimate purpose.

¹³⁸ Assoc Prof Dominique Allen submission, 2.

¹³⁹ See for example *Anti-Discrimination Act 1991* (Qld) s 8, 10, 11.

¹⁴⁰ Queensland Human Rights Commission, *Review of the Anti-Discrimination Act 1991* (Discussion Paper, November 2021) 19 and 42-43.

¹⁴¹ For example: Caxton Legal Centre consultation, 11 August 2021; Immigrant Women’s Support Service consultation, 19 August 2021; Youth Advocacy Centre Inc consultation, 3 September 2021.

discrimination because of combined grounds.¹⁴² This topic was explored in our roundtables with children and young people, people with disability, and our roundtable with legal practitioners.

We discuss the unique nature and impact of discrimination because of combined grounds in chapter 2.

Should combined grounds be recognised in the Act?

Of the 130 submissions that respond to the Discussion Paper, 45 addressed this issue. Of those, 38 supported recognition of discrimination on combined grounds,¹⁴³ and four did not support this.¹⁴⁴ Two submissions referred to this topic but did not provide a view.

Three themes emerged from our analysis of submissions and consultations that supported recognition of combined grounds discrimination:

- **Disconnect between the law and people's experience** – recognition of combined grounds discrimination would better reflect the reality of people's experiences, which are different for people who experience discrimination because of multiple, rather than a single attribute.
- **Proving combined grounds discrimination can be more difficult** – people who have experienced combined grounds discrimination can find it more difficult to prove discrimination, which can put them at a disadvantage when bringing a complaint.
- **Addressing a gap in protection** – changing the law to explicitly recognise discrimination on combined grounds would ensure that people with multiple attributes know they are protected by the law and close a gap in protection.

Disconnect between the law and real life

While the law focuses on separate and distinct 'grounds' of discrimination, in reality the reason for discrimination can be because of attributes that are multiple and overlapping.¹⁴⁵ Many submissions explained this disconnect between the legal framework and how people actually experience discrimination in practice.

Providing their experience of discrimination, one person who made a submission through our online Have Your Say survey told the Review:

¹⁴² For example: 2Sprints consultation, 13 Sep 2021; AMPARO Advocacy Inc consultation, 8 September 2021; Aboriginal and Torres Strait Islander Women's Legal Service North Queensland consultation, 15 September 2021, Queensland Indigenous Family Violence Legal Service consultation, 25 Aug 2021; Open Doors consultation, 13 September 2021.

¹⁴³ Queensland Council of Social Service submission; Public Advocate (Qld) submission, Fibromyalgia ME/CFS Gold Coast Support Group Inc submission; PeakCare Queensland Inc submission; Queensland Network of Alcohol and Other Drugs Ltd submission; Life Without Barriers submission; Pride In Law submission; Dr Nicky Jones submission; Name withheld (Sub.069) submission; LGBTI Legal Service Inc submission; Vision Australia submission; Women's Legal Service Qld submission, Australian Discrimination Law Experts Group submission; Tenants Queensland submission; Queensland Nurses and Midwives Union submission; Jenny King submission; Queensland Council of Unions submission; Ethnic Communities Council of Queensland submission; Maternity Choices Australia submission; Queensland Council for Civil Liberties submission; Community Legal Centers Queensland submission; Queensland Catholic Education Commission submission; Queensland Positive People submission, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission, Respect Inc and DecrimQLD submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Council for LGBTI Health submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission; Queensland Mental Health Commission submission; Multicultural Queensland Advisory Council submission; Department of Education (Qld) submission, Queenslanders with Disability Network submission.

¹⁴⁴ Name withheld (sub.026) submission; Australian Christian Lobby submission; Australian Christian Higher Education Alliance submission; Human Rights Law Alliance submission.

¹⁴⁵ Australian Discrimination Law Experts Group submission, 25.

As a person from a mixed-race background, I have experienced discrimination based on my perceived racial difference. I am also a female, so I have experienced harassment in a male-dominated world.

*I have learned to build a thick skin and not bite back when I feel racially discriminated. However, it makes me feel very sad and frustrated that my perceived racial difference due to the colour of my skin and shape of my eyes means I get treated differently. And then it's just very frustrating as a female that I can't be an "equal" in the world and/or where I'll be treated like a piece of meat just because of my gender. It's so prevalent and happens almost daily...*¹⁴⁶

Some submissions said that the current approach does not consider the compounding factors for why a person is exposed to discrimination¹⁴⁷ and is a reductive, 'single axis' approach.¹⁴⁸ We were told that recognising combined grounds discrimination in the Act, and changing its language, would better reflect the reality of people who have experienced multi-faceted discrimination.¹⁴⁹

We also heard that people who have combined attributes would be better protected if the law explicitly recognised them, because they would more readily identify as being included by the Act. This may assist in making the legislation more accessible.¹⁵⁰

The submissions we received reflect the three ways in which combined grounds discrimination can be conceptualised:

- **Sequential multiple discrimination** – when a person suffers discrimination on different grounds on separate occasions. For example, a woman with a disability might experience discrimination once because of her gender and on another occasion because of her disability. This type of discrimination is the easiest to deal with because each incident can be assessed separately.
- **Additive multiple discrimination** – when a person suffers discrimination on the same occasion but on two grounds. For example, a gay woman is harassed because she is a woman and gay. This type of discrimination is additive because each of the grounds can be identified independently.
- **Intersectional discrimination** – when two or multiple grounds operate simultaneously and interact in an inseparable manner, producing distinct and specific forms of discrimination.¹⁵¹

When considering these against coverage of the current Act, sequential multiple discrimination is covered, additive multiple discrimination is covered in a limited way given that a complaint can be made on the basis of more than one attribute, and intersectional discrimination is not covered.

¹⁴⁶ Name withheld (Form.411) survey response.

¹⁴⁷ LGBTI Legal Service Inc submission; Queensland Council of Unions submission.

¹⁴⁸ Queensland Nurses and Midwives Union submission, 10.

¹⁴⁹ See for example: Queensland Council of Social Service submission; Public Advocate (Qld) submission; Fibromyalgia ME/CFS Gold Coast Support Group Inc submission; LGBTI Legal Service Inc submission; Queensland Nurses and Midwives Union submission; Jenny King submission; Legal Aid Queensland submission; Queensland Council for LGBTI Health submission.

¹⁵⁰ Public Advocate Queensland, submission, 3.

¹⁵¹ Council of Europe, 'Intersectionality and Multiple Discrimination', *Gender Matters* (Web Page, 2022) <<https://www.coe.int/en/web/gender-matters/intersectionality-and-multiple-discrimination>>.

Proving discrimination can be more difficult

Some stakeholders observed that it can be difficult to ascribe conduct that is alleged to have contravened the Anti-Discrimination Act to one single attribute, and therefore can make it difficult to prove.¹⁵²

Discrimination may also occur based on the way in which the attributes intersect. However, framing a complaint in these terms can present more challenges than relying on a single attribute.¹⁵³ We were told that in these cases, often the legal advice provided to a prospective complainant is to choose the attribute that is the clearest.¹⁵⁴ When the complainant chooses one attribute, their claim may ultimately fail because it was the combined effect of the attributes that led to the discrimination.

For example, in the matter of *Given v State of Queensland (Queensland Police Service)*¹⁵⁵ the applicant, Marissa Given, was an Aboriginal woman suffering from post-traumatic stress disorder and a degenerative spinal condition. In 2016, she was arrested at her home and taken to the Brisbane Watch House. While in custody, Marissa was placed in a padded violent detention cell and forcibly changed into a suicide smock. As a result of her handling by officers of the Queensland Police Service, Marissa developed further injuries in her neck and thoracic spine, and her symptoms of PTSD returned.

It was submitted that Marissa was subject to unlawful discrimination because of her race and disability. However, creating a hypothetical comparator was extremely challenging and made it difficult to take into account Marissa's unique circumstances and attributes. Ultimately, the tribunal found that neither direct nor indirect discrimination could be established.

In reflecting on this case, Caxton Legal Centre considered that it exemplifies the 'failures of the Anti-Discrimination Act' because the applicant's multiple attributes made a fair comparison impossible.¹⁵⁶ This submission and case study exemplifies the view that First Nations people face specific barriers to establishing discrimination on the basis of combined grounds.

Addressing a gap in protection

Material received by the Review strongly suggests that people who experience discrimination on combined grounds are not being protected by the Act.

Our assessment of the information provided to the Review through consultations and submissions suggests that the greater number of attributes a person has, and the greater the intersection between those attributes, the less likely that person is to be adequately protected by the Act. This included being less likely to bring a complaint, and to be successful in proving discrimination.

Changing the law to explicitly recognise the lived reality of people's experience would address a gap in protection and ensure that people with multiple attributes know they are protected by the law.

Queensland Law Society also provided the view that express recognition in the Act may assist a respondent in being able to more comprehensively respond to a claim.¹⁵⁷

¹⁵² Tenants Queensland submission, 3; Queensland Council of Unions submission, 6; Equality Australia submission, 29.

¹⁵³ Life Without Barriers submission, 1.

¹⁵⁴ Queensland Council of Social Service submission, 2; Queensland Law Society submission, 6.

¹⁵⁵ *Given v State of Queensland (Queensland Police Service)* [2019] QCAT 16.

¹⁵⁶ Caxton Legal Centre submission, 3.

¹⁵⁷ Queensland Law Society submission, 6.



Astrid's* story

During our roundtable with children and young people, Astrid told us about the discrimination they have experienced in their life.

“So I’m someone who is disadvantaged in sort of a variety of ways, although I am white-passing (and that is a privilege) I am Indigenous, I’ve had a care and out of home care experience, I come from a background of trauma and abuse, I’m queer, I’m gender diverse, and I’m mentally ill, and have a disability. And I think kind of what you’re talking about [discrimination] – it’s cumulative. And it has an ongoing effect. And, and I think it just layers on top of each other. You know, it’s something that you carry with you all the time.

And when there’s multiple sort of ways of being ostracized.. there’s no way to sort of compartmentalise and go, ‘I’m just not going to deal with that today’. And you put it to the side or whatever - it feeds into every part of your life.

And it brings so much like fatigue, and exhaustion and frustration that even if you’re presented with the opportunity of, ‘Hey, do you want to try and get some justice? Do you want to speak up about your discrimination?’ You don’t have the energy and you don’t have the resources to do that.

And I think that is a huge and very detrimental impact is even if the resources are available, you don’t have the strength to do that once you’ve been oppressed in so many different ways.”

Astrid also told us about the challenges in making a complaint to the Commission. They said that:

“You’re kind of stuck in survival mode most of the time, like, the last thing you’re thinking of, is, hmm, like, I’m going to go through this really lengthy process to report discrimination like and, and even if you do have, like, the emotional and physical space to, you know, make those reports. It’s still like I you know, I struggle with stuff like paperwork, like executive dysfunction, etc. And it’s just so difficult to actually even know find what number to call to do that.”

* Not their real name



Concerns raised with this approach

Four submissions raised concerns with expressly recognising discrimination on combined grounds.¹⁵⁸

The most frequently cited concern raised in these submissions was that the concept of combined grounds (also known as intersectionality) is a contestable ideological concept or perspective.¹⁵⁹

The Australian Christian Higher Education Alliance considered that this approach could increase societal division through creating hierarchical group identity structures.¹⁶⁰

Unlike the Queensland Law Society, the Human Rights Law Alliance suggested that allowing combined grounds complaints would complicate the claim and make it more 'difficult, complex and costly for complainants'.¹⁶¹ We note that there would be no obligation for a complainant to rely on combined grounds and could therefore make their complaint on the basis of a single attribute if they chose.

A further concern was that measuring the influence of cumulative effects of potential discrimination requires an imprecise form of measurement which results in inaccurate assumptions, when compared to dealing with claims of a clear, single, protected attribute.¹⁶²

United Nations treaties and their commentary have recognised intersectionality in the context of international human rights law, including multiple and intersecting forms of discrimination.¹⁶³

Preventing discrimination on combined grounds

One or more grounds

The review of the ACT Discrimination Act recommended that their Act be amended so that it protects people against discrimination because of an attribute, or a combination of protected attributes.¹⁶⁴ As a result, the ACT Discrimination Act was amended to introduce the words 'one or more protected attributes'.

Of the submissions received by the Review that favoured legislative amendments for combined grounds discrimination, six submissions to the Review supported the ACT approach.¹⁶⁵

However, the ACT Discrimination Act does not expressly refer to a 'combination of protected attributes.' This raises a question about whether the cumulative impact of combined grounds discrimination is recognised by the ACT law.

The 'one or more' grounds approach has been interpreted broadly in international jurisdictions. For example, in South Africa the words 'one or more grounds'¹⁶⁶ has been interpreted to include discrimination based on combined grounds. A recent case exploring intersectionality involved the

158 Australian Christian Lobby submission; Australian Christian Higher Education Alliance submission; Christian Schools Australia submission; Human Rights Law Alliance submission.

159 See for example: Australian Christian Lobby submission; Australian Christian Higher Education Alliance submission; Christian Schools Australia submission; Human Rights Law Alliance submission.

160 Australian Christian High Education Alliance submission, 6.

161 Human Rights Law Alliance submission, 13.

162 Australian Christian Higher Education Alliance submission, 6.

163 See for example: United Nations Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/2010/47/GC.2 (19 October 2010) [18]; United Nations Committee on Economic, Social and Cultural Rights, *General Comment 20 on Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20 (2 July 2009) [27].

164 *Discrimination Act 1991* (ACT) ss 8(2) and 8(3).

165 Public Advocate (Qld) submission; PeakCare Queensland Inc submission; Queensland Council for Civil Liberties submission; Queensland Catholic Education Commission submission; Multicultural Queensland Advisory Council submission.

166 *Constitution of the Republic of South Africa 1996* (South Africa) ch 2 'Bill of Rights', s 9.3.

treatment of Black women who make up the overwhelming majority of domestic workers, but who were being excluded from a statutory definition of ‘employee’ for workplace injury and death.¹⁶⁷ The case was successfully argued on the combined grounds of gender and race.

However, there is no current case law under these provisions in the ACT. Therefore, whether a combination of attributes will be recognised by the tribunal or court is uncertain.

Combined grounds

The words ‘combined grounds’ are used in the Canadian legislation. This is a broader approach as it takes into account the effect of a combination of grounds, which accounts for the cumulative rather than the purely additive impact.

The Canadian Human Rights Act clarifies that:

For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.¹⁶⁸

Of the submissions that favored legislative amendments for combined grounds discrimination, eight submissions supported this approach.¹⁶⁹

Submissions in favour of the Canadian approach indicated that they preferred this drafting as it gave room to expressly recognise the combined effect of discrimination on multiple attributes. This would allow a complainant the flexibility to state their claim on the basis of one or more grounds, or because of the combination of grounds.

Therefore, ensuring the language of the Canadian Human Rights legislation’s clarifying provisions is also incorporated into the meaning of direct and indirect discrimination in the Queensland Act, should address any limitations with the ACT approach.

The Review’s position

The Review considers that:

- The Act should expressly protect people who experience discrimination on the basis of the combined effect of attributes.
- The Canadian approach is preferred to ensure the legislation captures the diversity of experience within combined grounds discrimination.
- A person should be entitled to make a claim on the basis that the discrimination was caused by one or more attributes, or on the basis of the cumulative impact of the combination of two or more attributes.
- Discrimination on combined grounds should be incorporated into the meaning of direct and indirect discrimination, and the language of the entire Act should be updated to remove the implication that discrimination is on the basis of a single attribute.
- Notwithstanding these changes, discrimination on combined grounds may continue to be a challenge for discrimination law in individual complaints because the barriers to accessing the complaints process and proving claims may continue to exist.

¹⁶⁷ *Mahlangu v Minister of Labour* [2020] ZACC 24 (Constitutional Court).

¹⁶⁸ *Canadian Human Rights Act*, RSC 1985, c H-6, pt I, 3.1.

¹⁶⁹ Pride in Law submission; LGBTI Legal Service Inc submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission; Name withheld (sub.135) submission; Caxton Legal Service submission; Queensland Advocacy incorporated submission; Queensland Law Society submission.

Recommendation 3

- 3.1** The Act should adopt the approach of the Discrimination Act 1991 (ACT) by creating a legislative provision entitled ‘meaning of discrimination’ which:
- explains that discrimination occurs when a person discriminates either directly or indirectly, or both directly and indirectly, against another person
 - defines direct discrimination
 - defines indirect discrimination
- 3.2** The definition of direct and indirect discrimination should expressly provide that discrimination can occur on the basis of one or more attributes, or because of the effect of a combination of attributes, and the Act should not use the singular language of ‘an attribute’.
- 3.3** Direct discrimination should be defined to mean where a person treats, or proposes to treat, another person unfavourably because of one or more attributes, or because of the effect of a combination of attributes.
- 3.4** The Act should clarify that the protected attribute or combination of attributes need only be one of the reasons, rather than a substantial reason, for the treatment.
- 3.5** The definition of indirect discrimination should include the following aspects:
- a person imposes a condition, requirement, or practice
 - which has or is likely to have the effect of disadvantaging the other person
 - because the person has one or more protected attributes, or because of the effect of a combination of attributes, and
 - the condition, requirement, or practice is not reasonable.
- 3.6** The Act should incorporate a non-exhaustive list of factors to determine reasonableness based on the Equal Opportunity Act 2010 (Vic).
-

Affirmative measures

To work towards achieving substantive equality, anti-discrimination laws have long endorsed taking proactive steps to address disadvantage through measures such as affirmative action, and policies and programs to support target groups.

Special measures and affirmative actions aim to ‘correct or compensate for past or present discrimination, or to prevent discrimination from recurring in the future’.¹⁷⁰

Examples of these measures can include:

- employment programs for people aged over 50
- initiatives to support women in male-dominated professions
- travel concessions for pensioners
- accommodation reserved for people who are experiencing domestic violence.

¹⁷⁰ Julie O'Brien, ‘Affirmative Action, Special Measures and the Sex Discrimination Act’ (2004) 27(3) *University of New South Wales Law Journal* 840.

The Review received 22 submissions about updating the approach to special or affirmative measures,¹⁷¹ and of those, all but two submissions¹⁷² were in favour of reframing these measures in the Act.

Language

There is no consistent approach to the use of terminology in this area of law, or between the words used by business, government, or the public to describe these measures.

We understand the term ‘affirmative measures’ is most commonly used with respect to employment,¹⁷³ whereas ‘special measures’ is more often used in relation to government programs and services that are intended to be for the benefit of a particular group.¹⁷⁴

The Committee on the Elimination of Racial Discrimination (CERD) has observed that some States use the words ‘affirmative measures’, ‘affirmative action’, or ‘positive action’ to mean ‘special measures’.¹⁷⁵

We recognise that the word ‘special’ in the term ‘special measures’ relates to measures to be implemented that are ‘exceptional, out of the ordinary or unusual’,¹⁷⁶ and not to any deficiency in a particular group. However, the terminology could have paternalistic connotations. Disability activists have long pointed out that people have human needs, not ‘special’ needs.

Because of this, we have concluded that a change in language away from ‘special measures’ to ‘affirmative measures’ is beneficial.

While ‘affirmative measures’ may be preferable language, we will refer to ‘special measures’ as needed below, given this is the language used by CERD and in the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)¹⁷⁷ and of many federal and state anti-discrimination laws.¹⁷⁸

For clarity, affirmative measures should not be confused with specific rights that exist independently in Queensland law, such as the right to belong to and enjoy one’s culture, religion, and language.¹⁷⁹

171 Name withheld (sub.026) submission; Assoc Prof Dominique Allen submission; Rainbow Families Queensland submission; Office of the Special Commissioner, Equity and Diversity (Qld); PeakCare Queensland Inc submission; One in Three Campaign submission; LGBTI Legal Service Inc submission; Vision Australia submission; Women’s Legal Service submission; Urban Development Institute of Queensland submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Queensland Council for Civil Liberties submission; Foundation for Aboriginal and Islander Research Action submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Law Society submission; Aboriginal and Torres Strait Islander Legal Service submission. We also received confidential officer-level feedback from a government department.

172 James Cook University submission; Name withheld (sub.026) submission.

173 For example, the Australian Public Service Commission has used affirmative measures as a preferred term since 2013, for example see: Australian Public Service Commission, ‘Affirmative measure for recruiting people with disability: guide for agencies.’ (Web page) <<https://www.apsc.gov.au/working-aps/diversity-and-inclusion/disability/affirmative-measure-recruiting-people-disability-guide-agencies>>

174 For example, limiting the right of local government areas to hold liquor licences: *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* (2010) 265 ALR 536; health services run for the benefit of Aboriginal and Torres Strait Islander people: *Central Northern Adelaide Health Service v Atkinson* (2008) 103 SASR 89.

175 United Nations Committee on the Elimination of Racial Discrimination, *General recommendation No. 32: The meaning and scope of special measures in the International Convention of the Elimination of All Forms of Racial Discrimination*, UN Doc CERD/C/GC/32 (24 September 2009) [12].

176 *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 at [42]-[44].

177 United Nations General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, (18 December 1979). Article 4 states that temporary special measures aimed at accelerating de facto equality before men and women shall not be considered discrimination.

178 See for example: *Disability Discrimination Act 1992* (Cth) s 45; *Sex Discrimination Act 1984* (Cth) s 7D; *Racial Discrimination Act 1975* (Cth) s 8; *Equal Opportunity Act 2010* (Vic) s 12.

179 See CERD, *General recommendation 32* [15]; *Human Rights Act 2019* sections 27-28.

Current approach

The Anti-Discrimination Act currently has two general exceptions to discrimination that fall into the category of affirmative measures:

- Welfare measures¹⁸⁰ – where an act is done for the welfare of the members of a group of people with a protected attribute.
- Equal opportunity measures¹⁸¹ – where an act is done to promote equal opportunity for a group of people with a protected attribute.

An alternative approach

Defining affirmative measures

In 2010, the Victorian Act was updated to clarify that taking ‘special measures’ to promote or realise substantive equality are ‘an expression of equality, rather than an exception to it.’¹⁸²

The Victorian Act contains safeguards to ensure a certain threshold is met and to prevent misuse of the provision, by requiring that the special measure is:

- undertaken in good faith to promote or realise substantive equality for members of a group with a particular attribute
- reasonably likely to achieve this purpose
- a proportionate means of achieving the purpose
- justified because the members of the group have a particular need for advancement or assistance.¹⁸³

Submissions to the Queensland Review expressed strong support for combining welfare and equal opportunity measures into a single provision and adopting the approach taken by the Victorian Equal Opportunity Act.¹⁸⁴ No other alternatives were proposed by stakeholders.

An exception, or an element of discrimination?

Cases decided under the special measures provision in the *Racial Discrimination Act 1975* (Cth) have determined that special measures are not, properly considered, exceptions to discrimination, but rather ‘integral to its meaning’.¹⁸⁵

The Australian Capital Territory Law Reform Advisory Council in 2015 recommended that special measures should not be seen as exceptions to discriminatory conduct, but rather as positive measures to promote equality.¹⁸⁶

In the Discussion Paper, we sought submissions on whether the Act should reframe these measures from being exceptions to discrimination to an essential element of the legislative framework with the goal of achieving substantive equality.

180 *Anti-Discrimination Act 1991* (Qld) s 104.

181 *Anti-Discrimination Act 1991* (Qld) s 105.

182 Victoria, Parliamentary Debates, Legislative Assembly, 10 March 2010, 786 (Rob Hulls, Attorney-General).

183 *Equal Opportunity Act 2010* (Vic) s 12.

184 See for example: Australian Discrimination Law Experts Group submission, 39; Queensland Council of Unions submission 17-18; Legal Aid Queensland submission, 58; Caxton Legal Centre submission, 17; Queensland Law Society submission, 11; Rainbow Families Queensland submission, 3.

185 Gageler J in *Maloney v The Queen* (2013) 252 CLR 168 at 292 [327].

186 ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final Report, 2015) 125.

Associate Professor Dominique Allen commented that framing welfare and equal opportunity measures as exceptions does not fit with the purpose of the law to 'redress historic inequality'. She noted that the law must be 'positive and proactive' in order to:

...encourage employers and goods and service providers to comply from the outset, rather than once a person has experienced discrimination, and to identify policies and practices that contribute to inequality.¹⁸⁷

Affirmative measures are a key mechanism by which organisations can work towards eliminating discrimination to the greatest extent possible. This approach to affirmative measures may also support the transition to a positive duty approach generally.¹⁸⁸

Making it clear and simple

Accessibility

Some submissions wanted to encourage the use of special measures by businesses and community organisations, and to this end advised that the legislation and processes should not be overly onerous, costly, or inflexible.¹⁸⁹ One submission suggested modernising and updating the examples provided in the Act, which they considered outdated.¹⁹⁰

In the case where a board of management wants to pass a resolution to reserve places for women, in circumstances where women are underrepresented, minimising procedural impediments to allow such affirmative measures to be put in place will mean that they are used more often.

The interaction with exemption applications

Currently, where a person wishes to rely on a welfare measure or equal opportunity measure exemption, they must prove that it applies, if a complaint is made. However, a person may apply to the tribunal for an exemption from the operation of specified provisions of the Act for up to five years. Such applications are often made as a form of insurance against a complaint, but may be refused because the general exceptions provisions are arguable, or they directly apply.¹⁹¹ We are aware of a common misunderstanding that a formal tribunal exemption is required.¹⁹²

The Office of the Special Commissioner, Equity and Diversity, was in favour of making the laws clearer and easier to access. In her experience, while many employers are ready and willing to implement these measures, having them expressed as exceptions to discrimination creates confusion and implies that employers need to 'seek approval' before utilising them.¹⁹³

The Queensland Council of Unions approved of a change in approach to support efforts to address discriminatory practices in a way that makes it clear that exemption applications are not required.¹⁹⁴ In Victoria, the practice of applying for exemptions in cases that are clearly special measures has continued. Many of these applications have been dismissed as not

187 Assoc Prof Dominique Allen submission, 3-4.

188 PeakCare Queensland Inc submission, 9.

189 Australian Industry Group submission, 11; Aboriginal and Torres Strait Islander Legal Service submission, 11

190 One in Three Campaign submission, 16-17.

191 See for example: *Re: Anglo Coal (Grosvenor Management) Pty Ltd & Ors* [2016] QCAT 160 (23 February 2016). For a full list of exemption application outcomes, see Queensland Human Rights Commission, 'Exemption application decisions', (Web page) <<https://www.qhrc.qld.gov.au/resources/legal-information/exemptions/exemption-application-decisions#content>>.

192 For instance, a recent Investigation Arista report considered whether the Queensland Police Service could have sought an exemption from the Tribunal to ensure the lawfulness of measures to address gender inequity, but the report did not identify or discuss the applicability of the equal opportunity measures exception in the Act. Crime and Corruption Commission (Qld), *Investigation Arista – a report concerning an investigation into the Queensland Police Service's 50-50 gender equity recruitment strategy* (Report, 12 May 2021) [56].

193 Office of the Special Commissioner submission, 2.

194 Queensland Council of Unions submission, 17-18.

being necessary because the measure or action is a special measure.¹⁹⁵ A small number of organisations and employers may continue to seek approval even when affirmative measures are clearly applicable. See also: chapter 8 for a discussion on Tribunal exemptions.

Human rights considerations

Human Rights Act

In recommending changes in Victoria, the Gardner Review noted the inconsistency between special measures in the Victorian *Charter of Human Rights and Responsibilities Act 2006* and the narrower approach in the Victorian anti-discrimination legislation.¹⁹⁶

In Queensland, the same considerations apply. The right to recognition and equality before the law under the *Human Rights Act 2019* contains an internal limitation that says:

Measures taken for the purpose of assisting or advancing person or groups of persons disadvantaged because of discrimination do not constitute discrimination.¹⁹⁷

The Queensland Law Society welcomed the opportunity to create better alignment with the Human Rights Act and to reflect the terminology of international human rights law generally.¹⁹⁸

Race convention obligations

We have considered the implications of any change to the current approach to affirmative measures on Aboriginal and Torres Strait Islander communities.

During our community consultations, First Nations people told us that special measures may undermine their self-determination, and this can have a detrimental effect.¹⁹⁹ This concern was also raised in two submissions made on behalf of Aboriginal peoples and Torres Strait Islander peoples, who strongly urged us to consider making a new regime that would be consistent with the *Convention on Elimination of all Forms of Racial Discrimination* (CERD).²⁰⁰

In summary, these stakeholders told us that these kinds of special measures should be temporary, taken only in partnership with community, managed locally, tailored to the community, and subject to continuous monitoring and objective measurement of effectiveness of the measures in meeting clear goals. The CERD requires that, when warranted, states should take special measures to ensure the adequate development and protection of certain racial groups for the purpose of guaranteeing full and equal enjoyment of rights and freedoms. The article has an important caveat that:

These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.²⁰¹

The Aboriginal and Torres Strait Islander Legal Service (ATSILS) recommended extreme caution in suggesting changes to define special measures as positive measures. The basis of their

195 See commentary and examples: Victorian Equal Opportunity and Human Rights Commission, 'Special measures', Victorian Discrimination Law (Wiki, 30 August 2019) <<http://austlii.community/foswiki/VicDiscrimLRes/Specialmeasures>>.

196 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 33.

197 *Human Rights Act 2019* (Qld) s 15(5).

198 Queensland Law Society submission, 11.

199 Public consultation, Yarrabah, 2 December 2021.

200 Foundation for Aboriginal and Islander Research Action submission; Aboriginal and Torres Strait Islander Legal Service submission.

201 United Nations General Assembly, *International Convention of the Elimination of All Forms of Racial Discrimination*, res 2106 (21 December 1965), art 2(2).

concern was that definitional changes could lead to misapplication or misuse, or the maintenance of separate rights for different racial groups, or entrenched and outdated measures.²⁰²

The Australian Discrimination Law Experts Group (ADLEG) urged that an assessment of special measures should include the views of the affected groups to avoid paternalistic measures that 'undermine the agency of members of that group'.²⁰³

The Foundation for Aboriginal and Islander Research Action (FAIRA) provided a detailed submission contending that there should be no ambiguity or doubt about whether a law is a special measure, or on the other hand racially discriminatory.²⁰⁴ FAIRA recommended that there be specific criteria included to establish whether a program or policy is a genuine special measure, including that they be temporary, established with free prior and informed consent, accountable to the people, appropriate for the situation, and subject to monitoring.²⁰⁵ These criteria are similar in substance to the requirements on State parties under CERD as expressed in General recommendation 32,²⁰⁶ but incorporate the higher bar of 'free, prior and informed consent' from the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).²⁰⁷

The issue of alcohol management plans (AMPs), particularly in the absence of genuine consultation, is a divisive issue for Aboriginal and Torres Strait Islander peoples and was the subject of a High Court challenge.²⁰⁸ In that matter, the court determined that special measures in the Racial Discrimination Act²⁰⁹ did not import a requirement from CERD or UNDRIP for consultation or free, prior, and informed consent. Hunyor considers that such measures in the absence of proper consultation are paternalistic, and rather than conferring additional benefits these are measures that limit rights of disadvantaged groups on the assumption it is 'good for them'.²¹⁰

Creating 'identified' positions for the employment of Aboriginal and Torres Strait Islander people falls into the category of affirmative measures for which there is no need for such intense scrutiny, and to do so would be counter-productive by discouraging their use.

A considered approach

Our analysis of submissions and academic research²¹¹ indicates there needs to be a careful and considered approach to the definition of affirmative measures. Legislative drafting must avoid entrenching disadvantage for marginalised racial groups, and in particular, First Nations peoples.

To meet international law obligations on race discrimination, the Act needs to provide a clear delineation between general affirmative measures, and the type of special measures implemented by government with respect to minority racial groups.

202 Aboriginal and Torres Strait Islander Legal Service submission, 4-5.

203 Australian Discrimination Law Expert Group submission, 39.

204 Foundation for Aboriginal and Islander Research Action submission, 4.

205 Foundation for Aboriginal and Islander Research Action submission submission, 6, and Attachment C – 10 'Principles to be applied to the Northern Territory Intervention.'

206 United Nations Committee on the Elimination of Racial Discrimination, *General recommendation No. 32: The meaning and scope of special measures in the International Convention of the Elimination of All Forms of Racial Discrimination*, UN Doc CERD/C/GC/32 (24 September 2009).

207 United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (13 September 2017), art 19.

208 *Maloney v The Queen* (2013) 252 CLR 168.

209 *Racial Discrimination Act 1975* (Cth) s 8.

210 Jonathon Hunyor, 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention', (2009) 14(2) *Australian Journal of Human Rights*, 63.

211 Jonathon Hunyor, 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention', (2009) 14(2) *Australian Journal of Human Rights*, 39-70.

A careful and considered approach is needed for the following reasons:

- Affirmative measures should be strongly encouraged in the work, accommodation, and goods and services sectors, with few onerous requirements for implementation in order to support proactive efforts to eliminate discrimination to the greatest extent possible; but
- Where a proposed measure involves programs, policies, and plans that are purported to be for the benefit of minority racial groups, and in particular First Nations peoples, a greater degree of consultation and scrutiny is required.

In the time available, we have not had the opportunity to adequately consult with First Nations people on this issue. However, based on the material we have received, we have developed an option for consideration. This will require further input from First Nations people.

The Review's position

The Review considers that:

- There are sound reasons to adopt the terminology 'affirmative measures' instead of the current 'equal opportunity' and 'welfare measures', and there is no benefit in retaining two separate sections.
- The Act should clarify that affirmative measures are a key concept in the shift towards substantive equality, and to be consistent with the *Human Rights Act 2019*, affirmative measures should be incorporated into the meaning of discrimination.
- Drafting of the affirmative measures provision needs to ensure the Queensland Government recognises its obligations under international law when implementing plans, policies, or programs for minority racial groups, with particular regard to CERD article 2(2) and General recommendation 32.

Recommendation 4

- 4.1** The Act should include a new provision called affirmative measures, contained within the part of the Act that explains the meaning of discrimination rather than in general exceptions, defined as per section 12 of the Equal Opportunity Act 2010 (Vic). The Act should include contemporary examples to demonstrate how affirmative measures may apply in practice.
 - 4.2** The Act should impose a different and higher standard for measures that apply to government plans, policies, or programs in relation to minority racial groups, requiring that they are reasonable and proportionate to the scope and impact of the measures on the affected group. The Act should confirm that such measures be designed and implemented after prior consultation with affected communities, and with the active participation of the communities.
 - 4.3** Prior to the enactment of legislation, the Queensland Government should ensure that Aboriginal and Torres Strait Islander peoples are genuinely consulted about this proposed approach.
-

Reasonable accommodations

The Terms of Reference ask us to consider:

- whether there is a need for any reform regarding the definitions in the Anti-Discrimination Act, including unjustifiable hardship²¹²
- whether a more positive approach is required to eliminate discrimination²¹³
- whether the Act should contain protections that exist in other Australian discrimination laws.²¹⁴

Throughout the Review, we asked stakeholders if the Act is effective in ensuring that reasonable accommodations are made when appropriate to avoid and eliminate discrimination, or whether the law needs to change.

In the Discussion Paper, we invited responses to questions about how reasonable accommodations (and unjustifiable hardship) should be referred to and framed in the Act, and whether the current obligations should be reframed to a positive obligation to make adjustments. We received 35 submissions on these subjects.²¹⁵

We also held focused consultations about these topics during our initial consultations and roundtables, including with people with disability, government agencies, and small business and industry.²¹⁶ We heard from 62 people with disability through our online Have your Say survey.

We recommend that a standalone positive duty to make reasonable accommodations be introduced. While no longer framed as exceptions to discrimination, we recommend that the concept of unjustifiable hardship be retained as a factor to determine whether accommodations are reasonable.

The terms ‘reasonable adjustments’ and ‘reasonable accommodation’ are often used interchangeably. While both are appropriate, we prefer the term reasonable accommodation because it is the wording of the *Convention on the Rights of Persons with Disabilities*,²¹⁷ and reflects an intention to ensure that people with disability enjoy their rights on an equal basis with others.

212 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(e).

213 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(b).

214 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(g).

215 Name withheld (Sub.026) submission; Public Advocate (Queensland) submission; Medical Insurance Group Australia submission; Assoc Prof Dominique Allen submission; Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission; Joint Churches submission; Rainbow Families Queensland submission; PeakCare Queensland Inc; Christian Schools Australia submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Maurice Blackburn Lawyers submission; Vision Australia submission; Human Rights Law Alliance submission; Women’s Legal Service Qld submission; Australian Discrimination Law Experts Group submission; Queensland Council of Unions submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Name withheld (Sub.135) submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre submission; Queensland Mental Health Commission submission; Department of Education (Qld) submission; Queenslanders with Disability Network submission; Rita Jabri Markwell submission; Chamber of Commerce and Industry Queensland submission.

216 People with disability roundtable, 4 February 2022; Small business roundtable, 7 March 2022; Government representatives roundtable, 14 February 2022.

217 United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, 61st sess, UN Doc A/RES/61/106 (13 December 2006).

Current approach

‘Reasonable accommodations’ refers to making suitable provisions or adjustments to accommodate a person’s attributes to avoid discrimination and achieve substantive equality. The provision of accessible toilets is an example of reasonable accommodation for a person with disability.

During our roundtable with people with disability, we were told about a situation of a person having no access to toilets at her workplace, and needing to go home twice a day for this reason. Even though the access issue could have been reasonably easily fixed, because her employer failed to address the issue in a reasonable timeframe, she had to stop working there altogether.²¹⁸

The Act implicitly provides for ‘reasonable accommodations’ in the current definition of indirect discrimination. Indirect discrimination occurs if a term is imposed, which a person cannot comply with because of their attribute, and the term is not reasonable.²¹⁹

However, where a person with disability requires ‘special services or facilities’ and the supply of those facilities would impose ‘unjustifiable hardship’, the Act provides for exceptions that allow for people with disability to be subject to discrimination in the areas of work, education, goods and services, accommodation, and clubs.²²⁰

The term ‘unjustifiable hardship’ also appears in the current Act in relation to:

- an exception to workplace discrimination on the basis of ‘impairment’, where the circumstances of a person’s ‘impairment’ causes unjustifiable hardship for an employer, depending on the impairment and the nature of the work;²²¹ and
- an exception to discrimination on the basis of sex, where the supply of separate sleeping accommodation for men and women working together would cause unjustifiable hardship to the employer.²²²

Positive duty to make reasonable accommodations

In the Discussion Paper, we asked for submissions on whether the Act should adopt a positive duty to make ‘reasonable accommodations’, for which attributes and areas, and using what factors to assess the ‘reasonableness’ of accommodations.

Of the 33 submissions that responded to this question, 29 were in favour of a positive duty in some form.²²³ Of the submissions that expressed concerns about a positive duty, stakeholders noted the challenges for smaller, not-for-profit organisations with limited resources to meet the duty, and potential inconsistencies with obligations in other contexts, such as in health settings or

218 People with disability roundtable, 4 February 2022.

219 *Anti-Discrimination Act 1991* (Qld) s 11.

220 *Anti-Discrimination Act 1991* (Qld) ss 35, 44, 51, 92, 100.

221 *Anti-Discrimination Act 1991* (Qld) s 36.

222 *Anti-Discrimination Act 1991* (Qld) s 30.

223 Name withheld (Sub.026) submission; Public Advocate (Queensland) submission; Assoc Prof Dominique Allen submission; Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission; Rainbow Families Queensland submission; PeakCare Queensland Inc; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Maurice Blackburn Lawyers submission; Vision Australia submission; Human Rights Law Alliance submission; Women’s Legal Service Qld submission; Australian Discrimination Law Experts Group submission; Queensland Council of Unions submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Name withheld (Sub.135) submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre submission; Queensland Mental Health Commission submission; Department of Education (Qld) submission; Queenslanders with Disability Network submission.

with Fair Work laws.²²⁴ As we discuss below, these concerns may be addressed by ensuring the duty is subject to appropriate limitations.

Comparative approaches

How the duty is framed

Under the federal Disability Discrimination Act, direct discrimination occurs if a person ‘does not make, or proposes not to make, reasonable adjustments’ that has the effect that the person ‘because of the disability, [is] treated less favourably than a person without the disability would be treated in circumstances that are not materially different.’²²⁵

In *Sklavos v Australasian College of Dermatologists*,²²⁶ the court held that the reason for not making the adjustment must still be ‘because of’ the person’s disability for direct discrimination to occur. For example, in order to succeed under federal law, an employee must show that the employer’s reason not to provide a screen reader was because the employee is blind.

To address this, the Australian Human Rights Commission has recommended that the Australian Government amend federal legislation by creating a new standalone provision that provides for a positive duty to make reasonable adjustments unless doing so would involve unjustifiable hardship.²²⁷

Both Victorian and Northern Territory anti-discrimination legislation create a standalone positive duty to make reasonable adjustments.

In Victoria, the duty is specifically and separately provided for in relation to particular areas of discrimination. For example, an employer has a duty to make reasonable adjustments for employees with disabilities who require adjustments to perform the genuine and reasonable requirements of their employment.²²⁸ In education, the duty is for educational authorities to make reasonable adjustments for a person with disability so that they can participate in or derive substantial benefit from an educational program.²²⁹

Practitioners in Victoria have noted that the introduction of positive duties in the Equal Opportunity Act was one of that Act’s strengths.²³⁰

The Northern Territory provides a generalised duty that requires duty-holders to accommodate a special need a person has because of an attribute, and failure to accommodate includes making inadequate or inappropriate provision to accommodate the need, and where a person unreasonably fails to provide for that need.²³¹

224 Joint Churches submission, 3; James Cook University submission, 1; Australian Industry Group submission, 4; Medical Insurance Group Australia submission, 3.

225 *Disability Discrimination Act 1992* (Cth) s 5(2). See also the definition of indirect discrimination in section 6(2) of the *Disability Discrimination Act 1992* (Cth) which provides indirect discrimination occurs if a person can only comply with a requirement or condition if reasonable adjustments are given, and the failure to make reasonable adjustments has the effect of disadvantaging a person with disability.

226 *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128.

227 Australian Human Rights Commission, ‘Information concerning Australia’s compliance with the Convention on the Rights of Persons with Disabilities’, Submission to the UN Committee on the Rights of Persons with Disabilities, 25 July 2019.

228 *Equal Opportunity Act 2010* (Vic) s 20. See also sections 22A (in relation to contract workers with disability) and 33 (in relation to partners in a firm with disability).

229 *Equal Opportunity Act 2010* (Vic) s 40.

230 Legal Aid Queensland submission, 23 citing Assoc Prof Dominique Allen, ‘An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)’ (2020) 44(2) *Melbourne University Law Review* 459, 488.

231 *Anti-Discrimination Act 1992* (NT) s 24.

Attributes and areas of protection

Under the Disability Discrimination Act, a duty to make reasonable adjustments is owed to people with disability in all areas.²³² No other federal anti-discrimination laws provide for reasonable adjustments.

In Victoria, the duty only relates to people with disability in relation to employment, education, and the provision of goods and services.²³³

In the Northern Territory, the duty extends to all attributes and all areas.²³⁴

Reasonableness of the accommodation

In Australia, an assessment of 'reasonableness' under a positive duty involves consideration of whether the accommodation causes 'unjustifiable hardship', or at least consideration of the same or similar factors.

Federal law

Under federal disability discrimination law, an adjustment is a reasonable adjustment unless it would impose an unjustifiable hardship.²³⁵ The definition of 'unjustifiable hardship' takes account of:

- the nature of the benefit or detriment to any person concerned
- the effect of the disability of any person concerned
- the financial circumstances of, and the estimated amount of expenditure required by, the person required to make the accommodation
- the availability of financial and other assistance to the person required to make the accommodation
- any relevant action plans given to the Commission under that Act.²³⁶

Disability standards provide further guidance on what constitutes a reasonable adjustment. Breach of a disability standard is unlawful, while acting in accordance with a disability standard is a defence to unlawful discrimination.²³⁷ There are disability standards in relation to access to premises, education, and public transport.²³⁸

The Disability Discrimination Act retains general exceptions to discrimination if avoiding the discrimination would impose an unjustifiable hardship on the discriminator, based on the same factors already described.²³⁹

Victoria

In Victoria, whether an adjustment is reasonable requires consideration of all relevant facts and circumstances, including consideration of a non-exhaustive list of factors, which vary slightly depending on the area of discrimination. The factors common to all areas are the:

- person's circumstances, including the nature of the disability
- nature of the adjustment

²³² *Disability Discrimination Act 1992* (Cth) ss 5(2) and 6(2).

²³³ *Equal Opportunity Act 2010* (Vic) ss 20, 22A, 33, 40, 45.

²³⁴ *Anti-Discrimination Act 1992* (NT) s 24.

²³⁵ *Disability Discrimination Act 1992* (Cth) s 4(1) (definition of 'reasonable adjustment').

²³⁶ *Disability Discrimination Act 1992* (Cth) s 11.

²³⁷ *Disability Discrimination Act 1992* (Cth) ss 31-34.

²³⁸ *Disability (Access to Premises – Buildings) Standards 2010* (Cth); *Disability Standards for Accessible Public Transport 2002* (Cth); *Disability Standards for Education 2005* (Cth).

²³⁹ *Disability Discrimination Act 1992* (Cth) ss 21B, 29A.

- financial circumstances of the person required to provide the adjustment – except in education
- effect on the workplace / educational authority / service provider in making the adjustment, including financial impact, the number of people who will benefit or be disadvantaged by the adjustment
- consequences for that person in making the adjustment
- consequences for the person with disability if the adjustment is not made
- relevant action plans under the *Disability Discrimination Act 1992* (Cth) and the *Disability Act 2006* (Vic).²⁴⁰

For employment matters, additional relevant factors include the nature of the employee's role, the size and nature of the organisation, and impacts on efficiency.²⁴¹

For education matters, additional consideration must be given to the educational impact on the student if the adjustment is made, and the effect on the educational authority, staff, other students, and any other person.²⁴²

For each area in which there is a positive duty, there is also a separate exception to discrimination if it is not reasonable to make adjustments.²⁴³

Northern Territory

In the Northern Territory, assessing whether there has been an unreasonable failure to provide for a special need depends on all the relevant circumstances, including the:

- nature of the special need
- cost of accommodating the special need and the number of people who would benefit or be disadvantaged
- financial circumstances of the person
- disruption that accommodating the special need may cause
- nature of any benefit or detriment to all persons concerned.²⁴⁴

There is an additional general exception to discrimination where it is unreasonable to require a person to supply special services or facilities, which provides the same list of factors to consider.²⁴⁵

Queensland

Under the current Act, where a person does not supply required special services or facilities, it is an exception to discrimination if the supply of those special services or facilities would impose unjustifiable hardship.²⁴⁶

The factors relevant to determining unjustifiable hardship are very similar to those considered under Northern Territory legislation.²⁴⁷

²⁴⁰ *Equal Opportunity Act 2010* (Vic) ss 20, 22A, 33, 40, 45.

²⁴¹ *Equal Opportunity Act 2010* (Vic) ss 20, 22A, 33.

²⁴² *Equal Opportunity Act 2010* (Vic) s 40.

²⁴³ *Equal Opportunity Act 2010* (Vic) s 23 (employees); s 34 (person or partner); s 41 (education); s 46 (goods and services).

²⁴⁴ *Anti-Discrimination Act 1992* (NT) s 24(3).

²⁴⁵ *Anti-Discrimination Act 1992* (NT) s 58.

²⁴⁶ *Anti-Discrimination Act 1991* (Qld) ss 35, 44, 51, 92, 100.

²⁴⁷ *Anti-Discrimination Act 1992* (NT) s 24(3).

A positive stand-alone duty

Rather than an implied obligation as it exists under the current Act, an express positive duty to make reasonable accommodations would improve clarity and give greater certainty regarding rights and obligations of the parties.²⁴⁸ Referring to ‘reasonable adjustments’ or ‘reasonable accommodations’, rather than ‘special services and facilities’, is consistent with the language of the Disability Discrimination Act, and is a term better understood by the community and could assist with raising awareness.²⁴⁹

Fourteen submissions supported a standalone duty, such as that found in the Victorian legislation.²⁵⁰ This would mean that failure to provide reasonable accommodations, in and of itself, would provide the basis for a complaint of unlawful discrimination.²⁵¹ Framing the duty in this way also supports a proactive rather than reactive approach to addressing substantive inequality.²⁵² It encourages early intervention to avoid discrimination rather than waiting for discrimination occur, saving the emotional and financial cost on the individual to make a complaint. In contrast, the current Act, through its ‘unjustifiable hardship’ exemptions, appears to support a person’s refusal to make accommodations.²⁵³

Two submissions suggested adopting the model in the Disability Discrimination Act, which incorporates the duty under current definitions of direct and indirect discrimination.²⁵⁴ However, other submissions noted potential problems arising from that approach, referring to the case of *Sklavos v Australasian College of Dermatologists*²⁵⁵ discussed above.²⁵⁶

During one of our roundtable consultations, we heard from people with disability about the importance of creating positive obligations to make reasonable accommodations.²⁵⁷ Reflecting on their experiences of discrimination, one person said that:

*You know, because it keeps happening time and time again, throughout your life has that like, make you feel over time, not just one occasion. But you know, that cumulative effect of it continually happening worn out, probably makes me feel a little bit like a second class citizen. They don’t seem to care that disabled people can’t get in there. So yeah, doesn’t feel good. But when I find a place that does allow access, I’m like, going there all the time and saying thank you for you know, you know, it’s great.*²⁵⁸

When we spoke with peak bodies representing small businesses in Queensland, we heard that there was a willingness to address barriers to inclusion:

248 Legal Aid Queensland submission, 12; Name withheld (Sub.135) submission, 13-14.

249 Legal Aid Queensland submission, 12.

250 Assoc Prof Dominique Allen submission; Rainbow Families Queensland submission; Vision Australia submission; Queensland Council for Civil Liberties submission; Australian Discrimination Law Experts Group submission; Legal Aid Queensland submission; Name withheld (Sub.135) submission; Queensland Advocacy Incorporated submission; Queensland Council of Unions submission; Aged and Disability Advocacy Australia submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission, Department of Education (Qld) submission; Queenslanders with Disability Network submission.

251 Australian Discrimination Law Experts Group submission, 21.

252 Aged and Disability Advocacy Australia submission, 3-4.

253 Maurice Blackburn Lawyers submission, 5.

254 Maurice Blackburn Lawyers submission; Human Rights Law Alliance submission.

255 *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128.

256 Queensland Advocacy Incorporated submission, 13; Australian Discrimination Law Experts Group submission, 21.

257 People with disability roundtable, 3 February 2022.

258 People with disability roundtable, 3 February 2022.

*We actively remove those barriers and try and create access. So, we don't get to see a lot of complaints from the small business or social enterprise perspective about having to make those changes, we actually hear the opposite from our social enterprises saying we need to be more accepting, more inclusive, make those changes quickly.*²⁵⁹

We heard that in some industries there is some room for improvement in creating accessibility for people with disabilities, but that:

*Our members have asked us to provide them with more and more education about how they could do that better. So any legislative or or structural support or pressure to expedite that would be great.*²⁶⁰

In what contexts should the duty apply?

Attributes

Eleven submissions supported the introduction of a positive duty in relation to all attributes.²⁶¹ Fifteen submissions particularly referred to a positive obligation in relation to disability, or only in relation to disability.²⁶² Some submissions supported the duty in relation to other attributes such as religion, domestic violence, older persons, pregnancy, and family responsibilities.²⁶³

Under indirect discrimination, the implicit obligation to make reasonable accommodations extends to all attributes and areas. However, under the current Act, an express obligation, if any, only exists in relation to impairment discrimination in certain areas via the 'unjustifiable hardship' exception where special services or facilities are required. It is also framed in the negative, as opposed to a positive obligation.

A positive duty in relation to disability is required by the *Convention on the Rights of Persons with Disabilities* (CRPD). The CRPD defines discrimination as including the 'denial of reasonable accommodation', and specifically provides that '[i]n order to promote equality and eliminate discrimination, State Parties shall take all appropriate steps to ensure that reasonable accommodation is provided'.²⁶⁴

Areas

The current requirement to provide 'special services and facilities' exists in relation to work, education, goods and services, accommodation, and clubs.²⁶⁵

²⁵⁹ Small business roundtable, 7 March 2022.

²⁶⁰ Small business roundtable, 7 March 2022.

²⁶¹ Rainbow Families Queensland submission; Australian Discrimination Law Experts group submission; Queensland Catholic Education Commission submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre In submission.

²⁶² Public Advocate (Queensland) submission; Assoc Prof Dominique Allen submission; Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission; Christian Schools Australia submission; Maurice Blackburn Lawyers submission; Vision Australia submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Name withheld (Sub.135) submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Mental Health Commission submission; Department of Education (Qld) submission; Queenslanders with Disability Network submission; Queensland Council of Unions submission.

²⁶³ Legal Aid Queensland submission; Community Legal Centres Queensland submission; Women's Legal Service Qld submission; Department of Education (Qld) submission; Human Rights Law Alliance submission; Assoc Prof Dominique Allen submission; Queensland Council of Unions submission.

²⁶⁴ United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, 61st sess, UN Doc A/RES/61/106 (13 December 2006) Articles 2 and 5(3).

²⁶⁵ *Anti-Discrimination Act 1991* (Qld) ss 35, 44, 51, 92, 100.

Nine submissions recommended that the duty apply to all areas, and that this was necessary in order ‘to achieve substantive equality’.²⁶⁶ Some submissions noted certain areas for protection such as employment,²⁶⁷ and education.²⁶⁸

What accommodations are required?

To ensure it is effective, it is important that any positive duty is clearly expressed.

A number of submissions endorsed the Victorian model, which imposes the duty to make reasonable adjustments and determines reasonableness specific to each area of activity.²⁶⁹

The Australian Discrimination Law Experts Group (ADLEG) recommended wording based on both the Northern Territory and federal approaches.²⁷⁰

Two submissions proposed a model that any refusal to accommodate disability should be unlawful, unless strictly necessary.²⁷¹ Caxton Legal Centre instead preferred an approach that would require reasonable accommodations to be made unless refusal to do so ‘is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’.²⁷²

Submissions also made the following suggestions in relation to this issue:

- An accommodation is reasonable if it is needed to ensure a person with disability does not experience discrimination and it does not impose unjustifiable hardship at the time of the alleged discrimination.²⁷³
- The relevant time for assessing unjustifiable hardship should be at the time of the discriminatory conduct, not at a later time. This draws in issues for consideration such as whether the person required to make the accommodations had information about the nature of the disability and the type of adjustment required, and had adequate time to put the accommodation in place.²⁷⁴
- An accommodation that was determined without giving significant weight to the view of the person with disability is not a reasonable adjustment.²⁷⁵
- There needs to be consistency with federal disability standards and obligations under other laws, such as industrial laws.²⁷⁶

266 Vision Australia submission; Queensland Council for Civil Liberties submission; Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission; Rainbow Families Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Australian Discrimination Law Experts Group submission.

267 Human Rights Law Alliance submission; Queensland Council of Unions submission; Respect Inc and DecrimQLD submission; Australian Industry Group submission; Queenslanders with Disability Network submission; Assoc Prof Dominique Allen submission.

268 Assoc Prof Dominique Allen submission; Vision Australia submission; Rainbow Families Queensland submission.

269 Youth Advocacy Centre Inc submission; Legal Aid Queensland submission; Queenslanders with Disability Network submission; Queensland Council of Unions submission; PeakCare Queensland Inc submission; Queensland Council for Civil Liberties submission.

270 Australian Discrimination Law Experts Group submission, 21-24.

271 Queensland Advocacy Incorporated submission, 13; Rita Jabri Markwell submission, 3-4 (in the context of disability discrimination in education). See also Community Legal Centers Queensland, ‘Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland’, (Web page) <<https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>>.

272 Caxton Legal Centre submission, 5. See also Community Legal Centers Queensland, ‘Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland’, (Web page) <<https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>>.

273 Australian Discrimination Law Experts Group submission, 24.

274 Australian Discrimination Law Experts Group submission, 24; Name withheld (Sub.135) submission, 14. See also Assoc Prof Dominique Allen, ‘An Evaluation of the Mechanisms designed to promote substantive equality in the Equal Opportunity Act 2010 (Vic)’ (2020) 44(2) *Melbourne University Law Review* 459, 489 – 490.

275 Australian Discrimination Law Experts Group submission, 23.

276 Christian Schools Australia submission, 9; Queensland Council of Unions submission, 40.

- Where government is the service provider or provides public funding to the service provider for the activity, there may be a greater expectation that the accommodation will be made, particularly where the main barrier is cost. This also models best practice and sets cultural norms.²⁷⁷

One submission gave the following example of where accommodations given did not achieve their purpose:

*In education for example my daughter is dyslexic so extra time was granted for tests/exams etc [sic] but it didn't really help her. She could have better educational success if her assessments were verbal. Trying to fit people into boxes and generic criteria doesn't always work.*²⁷⁸

The Convention on the Rights of Persons with Disabilities defines 'reasonable accommodation' to mean 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.'²⁷⁹

The Committee on the Rights of Persons with Disabilities explains this definition by breaking it down into two parts:

- First, that 'reasonable accommodation' is necessary and appropriate to achieve the objective of equality. In this context, 'reasonable' means that the accommodation is relevant, appropriate, and effective for the person with disability. This implies that the accommodation is developed in dialogue with the person with disability concerned.
- Second, that the accommodation does not impose 'a disproportionate or undue burden' on the duty bearer, setting a limit to the duty.²⁸⁰

What factors should be used to determine reasonableness?

Factors used in Victoria for assessing reasonableness received support from stakeholders.²⁸¹

One factor absent from the Victorian criteria for assessing reasonableness, but within the factors for assessing whether a term imposed under 'indirect discrimination' is reasonable, is whether the disadvantage to the person subject to discrimination 'is proportionate to the result sought by the person who imposes or proposes to impose' the term.²⁸² This reflects the approach endorsed by Caxton Legal Centre previously referred to.²⁸³

As already indicated, the factors for assessing reasonableness are the same, or similar to, the factors for assessing unjustifiable hardship.²⁸⁴

²⁷⁷ Youth Advocacy Centre submission, 3.

²⁷⁸ Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission, 12.

²⁷⁹ United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, 61st sess, UN Doc A/RES/61/106 (13 December 2006) Art 2.

²⁸⁰ United Nations Committee on the Rights of Persons with Disabilities General comment No. 6 (2018) on equality and non-discrimination, UN Doc CRPD/C/GC/6 (26 April 2018) [25]-[26].

²⁸¹ Youth Advocacy Centre submission; Legal Aid Queensland submission; Queenslanders with Disability Network submission; Queensland Council of Unions submission; PeakCare Queensland Inc submission; Queensland Council for Civil Liberties submission.

²⁸² *Equal Opportunity Act 2010* (Vic) s 9(3)(b).

²⁸³ Caxton Legal Centre submission, 5.

²⁸⁴ See also Legal Aid Queensland submission, 13-14.

Some submissions supported the current criteria for assessing unjustifiable hardship²⁸⁵ or recommended that the financial circumstances of the person required to make the accommodation be a primary or only consideration.²⁸⁶ The Chamber of Commerce and Industry Queensland suggested that the size of the business in terms of profitability and employee numbers should be considered.²⁸⁷ Consistent with this approach, some submissions suggested that large businesses, corporations, and governments should only be able to argue unjustifiable hardship in narrow circumstances.²⁸⁸

In contrast, some stakeholders told us that too much weight is given to the cost and effort of providing special services or facilities, and not enough to the impacts on the person requiring the services or facilities and the broader social benefits of inclusion.²⁸⁹ We were also told that concepts of ‘unreasonable’ and ‘unjustifiable’ are often skewed in favour of able-bodied people’s norms, which can be prejudicial to people with disability.²⁹⁰

During a roundtable session with people with disability one person told the Review:

*My issue with this particular point is that the language is very vague, and what’s reasonable to one person isn’t necessarily reasonable to another. And it depends on your point of view. And so and I think legally it needs to be more set out, so that everybody understands what it means.*²⁹¹

We also received submissions that suggested:

- The criteria should be consistent with Commonwealth disability discrimination laws and other relevant standards.²⁹²
- There should be an obligation to make efforts to identify and secure funding to assist with any financial costs of making accommodations, as is the case under federal law.²⁹³
- There should be an obligation to demonstrate what consideration was given to alternative adjustments short of unjustifiable hardship that would reduce the discriminatory effect of current arrangements.²⁹⁴

The Review’s position

The Review considers that:

- There should be a positive standalone duty to make reasonable accommodations for a person’s disability in all areas.
- The aim of substantive equality for people with disability would be best supported by a requirement to provide reasonable accommodation across all areas of activity under the Act.
- The duty should not extend to other attributes aside from disability, but simplifying indirect discrimination as recommended by the Review will assist in strengthening rights to reasonable accommodation for all attributes and areas.

285 Australian Industry Group submission, 4; Queensland Catholic Education Commission submission, 4.

286 Joint Churches submission, 17; Equality Australia submission, 28; Queensland Council for Civil Liberties submission, 3.

287 Chamber of Commerce and Industry Queensland submission, 12.

288 Vision Australia submission 3; Youth Advocacy Centre submission, 3.

289 Queensland Advocacy Incorporated, 14; Caxton Legal Centre, 5; Australian Discrimination Law Experts Group submission, 24; Community Legal Centres Queensland submission, 2; Legal Aid Queensland submission, 13.

290 Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission, 11-12; Caxton Legal Centre, 5.

291 Small business roundtable, 7 March 2022.

292 Department of Education (Qld) submission, 4; Queensland Advocacy Incorporated submission, 14; Christian Schools Australia submission, 9.

293 Australian Discrimination Law Experts Group submission, 24.

294 Australian Discrimination Law Experts Group submission, 24. This is found in the criteria for assessing indirect discrimination at section 9(3)(e) of the Equal Opportunity Act 2010 (Vic).

- To ensure the positive duty does not extend to accommodations that impose ‘a disproportionate or undue burden’ or an ‘unjustifiable hardship’ on the duty bearer, the duty should be subject to limits.
- While the financial circumstances of the person required to supply reasonable accommodations is an important factor for assessing whether an accommodation is reasonable, proportionate regard must also be given to the impact on the person who requires the accommodation, and broader consideration of the benefits and disadvantages of the accommodation on other people.
- Inclusive factors for assessing whether an accommodation is reasonable should be adopted that, while not significantly departing from the current test for ‘unjustifiable hardship’, strike a better balance between these competing interests.
- Creating a non-exhaustive list would mean that any other matters, such as intersection with federal disability standards, or efforts taken to secure financial assistance to make the reasonable accommodation, could be considered in appropriate cases.

Unjustifiable hardship

The Terms of Reference requires the Review to consider key definitions in the Act, including the definition of unjustifiable hardship.²⁹⁵

Under the current Act, the exception of ‘unjustifiable hardship’ applies in relation to the supply of special services or facilities that are required for a person with an ‘impairment’ in the areas of work, education, goods and services, accommodation, and clubs.²⁹⁶

Because of the conclusions we form above, we ultimately consider that the term ‘unjustifiable hardship’ no longer needs to be retained in the Act.

Comparative approaches

Unjustifiable hardship is a general exception to discrimination under the federal Disability Discrimination Act if avoiding the discrimination would impose an unjustifiable hardship on the discriminator.²⁹⁷ The failure to make reasonable adjustments appears in the definitions of both direct and indirect discrimination.²⁹⁸

While there is no reference to ‘unjustifiable hardship’ in the Victorian Act, factors that reflect similar considerations are embedded in the definition of ‘indirect discrimination’, when assessing whether a requirement, condition, or practice imposed is reasonable.²⁹⁹ However, for each positive duty to make reasonable accommodations, there is an express exception to discrimination in that area if it is not reasonable to make adjustments.³⁰⁰

The Northern Territory does not have a provision in relation to indirect discrimination but has a positive duty to accommodate special needs in relation to any attribute. Whether the duty has been breached is assessed by reference to a list of factors similar to those in Queensland for assessing unjustifiable hardship in the supply of special services or facilities.³⁰¹ In addition, the

²⁹⁵ Queensland Human Rights Commission Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(e).

²⁹⁶ See *Anti-Discrimination Act 1991* (Qld) ss 35, 44, 51, 92, and 100. Two further specific exceptions (s 36 and s 30) in the work area also include the term ‘unjustifiable hardship’, but the Review received no submissions on these sections.

²⁹⁷ *Disability Discrimination Act 1992* (Cth) ss 21B, 29A.

²⁹⁸ *Disability Discrimination Act 1992* (Cth) ss 5(2), 6(2).

²⁹⁹ *Equal Opportunity Act 2010* (Vic) s 9(3).

³⁰⁰ *Equal Opportunity Act 2010* (Vic) s 23 (employees); s 34 (person or partner); s 41 (education); s 46 (goods and services)

³⁰¹ *Anti-Discrimination Act 1992* (NT) s 24.

legislation contains a general exception to discrimination where the supply special services or facilities is required but it is unreasonable to do so, referring to the same list of factors.³⁰²

Should unjustifiable hardship be retained?

Fourteen³⁰³ out of 23 submissions received on this issue thought that the unjustifiable hardship exception should be retained. A further four indicated that if the exception were to be retained, it needed to be narrowed in its application.³⁰⁴

We heard from members of the Chamber of Commerce and Industry through a survey in February 2022 on this topic,³⁰⁵ and 75% of survey respondents thought that unjustifiable hardship should be retained in the Act, with one person commenting from a small business perspective that:

*If a person is unable to perform tasks consistent with the duties required in any workplace, with regard to their own and the safety of others or the overall productivity of a business they should not hold that position. In particular small business cannot afford extra staff under current climates to provide supervision of staff who cannot work to either physical/mental standards within a workplace.*³⁰⁶

Australian Discrimination Law Experts Group and Legal Aid Queensland, while supportive of retaining the unjustifiable hardship exceptions, acknowledge that having both might be unnecessary.³⁰⁷

Two submissions were against retaining the exceptions, noting that they ‘can be used to justify inaccessibility or processes which could ordinarily be viewed as discriminatory.’³⁰⁸

The exception of ‘unjustifiable hardship’ as it applies under the current Act to the supply of special services or facilities will be incorporated under recommendations that there be a positive duty to make reasonable accommodations, subject to a list of inclusive criteria for assessing ‘reasonableness’.

The recommended criteria include factors currently listed within the definition of unjustifiable hardship under the Act.³⁰⁹ This will have the practical effect of having the ‘unjustifiable hardship’ exception apply to the positive duty to make reasonable accommodations for people with disability in all areas, which replaces provisions that refer to ‘special services or facilities.’

Viewed this way, the exception of ‘unjustifiable hardship’ will be extended to indirect discrimination for all attributes and areas, under recommendations that reasonableness be assessed by reference to a similar set of expanded and inclusive criteria. See also: Indirect discrimination in this chapter.

302 *Anti-Discrimination Act 1992* (NT) s 58.

303 Name withheld (Sub.026) submission; Joint Churches submission; Christian Schools Australia submission; Vision Australia submission; Australian Discrimination Law Experts Group submission; Queensland Catholic Education Commission submission; James Cook University submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Department of Education (Qld) submission; Chamber of Commerce and Industry Queensland.

304 Rita Jabri Markwell submission; Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission; Community Legal Centers Queensland submission; Equality Australia submission.

305 Chamber of Commerce and Industry submission, 11-13.

306 Chamber of Commerce and Industry submission, 12.

307 Australia Discrimination Law Experts Group submission, 24; Legal Aid Queensland submission, 13-14.

308 Queenslanders with Disability Network submission, 5. See also Youth Advocacy Centre submission.

309 *Anti-Discrimination Act 1991* (Qld) s 5.

The Review's position

The Review considers that:

- Consistent with the approach of Victoria and the Northern Territory, the Act does not need to refer to the term 'unjustifiable hardship', but it is important to retain this concept to achieve a balanced outcome.
- In effect, the concept of unjustifiable hardship will be retained by referencing the factors that currently define unjustifiable hardship in the definition of 'reasonableness' in the positive duty to make reasonable accommodations in disability discrimination, and in the recommended expanded list of considerations for 'reasonableness' in indirect discrimination.

Recommendation 5

- 5.1** The Act should replace unjustifiable hardship exceptions with a positive, standalone duty to make reasonable accommodations for a person with disability which applies to all areas of activity in which the Act operates.
- 5.2** A non-exhaustive list of criteria for assessing whether an accommodation is reasonable should be included in the Act, including:
- the person's circumstances, including the nature of the disability
 - the nature of the accommodation
 - the consequences for the person with a disability if the accommodation is not made
 - the financial circumstances of the person required to provide the accommodation
 - the consequences for the person required to provide the accommodation, including any financial impact
 - the consequences for other people affected by the accommodation, including numbers of people advantaged or disadvantaged
 - balancing the consequences of providing the accommodation against the disadvantage that would be imposed upon the person with disability and others if the accommodation is not made.
-

Sexual harassment

The Terms of Reference for the Review ask us to consider:

- whether there is a need to amend the definition of sexual harassment in the Anti-Discrimination Act³¹⁰
- implementing the recommendations from the *Respect@Work: Sexual Harassment National Inquiry Report*,³¹¹ including options for legislating for a positive duty to eliminate sexual harassment.³¹²

We asked stakeholders if the Anti-Discrimination Act is effective in responding to sexual harassment and whether the law needs to change and were told that sexual harassment is still occurring and the harm caused can be devastating. In chapter 2 we describe some of the experiences of sexual harassment we heard about, and the impacts on individuals and the community.

We identified that more needs to be done to proactively prevent sexual harassment. In chapter 6 we recommend the introduction of a positive duty to take reasonable and proportionate measures to eliminate discrimination and sexual harassment.

This section focuses on the current Queensland definition of sexual harassment and whether it should change, and any additional provisions that are needed to address sex discrimination. We have kept the recommendations made by the Respect@Work report as a constant reference point.

In the Discussion Paper, we asked whether additional words should be added to the definition of sexual harassment to ensure it covers all conduct that should be prohibited. We also asked whether additional, specific contraventions of the law should be added. We received 28 submissions in response to these questions.³¹³ In response to our Have Your Say survey, 27 people shared their personal experiences of sexual harassment, and 8 talked about sex discrimination. We also discussed these topics in consultations with stakeholders.³¹⁴

After in-depth consultations, consideration of submissions and legal research, we have concluded that the current sexual harassment laws in Queensland are working well, and substantially cover the situations that Respect@Work sought to address in the federal jurisdiction. For this reason, we recommend that the sexual harassment provisions of the Act remain unchanged, and that education and awareness about the law and its coverage is increased.

310 Queensland Human Rights Commission, *Review of the Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(e).

311 Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020).

312 Queensland Human Rights Commission, *Review of the Anti-Discrimination Act 1991* (Qld), Terms of Reference 5.

313 Caxton Legal Centre submission; Queensland Law Society submission; Queensland Council of Unions submission; Office of the Special Commissioner, Equity and Diversity (Qld), submission; Maurice Blackburn Lawyers submission; Queensland Nurses and Midwives Union submission; Australian Lawyers Alliance submission; Australian Discrimination Law Experts Group submission; Maternity Choices Australia submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; PeakCare Queensland Inc submission; Queensland Council for Civil Liberties submission; SIN (South Australia) submission; Sienna Charles submission; Alistair Witt submission; Jenny King submission; Name withheld (sub.059) submission; Name withheld (sub.064) submission; Name withheld (sub.026) submission; Youth Advocacy Centre Inc submission; Department of Education (Qld) submission; Dr Zahra Stardust submission; Chamber of Commerce and Industry submission; Australian Industry Group submission; Christian Schools Australia submission; James Cook University submission; Equality Australia submission.

314 For example: Women's Legal Service Queensland consultation, 10 September 2021; YWCA Australia consultation, 26 August 2021; Young peoples' roundtable, 17 February 2022.

Effectiveness of the law

A common view expressed in submissions and consultations was that Queensland's sexual harassment provisions are working well and are even the best in Australia.³¹⁵

Some stakeholders considered that the Commission's relatively low sexual harassment complaint numbers are less to do with the legislation and more to do with the stigma and negative consequences from complaining, as well as poor experiences with previous complaints.³¹⁶

Women's Legal Service Queensland drew our attention to the issue of women being reluctant to identify themselves as 'victims' of sexual violence because of the social stigma and attitudes attached to this label.³¹⁷

These issues were evident in a confidential submission to our Have your Say survey from a young woman from a culturally and linguistically diverse background. In this case, the negative experience of complaining had a silencing effect. She told the Review that:

*A senior manager in the [redacted workplace] made sexual comments on multiple occasions when I was a young graduate. His comments – including calling me a slut in front of my supervisor – were heard by others but no action was taken. When I told a more senior female staff member, she dismissed my concerns and basically encouraged me to let it go as the senior manager was going through a divorce. I never raised it again. Based on my experience, I would not speak up if I, or others, experienced sexual harassment.*³¹⁸

We were told that these issues were reflective of structural and cultural gender inequality.³¹⁹

Current approach

The current test for sexual harassment under the Queensland Act is simple and broadly defined. A complainant is required to prove that some form of unwelcome sexual conduct towards them occurred, and that the conduct was done either:

- with the intention of offending, humiliating, or intimidating the complainant; or
- in circumstances where a reasonable person would have anticipated the possibility that the complainant would be offended, humiliated, or intimidated.³²⁰

Sexual harassment is unlawful regardless of where it happens, which is different from other jurisdictions in which sexual harassment is only unlawful when it occurs in proscribed 'areas'.

Even though sexual harassment is unlawful in all contexts and settings, the Commission receives most complaints about sexual harassment in work. Over 80% of sexual harassment complaints made to the Queensland Human Rights Commission in 2020-21 involved the workplace.³²¹

315 See for example: Caxton Legal Centre submission, 7; Queensland Law Society Submission, 4.

316 Caxton Legal Centre submission, 7.

317 Women's Legal Service Queensland, Consultation with the Review of the Anti-Discrimination Act, 10 September 2021.

318 Name withheld (Form.60) survey response.

319 Caxton Legal Centre submission, 7-8.

320 *Anti-Discrimination Act 1991* ss 118–120.

321 Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 2021) 36.

Relational aspect

The current law in Queensland contains a 'relational aspect'. This means that for conduct to amount to sexual harassment, it must be directed towards the person. The Act uses the words 'in relation to the other person', or 'relating to the other person'. There is generally a requirement that the conduct be either done with the person in mind or have a connection with the person.³²²

The requirement to prove the relational aspect is difficult in highly sexualised work environments. Cases in which the relational aspect couldn't be proved include a work Christmas party for which a topless waitress was engaged,³²³ and a work area in which posters that could be considered to sexualise women were displayed.³²⁴

These situations usually amount to sex discrimination. However, we considered whether changing the definition of sexual harassment to clearly include 'toxic' environments was needed.

In the Discussion Paper we asked whether the definition of sexual harassment should more clearly cover situations in which a person is exposed to conduct that would amount to sexual harassment, but where it is not directly in relation to them. Below we examine the advantages and disadvantages of expanding the sexual harassment provisions.

Benefits of extending scope of provision

The Australian Capital Territory legislation specifies that sexual harassment may be 'to, or in the presence of' the person.³²⁵

Several submissions supported changing the Act to incorporate this approach because of the weight it would lend to effectively addressing toxic work environments.³²⁶

The Office of the Special Commissioner, Equity and Diversity, commented that:

an important step to addressing a legislative gap, being the preventing of, and responding to, sexualized work environments, conduct may not be readily identifiable as directed towards a person but is instead a systemic workplace cultural problem.³²⁷

The Queensland Council of Unions and Maurice Blackburn Lawyers had both supported people experiencing sexism and sexual harassment in workplaces, and provided these real examples in which the conduct was not specifically directed at the person:

- sexual remarks made behind a person's back³²⁸
- situations in which gender is objectified through advertisements, stock imaging, and marketing strategies, including calendars or posters in common areas of workplaces.³²⁹

While many Queensland Law Society members were concerned about such experiences, particularly in male-dominated environments, some practitioners felt that there is no need for legislative change, because the Queensland case authorities (while small in number) already recognise these behaviours as sex discrimination.³³⁰

322 *Streeter v Telstra Corporation Limited* [2007] AIRC 679.

323 *Carter v Linuki Pty Ltd trading as Aussie Hire & Fitzgerald* (EOD) [2005] NSWADTAP 40.

324 *Perry v State of Queensland & Ors* [2006] QADT 46.

325 *Discrimination Act 1991* (ACT) s 58 (2).

326 See for example: Queensland Nurses and Midwives Union submission, 14; Australian Lawyers Alliance submission, 9; Office of the Special Commissioner, 2; Maternity Choices Australia submission, 3; Aged and Disability Advocacy Australia submission, 4.

327 Office of the Special Commissioner, Equity and Diversity (Qld) submission, 1.

328 Queensland Council of Unions submission, 11.

329 Maurice Blackburn submission, 4.

330 Queensland Law Society submission, 4-5.

Risks to extending scope of provision

Given that we identified the sexual harassment laws are already operating well, many stakeholders were hesitant about changing the definition of sexual harassment as there may be unintended adverse consequences.

The Review has identified two key risks with adding the words ‘in the presence of the person’:

- potential for literal interpretation of the word ‘presence’
- overreach into areas of private life.

Literal interpretation of the word ‘presence’

One submission identified concerns with the way that the ACT Discrimination Act has been interpreted. In *De Domenico v Marshall*,³³¹ the Supreme Court interpreted the provision narrowly to mean that a statement of a sexual nature could not amount to sexual harassment unless the person the statement was about was present at the time.

Another concern with the ACT Act relates to determining illegality of sexual harassment in the context of technology and social media.³³² Sexual harassment often occurs through emails, texts, and phone apps, and so if the word ‘presence’ is taken to be a physical, rather than virtual presence, the provision is limited.

Legal Aid Queensland didn’t think that this hurdle was insurmountable but suggested that careful drafting of any new Queensland provisions would be required to avoid the same complications, including by clarifying it is not a requirement of the test.³³³

Unreasonable intrusion into private life

While many submissions acknowledged the importance of addressing underlying cultures that allow or encourage sexual harassment, several had serious reservations about extending the law because it may lead to an unreasonable intrusion into people’s private lives or undermine genuine sexual harassment claims.³³⁴

Because the law applies everywhere, rather than being confined to areas of activity, it could lead to over-sanitisation of spaces in which people gather, and potentially operate to the detriment of young people, LGBTIQ+ people, people experiencing homelessness, and sex workers.³³⁵ The Queensland Law Society provided an example:

If a group of people were engaging in a sexually explicit discussion in a pub and a person sitting nearby was offended by the discussion, they could seek redress in the Queensland Human Rights Commission. In this scenario, it would be reasonable to expect that the “victim” can simply walk away if they find the discussion offensive, unlike, for example in a workplace. The extended definition should be designed to assist people who do not have a simple option of walking away (e.g. because they need to remain in school or work etc.)³³⁶

³³¹ *De Domenico v Marshall* [2001] ACTSC 52.

³³² Legal Aid Queensland submission, 22.

³³³ Legal Aid Queensland submission, 21-23.

³³⁴ PeakCare Queensland Inc submission, 6.

³³⁵ Caxton Legal Centre submission, 9; Legal Aid Queensland submission, 23-24; Respect Inc and DecrimQLD submission, 20.

³³⁶ Queensland Law Society submission, 4.

Other submissions raised concerns that such a broad scope may unreasonably restrict the right to freedom of expression and freedom of thought, conscience, religion and belief.³³⁷ To this, we would add that the right to privacy and the right to free association may also be unreasonably limited outside of work and other formal settings if the provision was too broad.³³⁸

The Queensland Council for Civil Liberties did not support any changes and preferred that sexual harassment occurring in the presence of others be addressed through the introduction of a positive duty.³³⁹

A different bar for private vs public settings

One solution may be to limit the extent of protection from sexual harassment 'in the presence' of a person to the particular areas of activity, e.g. work.³⁴⁰

While it may be possible to have a higher threshold test for sexual harassment that occurs in areas of public life, this could create confusion and dilute what has been identified as a strength in Queensland's approach – that it is prohibited, regardless of where it happens.

A complaint which alleged that conduct took place in both public and private settings would require careful dissection. This situation could happen where the conduct was between people who work together, but some of the alleged conduct occurred outside of work, such as in a group chat or social occasion outside of work hours and not connected to work.³⁴¹

The Review's position

The Review considers that:

- The current definition of sexual harassment is effective and operates well, and currently covers circumstances including a toxic workplace environment.
- Changing the definition to remove the relational aspect may cause unjustifiable limitations on rights to privacy, association, and expression.
- Addressing the relational issue by limiting the areas of operation may undermine what has been identified as a strength in Queensland's sexual harassment provisions.
- The risks involved in changing the sexual harassment provisions outweigh the benefits.
- Community education about the existing sexual harassment provisions is required to ensure they are effective and well understood.
- Introducing a positive duty to eliminate discrimination and sexual harassment, as recommended by this report, provides an additional mechanism to address this issue.

Addressing underlying culture

Sexual harassment thrives in environments where there is a culture of acceptance of inappropriate behaviour, particularly where an employer has failed to take reasonable steps to address the behaviour.

The Respect@Work report recommended introducing two new contraventions into the Sex Discrimination Act in addition to the existing sexual harassment and sex discrimination protections.

³³⁷ Legal Aid Queensland submission, 23-24.

³³⁸ These rights are protected by the *Human Rights Act 2019* ss 25 and s 22.

³³⁹ Queensland Council for Civil Liberties submission, 5.

³⁴⁰ Legal Aid Queensland submission, 23-25.

³⁴¹ Caxton Legal Centre submission, 8-9.

They are:

- sex-based harassment
- creating an intimidating, hostile, humiliating or offensive environment on the basis of sex ('hostile environments')

These proposed additional contraventions are directed at addressing underlying cultures of sexist and sexualised behaviour that permeates some workplaces. A sex-based harassment provision would only capture conduct that is currently unlawful under the direct sex discrimination provisions (such as sexist comments). The addition of a specific hostile environment provision may cover conduct that is currently dealt with as indirect sex discrimination (such as requiring a person to put up with an environment that disadvantages them because of their sex).

The following sections of this report discuss each of the new contraventions proposed by the Respect@Work report. We have concluded that the type of conduct they intend to cover is already prohibited under the Queensland Anti-Discrimination Act. Introducing new and overlapping contraventions risks making the law hard to understand or may undermine existing protections.

We recommend there be no change to the existing sexual harassment provisions, but rather a greater focus on education about the existing law to spread the message that such conduct is not acceptable.

Sex-based harassment

Sex-based harassment has been defined as behaviour that 'derogates, demeans or humiliates an individual based on that individual's sex,' and encompasses a range of behaviours including gender harassment, unwanted sexual attention, and sexual coercion. Sex-based harassment can be experienced by people other than women if understood broadly to extend to 'maintaining traditional gender structures', such as when men are harassed for traditionally feminine characteristics.³⁴²

Federal protections

The Respect@Work report considers that while sex-based harassment is already covered as a form of sex discrimination, this aspect of the law is not well understood.³⁴³ The report's recommendation to prohibit sex-based harassment was recently implemented into law.³⁴⁴

The Sex Discrimination Act now prohibits harassment 'on the ground of sex' where:

- a person engages in unwelcome conduct of a seriously demeaning nature in relation to the person harassed; and
- 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.³⁴⁵

The Explanatory Memorandum for the Bill indicates there was a deliberate decision to include the words 'seriously demeaning' to prevent 'capturing mild forms of inappropriate conduct based on a person's sex that are not of a sufficiently serious nature to meet the threshold.'³⁴⁶

342 Legal Aid Queensland submission, 24 – referring to a number of contemporary sources on the meaning of sex or gender-based harassment.

343 Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020), 457-458.

344 Recent changes to the law were made in the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) s 28AA.

345 *Sex Discrimination Act 1984* (Cth) ss 28AA (1)(a) and (b).

346 Explanatory Memorandum, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021*, [10].

Support for prohibiting sex-based harassment

In the Discussion Paper, we asked whether an additional contravention of sex-based harassment should be introduced.

Submissions from a range of stakeholders expressed general support for this approach,³⁴⁷ including on the basis that not all harassment of women relates to their sexuality, but is ‘simply misogynist, or anti-woman put downs’.³⁴⁸

Concerns about prohibiting sex-based harassment

‘Seriously demeaning’ conduct

Of those submissions that supported the introduction of a separate contravention for sex-based harassment, three raised concerns about replicating the approach in the Sex Discrimination Act,³⁴⁹ which they considered to be too narrow. One submission commented that in a modern workforce, no-one should have to put up with conduct that is demeaning, even where it falls short of ‘seriously’ demeaning.³⁵⁰

The Queensland Council of Unions was concerned that the federal law ‘narrows existing case law where sexist behaviour and treatment has been found to be unlawful’.³⁵¹

On the other hand, three submissions felt that alignment and consistency with the federal laws was important to avoid complexity and confusion.³⁵²

Risks of narrowing the law

Some stakeholders who represent complainants had reservations.³⁵³ While ultimately supportive of the introduction of a ‘gender-based harassment’ provision, Legal Aid Queensland recommended caution because of the complexity in statutory interpretation, and confusion for complainants about which provisions best apply to their complaints.³⁵⁴

Complaints that would be likely to be captured by sex-based harassment are covered by the current provisions and would be accepted by the Commission under the current laws. For instance, a complaint in which a person was subjected to harassing words and conduct because of their sex would be likely to be accepted as direct sex discrimination.

If sex-based harassment provisions were introduced, a complaint may overlap with sexual harassment if the words or conduct are also of a sexual nature. This could result in a complainant arguing three contraventions for the same conduct: sex discrimination, sex-based harassment, and sexual harassment.

A new specific provision may override an established general prohibition against direct and indirect discrimination and sexual harassment.³⁵⁵ Having an additional provision that addresses the same kind of conduct that is already prohibited through the sex discrimination and sexual harassment provisions could lead to the misunderstanding or misinterpretation that only conduct that is ‘seriously

347 See for example: Australian Discrimination Law Expert Group submission, 9; Queensland Law Society submission, 5; Queensland Nurses and Midwives Union submission, 14; Queensland Council of Unions submission, 12; Maternity Choices Australia submission, 1; Chamber of Commerce and Industry submission, 4.

348 Australian Discrimination Law Experts Group submission, 28.

349 Queensland Council of Unions submission, 11-12; Queensland Nurses and Midwives Union submission, 14-15.

350 Australian Discrimination Law Experts Group submission, 28.

351 Queensland Council of Unions submission, 11-12.

352 Australian Industry Group submission, 7; James Cook University submission, 4; Christian Schools Australia submission, 10.

353 Caxton Legal Centre submission, 9; Legal Aid Queensland submission, 25.

354 Legal Aid Queensland submission, 25.

355 The Review notes that there is a general statutory interpretation principle that provides for a later specific provision to override an earlier general provision - *Goodwin v Phillips* (1908) 7 CLR 1 at 14; *Commissioner of Police v Eaton* (2013) 252 CLR 1 at 19 [46], 32 [92].

demeaning' is unlawful. Incorporating a specific provision against sex-based harassment may also inadvertently suggest that seriously demeaning conduct is unlawful in relation to sex, but not other attributes. This would defeat the intended educative purpose of the provision.

Educating workplaces

Participants in our small business roundtable shared mixed views about whether an additional contravention would improve the educative function of the law. Some participants were concerned that the intrusion of an additional contravention to contend with might erode workplace relationships. In creating education campaigns or explanatory material, members raised the particular challenges of low formal education and literacy levels in traditionally male-dominated industries and recommended that guidance material and training must be simple, clear, 'short and sweet'.³⁵⁶

Other kinds of harassment

The view that the Act should cover protection from harassment based on attributes other than sex was put forward in submissions received by the Review.³⁵⁷ These submissions questioned the rationale for having only one attribute (sex) protected from harassment, when people who experience race, disability, age, and sexuality harassment, for example, might be equally deserving of protection from harassment. We note that similar issues have been considered by the Legal Affairs and Safety Committee in relation to an inquiry into hate crimes and vilification.³⁵⁸

Human rights considerations

Extending protection against harassment only on the attribute of sex and/or gender may serve to embed inequality in the Anti-Discrimination Act. Queensland's Human Rights Act provides that every person has the right to equality and freedom from discrimination, and that this right may only be limited in a proportionate way to meet a legitimate purpose.³⁵⁹ We have not heard that sex-based harassment is more serious or prevalent than other kinds of harassment, such that it justifies a more favourable approach than harassment because of other attributes.

The Review's position

The Review considers that:

- Insufficient reasons exist to justify a new prohibition against sex-based harassment.
- The new section 28AA of the Sex Discrimination Act (Cth) may not have much utility as the bar is so high that a complainant would be more likely to rely on sexual harassment or discrimination.
- As s28AA is untested, waiting to see how the provision is used and applied may be instructive.
- Removing the word 'seriously' from a similar Queensland provision would create inconsistency with the federal Sex Discrimination Act and would mean that employers have to comply with two different standards.
- New specific legislative provisions may override general discrimination and sexual harassment protections that have been working well.

³⁵⁶ Small business roundtable, 7 March 2022.

³⁵⁷ See for example: Equality Australia submission, 12-15 and 30; Caxton Legal Centre submission, 9.

³⁵⁸ Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, Inquiry into serious vilification and hate crimes (2022) 45. The Committee commented that the civil test for vilification should be changed to reflect a focus that vilification has on the victim.

³⁵⁹ *Human Rights Act 2019* (Qld) ss 15, 13.

- Protecting only one attribute (sex) could cause incompatibility with the Human Rights Act.
- Future reviews of the Act could re-evaluate any benefit from incorporating the same (or similar) provisions in the Queensland Act.
- Simplifying the tests for direct and indirect discrimination is a better way to improve the educative function of the law.
- Training and guidance materials that are concise, easy to understand, and tailored to particular industries should be developed.

Hostile environments

Respect@Work considered that a hostile environment is one in which a person is made to feel uncomfortable or excluded by the workplace environment. Factors that may indicate such an environment include:

- display of obscene or pornographic materials
- general sexual banter or innuendo and offensive jokes.³⁶⁰

Respect@Work referred to a case in which two women who worked as cleaners (the only women on a construction site) were exposed to posters of naked women around the worksite. After complaining to male co-workers about the sexually explicit posters, there was a general increase in the number of posters displayed and their content was more explicit and degrading. The women also became aware that the male toilets contained offensive graffiti about the women personally. As a result of these events, both women left their jobs. This was found to be sexual harassment.³⁶¹

The Committee on the Elimination of Discrimination against Women has referred to negative health and safety problems and loss of opportunity that can result from a 'hostile working environment'.³⁶²

In response to our Have your say survey, an Aboriginal woman who identifies as LGBTIQ+ told us that:

*I work in a male dominated field and often have males believe that I cannot do what they do because I'm female, I also get cat called / wolf whistles often, have mainly males yell derogatory remarks at me... I also feel I need to show my engagement ring in subtle ways to remind the opposite sex that I am not a single person. It feels as though there is no one to back you up and that if you do make a complaint, you'll either lose your job or the person you tell will ask what you are doing to stop the behaviour.*³⁶³

In the Discussion Paper we asked whether the Anti-Discrimination Act should expressly prohibit creating an intimidating, hostile, humiliating or offensive environment on the basis of sex.

360 Respect@Work report, 458-459.

361 *Home v Press Clough Joint Venture* (1994) EOC 92-556; (1994) EOC 92-591.

362 Committee on the Elimination of Discrimination against Women, General Recommendation No 19, 11th sess (1992) [18].

363 Name withheld (Form.059) survey response.

While the term ‘hostile work environment’ has mostly been used to refer to situations where a workplace is permeated by sexualised behaviour that is hostile to women, stakeholders considered that it might extend to situations in which other minority groups, such as LGBTIQ+ people and First Nations peoples, are subjected to constant racist, homophobic, or transphobic comments, ‘jokes’, and banter.³⁶⁴

An express prohibition on hostile environments

While acknowledging the existing case law in this area, Respect@Work noted that it was limited.³⁶⁵ To clarify the law, the Respect@Work report recommended that the federal Sex Discrimination Act be amended to expressly prohibit creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex.³⁶⁶

The effect of this change would be to do away with the requirement for the conduct to be directed towards a particular person.

As an alternative, the Respect@Work report suggested that this issue could be addressed by non-legislative measures, such as good practice, guidance, and education materials.³⁶⁷

The federal Attorney-General is currently consulting on incorporating the hostile work environment provision into the federal Sex Discrimination Act.³⁶⁸

Support for prohibiting hostile environments

Submissions received by the Review supported a prohibition on creating or facilitating a hostile environment,³⁶⁹ with one submission suggesting that the word ‘maintaining’ might be more appropriate.³⁷⁰ Two submissions expressed support for coverage to be extended beyond the workplace to all areas of activity.³⁷¹

Concerns about prohibiting hostile environments

Overlap with existing provisions

The Australian Industry Group opposed adding an additional contravention because the existing sexual harassment provisions already extend to hostile work environments, and it might:

...narrow existing common law definitions of sexual harassment by carving out aspects of the working environment as separate to the statutory definition of harassment itself. This may limit the nature of relief sought by applicants and limit the application of employer policies designed to prevent and respond to sexual harassment in its broader meaning.³⁷²

In most cases, sexual or sexist behaviour is directed at or is about a particular person and will amount to unlawful sexual harassment and/or direct sex discrimination. In the recent case of *Golding v Sippel and the Laundry Chute Pty Ltd*,³⁷³ the Queensland Industrial Relations Commission found that inappropriate touching, massage requests, explicit text messages, and demands for sex were both sexual harassment and direct sex discrimination because they would not have happened to a man.

364 Caxton Legal Centre submission, 9

365 Respect@Work report, 460.

366 Respect@Work report, Recommendation 16(c).

367 Respect@Work report, 460.

368 Attorney-General's Department (Cth), *Respect@Work – Options to progress further legislative recommendations* (Consultation Paper, February 2022).

369 See for example: Office of the Special Commissioner submission, 3; Legal Aid Queensland submission, 26; Peak Care submission, 6; Australian Lawyers Alliance submission, 8; Chamber of Commerce and Industry submission, 5.

370 Queensland Law Society submission, 5.

371 Maternity Choices Australia, 3; Legal Aid Queensland submission, 26.

372 Australian Industry Group submission, 8.

373 *Golding v Sippel and the Laundry Chute Pty Ltd* [2021] ICQ 14

Case law has established that a person may be affected by a hostile work environment even if they are not the direct target of the behaviour:

...the presence in a workplace of sexually offensive material which is not directed to any particular employee may still constitute sexual harassment where a hostile or demeaning atmosphere becomes a feature of the workplace environment.³⁷⁴

While not always using these words, conduct that appears to fit the description of a 'hostile environment' has also been found to be sexual harassment and/or sex discrimination in Queensland case law.

In one case, an office worker could not help but hear numerous office telephone calls and conversations in which foul and sexually derogatory comments about women featured. The tribunal found that this was sexual harassment.³⁷⁵ In another matter, the complainant's boss talked about his sex life two or three times a week, discussed a bedroom photo of his ex-wife, and simulated orgasms. As it was a small workplace, the complainant could not escape hearing the conversations. This was also found to be sexual harassment.³⁷⁶

Submissions to the Review did not clearly identify examples of matters that were falling outside the scope of current provisions. The Review has considered the cases mentioned by Respect@Work and the Attorney-General's Department's Consultation Paper³⁷⁷ and has not identified obvious gaps in Queensland's coverage of sexual harassment.

Who is responsible?

Determining responsibility for a hostile work environment is not straight forward, especially when the underlying workplace culture has developed over years. The complexity is compounded by the reality that a negative culture may be as much about failing to call out, or take action on, harmful behaviour when it happens, as it is about the prevalence of the behaviour. The law is generally better at responding to actions or conduct, rather than a failure to act or delays in taking action.

While expressing general support for the provision, the Queensland Nurses and Midwives Union urged consideration of the potential liability of bystanders who witness conduct but don't take any action.³⁷⁸

This issue was highlighted recently by the Attorney-General's Department in consultations on whether to introduce a new contravention in the federal Sex Discrimination Act.³⁷⁹

We consider inaction on sexual harassment could be for reasons such as a person wanting to just get on and not draw attention to themselves, or not wishing to jeopardise their job.

Other kinds of hostile environments

Some stakeholders thought that the addition of a hostile work environment contravention may be too narrow and should apply to a broader range of attributes than sex, and could include sexuality, gender identity, sexuality, and race.³⁸⁰

374 *G v R and Dept of Health* [1993] HREOCA 20, 1993.

375 *Rutherford v Wilson* [2001] QADT 7.

376 *Foran v Bloom* [2007] QADT 31.

377 Attorney-General's Department (Cth), *Respect@Work – Options to progress further legislative recommendations* (Consultation Paper, February 2022).

378 Queensland Nurses and Midwives Union, 15.

379 Attorney-General's Department (Cth), *Respect@Work – Options to progress further legislative recommendations* (Consultation Paper, February 2022) 3.

380 Caxton Legal Centre submission, 9; Aged and Disability Advocacy Australia submission, 4; Multicultural Queensland Advisory Council submission, 4-5; Maurice Blackburn Lawyers submission, 4.

Caxton Legal Centre gave an example of a client who had to put up with racist 'jokes', songs, and offensive comments about Aboriginal and Torres Strait Islander people on an almost daily basis, and commented that:

Whilst this sort of conduct offends almost everyone, which is apparently its appeal to some of the people who engage in it, it is humiliating, distressing and unsafe for people with those attributes who are also being required to work productively in its presence.³⁸¹

As with sex-based harassment, the Review has not heard any compelling reasons to create a new provision that applies only to sex and not other attributes. Exclusion of other attributes may also risk inconsistency with section 15 of the *Human Rights Act 2019*.

The Review's position

The Review considers that:

- Work environments that are intimidating, hostile, humiliating, or offensive for people because of their sex can be destructive to the wellbeing of workers and may reduce workplace productivity and efficiency.
- We did not identify a significant gap in protection that would be addressed by creating a new contravention of creating or facilitating a hostile environment.
- A gap in understanding about the scope of sexual harassment and sex-based harassment could be addressed through education.
- Determining responsibility for 'creation' of an environment is not straight forward, and bystanders with limited control over the workplace may become liable.
- A specific provision for hostile work environments may inadvertently override the general prohibitions against sex discrimination and sexual harassment.
- Protecting only one attribute (sex) in hostile work environments could cause incompatibility with the Queensland Human Rights Act.
- Cultural change may be better achieved through improving the tests for direct and indirect discrimination, introducing a positive duty on employers, and including an example in the Act under indirect discrimination to demonstrate that the Act covers hostile work environments.

³⁸¹ Caxton Legal Centre submission, 9.

Sex worker experiences

Survey responses and submissions made by and on behalf of sex workers highlighted that the Act does not explicitly recognise that sexual harassment can and does happen to sex workers,³⁸² whether they are working, or outside of work.

One submission stated that it is:

*Essential to include sex workers in the sections 119 to 120 clarifying that sex workers can experience sexual harassment. We are either regarded as being raped continuously on the job or consenting to rape during the job, and this is inaccurate and harmful. Sex workers, as any other individual, have the right to withdraw their consent explicitly during sex.*³⁸³

The Review is not aware of any Queensland cases on this point, but if a sex worker were to bring a sexual harassment complaint to the Commission, there would be no impediment to accepting it, provided it met the threshold test.

Research about sex worker experiences of sexual assault is limited, but the studies we identified indicate that sex workers likely experience more sexual harassment including serious sexual violence than other professions and occupations, with many incidents going unreported.³⁸⁴ The Committee on the Elimination of Discrimination against Women has commented that sex workers are vulnerable to violence because of their status and need equal protection of the laws against rape and other forms of violence.³⁸⁵

While sex workers are covered by the existing protections, many may not know about their right to make a complaint, including rape and sexual assault, which are extreme forms of sexual harassment.

The options suggested by submissions to address this issue are to:

- add sex worker examples to the Act and to guidance material produced by the Commission³⁸⁶
- include reference to sex workers in section 119 of the Act (meaning of sexual harassment)³⁸⁷
- include 'sex worker' in the 'Meaning of relevant circumstances' section 120 of the Act that relates to circumstances relevant in determining whether a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.³⁸⁸

382 See for example: Respect Inc and DecrimQLD submission, 20-21; SIN SA submission, 5; Sienna Charles submission, 2, 6; Name withheld (sub.059) submission, 1.

383 Name withheld (sub.059) submission, 1.

384 Dr Antonia Quadara, 'Sex workers and sexual assault in Australia – Prevalence, risk and safety' (2008) Iss 8, *Australian Institute of Family Studies: Australian Centre for the Study of Sexual Assault*.

385 Committee on the Elimination of Discrimination against Women, General Recommendation No 19, 11th sess (1992) [15].

386 See for example: Alistair Witt submission, 2; Name withheld (sub.064) submission, 5; Dr Zahra Stardust submission, 64.

387 See for example: Respect Inc and DecrimQLD submission, 20-21; Abigail Corrin submission, 2; Name withheld (sub.064) submission, 5.

388 See for example Name withheld (sub.059) submission, 1. *Anti-Discrimination Act 1991* (Qld) s 120.

The Review's position

The Review considers that:

- Sex workers have the right to be protected from unwelcome sexual conduct like any other person, and we consider they are currently protected by the sexual harassment provisions in the Act.
- Adding 'lawful sexual activity' or 'sex workers' to section 120 of the Act (Meaning of relevant circumstances) may be counter-productive, and suggest that whether someone is a sex worker is a relevant factor in whether a reasonable person should have anticipated the possibility that the sex worker would be offended, humiliated or intimidated. This may have the unintended consequence of perpetuating a repugnant myth that sex workers cannot be victims of sexual violence.
- No legislative changes need to be made in response to sex workers' experiences of sexual harassment, but there may be benefit in creating specific guidance material for sex workers to inform them of existing rights.

Recommendation 6

- 6.1** The current test for sexual harassment should be retained.
 - 6.2** The Act should not introduce new prohibitions against sex-based harassment or creating an intimidating, hostile, humiliating or offensive environment on the basis of sex. An example of indirect discrimination should be included to demonstrate that creating or facilitating an environment where people with particular attributes are disadvantaged is a form of indirect discrimination.
 - 6.3** The Commission should undertake engagement with stakeholders to promote a greater understanding about the protections in the Act that prohibit sexual harassment and develop targeted resources for particular industries and groups, including for sex workers.
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Chapter 5:

Improving the complaints system

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The complaints process

The Terms of Reference ask us to consider:

- whether the Anti-Discrimination Act should reflect protections, processes and enforcement mechanisms that exist in other Australian discrimination laws¹
- legislative barriers that apply to the prohibition on discrimination²
- ways to improve the process and accessibility for bringing and defending a complaint of discrimination, including how the complaints process should be enhanced to improve access to justice for victims of discrimination³
- options for more tailored approaches towards, or alternatives to existing frameworks for, dispute resolution that enable systemic discrimination to be addressed as well as discrimination complaints that raise public interest issues.⁴

Under the current legislation, one of the main roles of the Commission is to resolve complaints that are within the jurisdiction of the Act.

The Commission attempts to resolve complaints through conciliation, a process of alternative dispute resolution that aims to resolve a dispute without litigation. The Commission has a ‘filtering role’ in relation to complaints, which has two elements:

- deciding whether a complaint should be accepted
- holding a conciliation conference.

If a complaint is assessed by the Commission as within its jurisdiction, involvement in conciliation is compulsory for all parties. All parties, including each individual respondent alleged to have contravened the Act, must attend the conciliation conference.⁵

The Commission does not have the role of deciding whether unlawful discrimination or sexual harassment has or has not occurred. Therefore, the focus is on helping parties to reach an agreement, rather than on fact finding and determination.

If the matter does not resolve by conciliation, the complainant may elect to have their complaint referred to the relevant tribunal.⁶ Around one in three complaints that do not resolve by conciliation request referral to a tribunal. Of those, a very small proportion of complaints proceed to a hearing and decision.⁷

A complainant does not have a right of direct access to the tribunal. This is consistent with other jurisdictions in Australia, except for Victoria.⁸

In considering whether this process remains the most effective approach to resolving complaints, the Discussion Paper explored whether:

- the process should allow direct access to courts and tribunals, which would bypass the Commission at first instance

1 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(g).

2 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(h).

3 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(i).

4 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(m).

5 Sometimes parties resolve their complaint prior to the conciliation conference, but this is uncommon.

6 *Anti-Discrimination Act 1991* (Qld) ss 164A and 165.

7 In the 2020 calendar year, the Review identified 26 decisions that had been published by the tribunals, many of which were about procedural matters.

8 *Equal Opportunity Act 2010* (Vic) s 122.

- terminology used to describe the Commission's functions and processes should change
- improvements to make the process more efficient and flexible could be implemented
- the time limit to make a complaint should be extended
- the requirement for a written complaint is needed.

A total of 55 submissions responded to specific questions about dispute resolution.⁹ We also discussed these topics in consultations and roundtables conducted as part of the Review, consulted with federal and Victorian human rights agencies about their processes and examined the recommendations of past inquiries and reports in those jurisdictions.

Through this process, we have identified the federal and Victorian legislation provides a more flexible process that allows dispute resolution to be tailored to the needs of each complaint. This can make the process more efficient and provide a better outcome for both parties.

Ultimately, we conclude that the Anti-Discrimination Act should provide more flexibility to resolve disputes. We also recommend changes to make the process more efficient and accessible.

Human rights considerations

The right to a fair hearing is engaged by the complaints and tribunal hearing process. The Human Rights Act requires that all parties to a civil proceeding have a right to a decision by a competent, independent and impartial court or tribunal after a fair and public hearing.¹⁰

This right may not be confined to the hearing process in courts and tribunals, and may extend to the initial decision-making procedures of administrative decision-makers.¹¹ As complaints made under the Anti-Discrimination Act may proceed to a hearing and decision in a tribunal, both complainants and respondents must be afforded a fair process while the Commission is providing dispute resolution.

In this chapter, we have properly considered the right to a fair hearing when making recommendations about:

- access to the dispute resolution process for a complainant
- respondents' rights to understand and respond to the allegations made against them
- processes regarding time limitations
- the rights of all parties to a reasonably expedient process
- the need for the Commission to remain impartial when attempting to resolve disputes
- the requirement for all judgements or decisions made by a court or tribunal to be publicly available.¹²

Making a complaint

Throughout the Review, we asked stakeholders if the current complaints process under the Anti-Discrimination Act is effective, and whether the law needs to change.

⁹ The relevant questions in the Discussion Paper, November 2021, were questions 10, 11, 12, 13, 14 and 23.

¹⁰ *Human Rights Act 2019* (Qld) s 31(1).

¹¹ See *Kracke v Mental Health Review Board* (2009) VCAT 66 at [370] – [419]; *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221.

¹² See *Human Rights Act 2019* (Qld) s 31(3).

The current system largely relies on complaints to enforce the Anti-Discrimination Act. Throughout the Review, we heard that further mechanisms are required to ensure a more proactive approach to supporting and enforcing compliance. During our consultations, stakeholders suggested that a person should be able to tell the Commission about alleged discrimination or sexual harassment, without instigating a formal complaint. This information could inform the Commission's proactive and preventative role, which we discuss in chapter 6. This section will focus on what happens when a person does want to go through an individual process.

Once a person decides to make a complaint, we heard that people face significant barriers in bringing those complaints to the Commission. We also heard that the process can be long and complex. There are other practical barriers such as the need to have a high standard of literacy in English, and being able to provide an address for service to make a complaint. Other people feared that making a complaint would have negative repercussions. There were also specific legislative barriers that may reduce access to justice for some people.

In the next section, we focus on three legislative barriers identified through submissions, consultations and research as priority issues for the review - terminology, written complaints, and time limits.

Terminology

The terms 'complaint', 'conciliation', 'complainant', and 'respondent' are used throughout the Anti-Discrimination Act. The Human Rights Act also uses the word 'complaint'.¹³

In response to the Discussion Paper, we received 18 submissions about this terminology and whether it should be changed.¹⁴ Of those, 13 said that, in their view, the current terminology is not appropriate.¹⁵

These submissions told us that the word 'complaint':

- is legalistic¹⁶
- may create a perception that the Commission takes the side of the complainant¹⁷
- keeps the emphasis on complaining and responding, instead of focusing on resolution¹⁸
- has pejorative connotations¹⁹ including where the person making the complaint is seen as a troublemaker.²⁰

13 A person making a complaint to the Commission is not required to identify under which Act they are making their complaint – and the Commission uses a single form for both.

14 Public Advocate (Qld) submission; PeakCare Queensland Inc submission; Australian Lawyers Alliance submission; Fibromyalgia ME/CFS Gold Coast Support Group submission; Joint Churches submission; Sikh Nishkam Society of Australia submission; Australian Psychological Society submission; Vision Australia submission; Women's Legal Service submission; Anti-Discrimination Law Experts Group submission; Jenny King submission; Queensland Council for Civil Liberties submission; Queensland Catholic Education Commission submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Caxton Legal Centre submission; Youth Advocacy Centre Inc submission.

15 Public Advocate (Qld) submission; PeakCare Queensland Inc submission; Australian Lawyers Alliance submission; Joint Churches submission; Sikh Nishkam Society of Australia submission; Australian Psychological Society submission; Vision Australia submission; Women's Legal Service submission; Queensland Catholic Education Commission submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Youth Advocacy Centre Inc submission.

16 Public Advocate (Qld) submission, 3.

17 Joint Churches submission, 17.

18 Queensland Catholic Education Commission submission, 6.

19 Australian Psychological Society submission, 4.

20 Sikh Nishkam Society of Australia submission, 4.

Of the 13 submissions that were in favour of changing the terminology, nine suggested moving towards the word ‘dispute’ and language used in the Victorian legislation, which includes ‘bringing a dispute’ and ‘dispute resolution’.²¹

While most submissions preferred the word ‘dispute’, two others pointed out that this language may also be problematic because ‘dispute’ may suggest that the process is aggressive and argumentative, or there may be negative connotations associated with family relationship dispute processes.²²

We also heard that for some people, the word ‘dispute’ may be associated with less serious allegations between parties.²³ These submissions were of the view that terminology should be appropriate to the gravity of the allegations, rather than softening the language for any reason.²⁴

Building on these concerns, the word ‘dispute’ may suggest a disagreement between two parties in circumstances where person who has experienced discrimination or sexual harassment or would consider that ‘grievance’ is a more appropriate term.

Legal Aid Queensland noted that changing the words alone may not be enough to overcome barriers to making a complaint.²⁵

There were therefore mixed views about terminology, and it was hard to identify any one term that was an accurate description of the process, and that also meets diverse community expectations.

The Review’s position

The Review considers that:

- The new Act should re-orientate the Commission’s role from a complaint handling approach to a focus on dispute resolution.
- The terminology in the Act should retain the word ‘complaint’ to refer to a matter lodged with the Commission based on an alleged contravention/s of the Act, but refer to ‘dispute resolution’ to describe the process undertaken to resolve the complaint.
- The Commission should continue to work with relevant stakeholders to improve understanding of the Commission’s processes, specifically to help overcome reluctance to bringing a complaint.

Written complaints

The complaints process requires a means to make an allegation of a contravention of the Act (‘a complaint’).

Organisations and people against whom complaints are made (‘respondents’) are entitled to procedural fairness.²⁶ Therefore they must be informed of the allegations against them, have the right to respond to the allegations, and the decision-maker must be unbiased.

21 See *Equal Opportunity Act 2010* (Vic) Part 8.

22 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 8; Legal Aid Queensland submission, 32.

23 Institute for Collaborative Race Research, consultation, 12 May 2022.

24 Caxton Legal Centre submission, 13; Anti-Discrimination Law Experts Group submission, 30.

25 Legal Aid Queensland submission, 32.

26 The duty to provide procedural fairness (or natural justice) requires that a person whose rights, interests or legitimate expectations could be affected will be given a right to be heard (the hearing rule); and that the applicant is entitled to an impartial hearing, that is, that the decision-maker is not biased (the bias rule). This information is taken from Barry Dunphy and Michelle Hutchinson, *Advanced Government Decision-Making* (Clayton Utz, 2008).

We received 29 submissions²⁷ about whether the requirement for the complainant to make a complaint in writing should be retained.

21 submissions²⁸ supported assistance being given to complainants to lodge a complaint, with six²⁹ of these suggesting that assistance should be given to respondents as well. Later in this section, we discuss what type of assistance may be provided. 16 submissions suggested assistance should be given by the Commission, one did not express a preference and the others suggesting an outside agency should give this support.

Several submissions highlighted that there is benefit to respondents in being able to readily understand the allegations against them.³⁰ In fact, there is potential benefit to all parties, the Commission, and the tribunals if complaints are readily understood at the earliest opportunity, because it makes the whole process fairer and more expedient.

The main concern about the Commission providing assistance to a complainant to lodge a complaint, as opposed to another agency, was maintaining independence (including avoiding a perception of bias) when offering an impartial dispute resolution service.³¹ As contemplated in the Discussion Paper, impartiality could be maintained by an outside agency providing the assistance, or by the Commission having separate staff for intake and complaint-handling functions and being transparent about what assistance was given.

Current approach

The Anti-Discrimination Act requires complaints to be made in writing.³² Unlike the Human Rights Act,³³ there is no provision in the Act to allow the Commission to help complainants put their complaint in writing.

The Act also requires the Commission to promptly notify the respondent ‘in writing’ of the substance of the complaint if a complaint is accepted.³⁴ This is done by sending an electronic copy of the written complaint form by email to the respondent, or a hard copy to a postal address if necessary.

27 Public Advocate (Qld) submission; Australian Lawyers Alliance submission; PeakCare Queensland Inc submission; Independent Education Union submission; Women’s Legal Service submission; Queensland Network of Alcohol and Other Drug Agencies submission; Name withheld (Sub.026) submission; Anti-Discrimination Law Experts Group submission; Christian Schools Australia submission; Sikh Nishkam Society of Australia submission; Vision Australia submission; Multicultural Australia submission; Queensland Family and Child Commission submission; Jenny King submission; Ethnic Communities Council of Queensland submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Australian Industry Group submission; Caxton Legal Centre submission; Aged and Disability Advocacy Australia submission; Human Rights Law Alliance submission; Department of Transport and Main Roads submission; Respect Inc and DecrimQLD submission; Queensland Law Society submission; Australian Association of Christian Schools submission.

28 Public Advocate (Qld) submission; Australian Lawyers Alliance submission; PeakCare Queensland Inc submission; Women’s Legal Service submission; Queensland Network of Alcohol and Other Drug Agencies submission; Name withheld (Sub.026) submission; Australian Discrimination Law Experts Group submission; Christian Schools Australia submission; Vision Australia submission; Jenny King submission; Ethnic Communities Council of Queensland submission; Queensland Catholic Education Commission submission; Queensland Council for Civil Liberties submission; Equality Australia submission; Legal Aid Queensland submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Law Society submission; Australian Association of Christian Schools submission; Department of Transport and Main Roads submission; James Cook University submission (only supportive of pure transcription service).

29 PeakCare Queensland Inc submission; Christian Schools Australia submission; Equality Australia submission; Aged and Disability Advocacy Australia submission; Queensland Law Society submission; Australian Association of Christian Schools submission.

30 See for example: Public Advocate (Qld) submission, 3; Australian Discrimination Law Experts Group submission, 31; Department of Transport and Main Roads submission, 1.

31 See for example, Queensland Law Society submission, 14; Queensland Council of Civil Liberties submission, 6.

32 *Anti-Discrimination Act 1991* (Qld) s 136(a).

33 *Human Rights Act 2019* (Qld) s 67(2).

34 *Anti-Discrimination Act 1991* (Qld) s 143(1).

Respondents are not required to give a written response but can do so if they choose.³⁵ Some submissions suggested that assistance should be also given to respondents. The Commission is required to provide reasonable accommodations to parties if they require assistance because of a disability or if they have difficulty communicating in English because it is not their first language.³⁶

Limitations of written complaints

Of the 29 submissions that touched on these issues, 24 submissions³⁷ supported non-written³⁸ complaints being permitted. A number of these submissions framed their support in terms of the Commission making reasonable accommodations to accommodate communication preferences.³⁹

The Review heard that the requirement for a written complaint can deter many people from accessing the complaints process.⁴⁰ We also heard that most people who experience unlawful discrimination also experience significant barriers to access to justice.⁴¹

This was identified in our consultations with First Nations community-controlled organisations, or organisations that support First Nations communities. For example, we heard from people engaged with 2Spirits, an organisation that supports Aboriginal and Torres Strait Islander peoples who identify as Lesbian, Gay, Bisexual, Transgender, Intersex, Sistergirls, and Brotherboys across Queensland. We were told that it would be helpful to have someone assist people with making a written complaint particularly because:

*You know, it may not be the incident that causes... a massive impact on your mental health, but it could be past traumas and PTSD. And so when you're functioning in that space, writing is not, it just doesn't happen, because you're not thinking straight.*⁴²

The First Nations Employee Network at Community Legal Centres Queensland also told us that:

Many people do not want to make a complaint, or experience barriers to accessing the process due to the lack of cultural safety. This is true of the requirement of a written complaint...⁴³

35 *Anti-Discrimination Act 1991* (Qld) s 143(2)(c).

36 In this report, we recommend changes the current approach for providing reasonable accommodations. See chapter 5.

37 Public Advocate (Qld) submission; Australian Lawyers Alliance submission; PeakCare Queensland Inc submission; Independent Education Union submission; Women's Legal Service submission; Queensland Network of Alcohol and Other Drug Agencies submission; Australian Discrimination Law Experts Group submission; Sikh Nishkam Society of Australia submission; Vision Australia submission; Multicultural Australia submission; Queensland Family and Child Commission submission; Ethnic Communities Council of Queensland submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Aged and Disability Advocacy Australia submission; Department of Transport and Main Roads submission; Respect Inc and DecrimQLD submission; Queensland Law Society submission; Australian Association of Christian Schools submission.

38 The submissions suggested audio and/or video as had been outlined in the Discussion Paper, but overall did not contain a strong preference or identify any particular issues with either format.

39 See for example: Queensland Family and Child Commission submission, 6; Public Advocate (Qld) submission, 3.

40 See for example: Public Advocate (Qld) submission; PeakCare Queensland Inc submission, Independent Education Union submission; Queensland Network of Alcohol and Other Drug Agencies submission; Sikh Nishkam Society of Australia submission; Queensland Family and Child Commission submission; Ethnic Communities Council of Queensland submission; Legal Aid Queensland submission; Queensland Advocacy Incorporated consultation, 12 August 2021; Bangladeshi Community consultation, 15 August 2021; Queensland Indigenous Family Violence Legal Service consultation, 25 August 2021; 2Spirits consultation, 13 September 2021.

41 Law Council of Australia, *The Justice Project Final Report* (2018), as cited by Australian Discrimination Law Experts Group submission, 30.

42 2Spirits consultation, 13 September 2021.

43 Community Legal Centres Queensland submission, 5.

The Ethnic Communities Council of Queensland similarly told us that the complaint system is not culturally responsive or supportive, and the most significant hurdle is that all complaints must be written.⁴⁴

PeakCare Queensland noted they support measures that promote participation and increase accessibility for people with a diverse range of abilities and from culturally and linguistically diverse backgrounds.⁴⁵

The Commission currently provides accommodations that are necessary for parties, to both complainants and respondents, to participate in the complaints process in a way that ensures procedural fairness. For example, the Commission translates complaints made in languages other than English and translates letters or information into other languages as necessary. This does not, however, overcome the difficulty that some complainants have in providing a written complaint, particularly where the issue is a low level of literacy or disability.

These issues could be addressed by complainants being given assistance to lodge a written complaint. In practical terms, this would mean a person could speak with a staff member of the Commission, who would put their words in writing.

Comparative approaches

ACT approach – oral complaints

Of the Australian jurisdictions, only in the ACT can a complaint be made orally, and only if the Commission is satisfied on reasonable grounds that exceptional circumstances justify action without a written complaint.⁴⁶ The example of ‘exceptional circumstances’ provided in the Human Rights Act is if waiting until the complaint is put in writing would make action in response to the complaint impossible or impractical.

Queensland’s Human Rights Act

In Queensland, the Human Rights Act allows the Commission to provide ‘reasonable help’ to a complainant where satisfied that the complainant needs help to put the complaint in writing.⁴⁷

The Commission has a single form for all complaints, whether they be under the Human Rights Act or the Anti-Discrimination Act. Given that a person making a complaint may not be aware of which Act they are invoking, having two different standards can be problematic.

Other jurisdictions

Under the discrimination legislation federally⁴⁸ and in New South Wales,⁴⁹ Tasmania⁵⁰ and the ACT,⁵¹ the relevant commissions can give assistance to a person to make a complaint.

The Review’s position

The Review considers that:

- The requirement that complaints be made in writing is a barrier to complaints being made.
- There is benefit to parties, the Commission and the tribunals in ensuring complaints and responses are easily understood.

44 Ethnic Communities Council of Queensland submission, 2.

45 PeakCare Queensland Inc submission, 7.

46 *Human Rights Commission Act 2005* (ACT) s 44(4).

47 *Human Rights Act 2019* (Qld) s 67.

48 *Australian Human Rights Commission Act 1986* (Cth) s 46P(4).

49 *Anti-Discrimination Act 1977* (NSW) s 88A.

50 *Anti-Discrimination Act 1998* (Tas) s 62(2).

51 *Human Rights Commission Act 2005* (ACT) s 44(3).

- Maintaining impartiality of the Commission's dispute resolution service is important.
- Providing reasonable assistance to people to record their complaint in writing would improve access to justice for people who experience discrimination and sexual harassment, such as over the assistance by phone to complete the Commission's complaint form.
- A written record of a complaint is required in order to afford procedural fairness to the respondent and to facilitate the potential escalation of the complaint to a tribunal if it cannot be resolved at the Commission.
- Ideally, a person wanting to make a complaint would be provided with assistance by an external organisation or agency.
- If the Commission provides assistance, it should maintain the impartiality of its dispute resolution function by ensuring structural separation between staff who provide assistance to record a complaint, and those who resolve disputes.
- Reasonable accommodations are provided to both complaints and respondents under the current system.

Recommendation 7

- 7.1** The Act should provide that if the Commission is satisfied that the complainant needs help to put their complaint in writing, the Commission must give reasonable help to them to do so.
 - 7.2** If the Commission is satisfied on reasonable grounds that exceptional circumstances justify the complaint being made orally, the Act should allow the Commission to receive the complaint orally and transcribe into written form.
 - 7.3** The Commission should ensure that if help is given to a person to put their complaint in writing, it should be given by a staff member who will not be responsible for providing dispute resolution services to that party.
-

Time limits for making a complaint

Statutory provisions imposing time limits on initiating proceedings are a common feature of civil procedure.

On the one hand, they provide certainty to parties because action generally cannot be brought outside the time limit. On the other hand, they create a barrier to those who allege they have experienced discrimination or sexual harassment, so can result in otherwise unlawful behaviour remaining unchecked.

For tort or contract law, or for industrial law general protections,⁵² the time limit for making a complaint is between three and six years.

As noted elsewhere in this report, consistency across equality legislation is important and can have benefits. However, there is already some inconsistency across the jurisdictions with respect to time limits, even within the federal protections, as outlined in the Discussion Paper.⁵³

⁵² *Fair Work Act 2009* (Cth) s 544.

⁵³ Queensland Human Rights Commission, *Review of the Anti-Discrimination Act 1991* (Discussion Paper, November 2021) 58.

The current time limitations and the process undertaken across Australia in discrimination laws are displayed in the following table.

Jurisdiction	Time limit	Considerations	Appeal options
QLD	1 year	'complainant has shown good cause'	Judicial review ⁵⁴
NSW	1 year	'may decline'	Judicial review ⁵⁵
TAS	1 year	'...if satisfied that it is reasonable to do so'	Judicial review ⁵⁶
NT	1 year	'...if satisfied it is appropriate to do so'	Judicial review ⁵⁷
VIC	1 year	'discretion to decline...'	Merits to tribunal, but direct access exists ⁵⁸
SA	1 year	'if 'there is good reason and it is just & equitable to do so'	Merits to tribunal ⁵⁹
WA	1 year	'on good cause being shown'	Judicial review ⁶⁰
ACT	2 years	'may close a complaint...'	Merits to tribunal ⁶¹
Federal	6mths – 2yrs	'may terminate...'	Merits to court (with leave in some) ⁶²

Table: Comparison of statutory provisions and appeal rights

Judicial review is the court process by which the administrative decisions of government can be reviewed, and generally focuses on legal errors in the decision-making process rather than the substance or merit of the decision.⁶³ Merits review can be done internally or through administrative tribunals (and sometimes courts) and generally tries to 'stand in the shoes' of the original decision-maker and decide if the substantively correct decision was made or not.⁶⁴

Length of time

Current approach

Under the current Act, a person is only entitled to make a complaint within 1-year of the alleged contravention of the Act. This time limit is universal for all complainants. A complaint about conduct that occurred over one year ago can only be dealt with by the Commission if the complainant can show 'good cause.'

⁵⁴ *Anti-Discrimination Act 1991* (Qld) s 138.

⁵⁵ *Anti-Discrimination Act 1977* (NSW) s 89B(2)(b).

⁵⁶ *Anti-Discrimination Act 1998* (Tas) s 63.

⁵⁷ *Anti-Discrimination Act 1992* (NT) s 65.

⁵⁸ *Equal Opportunity Act 2010* (Vic) s 115.

⁵⁹ *Equal Opportunity Act 1984* (SA) ss 93, 96B.

⁶⁰ *Equal Opportunity Act 1984* (WA) s 83.

⁶¹ *Human Rights Commission Act 2005* (ACT) s 78.

⁶² *Australian Human Rights Commission Act* (Cth) ss 46PH(1)(b), 46PO.

⁶³ Robin Creyke, Matthew Groves, John McMillan and Mark Smyth, *Control of Government Action*, (LexisNexis Butterworths, 5th ed, 2019) 375-385.

⁶⁴ Robin Creyke, Matthew Groves, John McMillan and Mark Smyth, *Control of Government Action*, (LexisNexis Butterworths, 5th ed, 2019) 185-198.

In the Discussion Paper, we asked if the 1-year time frame is appropriate, or if it should be increased. We received 27 submissions⁶⁵ on this topic, 18⁶⁶ of which thought that there should be an increase in the time limit.⁶⁷

Should the time limitation be longer?

Stakeholders who thought the time limitation should be longer said that this would give complainants:

- A better opportunity to identify their issue as falling under the Act and to obtain advice⁶⁸
- A chance to move away from the setting in which the alleged incidents occurred⁶⁹ (for example, a tenancy⁷⁰ or workplace⁷¹)
- Time to fully utilise internal complaint mechanisms⁷²
- Relief from the time pressure that can increase the mental burden of bringing a complaint⁷³
- A chance to try to resolve matters directly with the other party, which is beneficial to respondents too⁷⁴

We also heard that for some people, discrimination or sexual harassment can cause trauma or psychological distress which can mean it takes a longer time to disclose. In these circumstances, time limits may expire before a person is ready to bring a claim.⁷⁵

Discussing how a 1-year time limit can largely be used up by delay in internal processes, Queensland Advocacy Incorporated gave the following example:

Ruby* started prep at her local school in 2020. Ruby's mother first started to raise concerns about the appropriate supports and adjustments in relation to Ruby's diagnosis of Autism Spectrum Disorder in 2020 without receiving an adequate response. The lack of communication and supports from the school escalated in year one. Ruby's mother attempted to raise these concerns with the school and regional office. The regional office suggested that Ruby's mother contact the Education Advocacy Service (EAS) at Queensland Advocacy Incorporated for assistance. The EAS Advocate attempted to resolve the concerns with the regional office without success. The EAS Advocate drafted

65 Name withheld (Sub.026) submission; Vision Australia submission; Ethnic Communities Council Queensland submission; Queensland Council for Civil Liberties submission; James Cook University submission; Australian Industry Group submission; Australian Association of Christian Schools submission; Australian Lawyers Alliance submission; Neami National submission; Tenants Queensland submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Community Legal Centres Queensland submission; Equality Australia submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Multicultural Advisory Council submission; Christian Schools Australia submission; Maurice Blackburn Lawyers submission; Women's Legal Service submission; Australian Discrimination Law Experts Group submission; Jenny King submission; Respect Inc and DecrimQLD submission; Queensland Law Society submission; Life Without Barriers submission; TASC National Limited submission; Youth Advocacy Centre Inc submission.

66 Australian Lawyers Alliance submission; Neami National submission; Tenants Queensland submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Community Legal Centres Queensland submission; Equality Australia submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Multicultural Advisory Council submission; Maurice Blackburn Lawyers submission; Women's Legal Service submission; Australian Discrimination Law Experts Group submission; Jenny King submission; Respect Inc and DecrimQLD submission; Queensland Law Society submission; Life Without Barriers submission; TASC National Limited submission.

67 There was variability in the proposed increases – ranged from 18 months to indefinite.

68 Equality Australia submission, 35.

69 Queensland Nurses and Midwives Union submission, 28.

70 Tenants Queensland submission, 4.

71 Legal Aid Queensland submission, 38.

72 Queensland Advocacy Incorporated submission, 22.

73 Australian Discrimination Law Experts Group submission, 33.

74 Queensland Advocacy Incorporated submission, 22.

75 Legal Aid Queensland submission, 38.

and sent a formal complaint on behalf of Ruby to the Department of Education, requesting a separate regional office review the complaint due to the region's previous involvement. The Department decided to send the complaint back to the same regional office for an outcome. Despite numerous attempts to follow up the complaint and seek an outcome, it took 15 weeks for the regional office to provide a response.⁷⁶

Seven submissions⁷⁷ preferred the time limit to remain at 1-year and one⁷⁸ suggested that an additional interim step be introduced requiring early notification of the potential complaint. Reasons given were:

- Giving individuals and organisations certainty sooner⁷⁹
- Parties would have a better chance of compiling necessary evidence (both internal records and witness accounts)⁸⁰
- There is already a reasonable process available for out-of-time complaints⁸¹

One stakeholder raised the issue of 'creep' – if complaints outside the time limit are accepted now, then if a longer time limit is instituted, complaints that are outside that longer time limit will potentially also be accepted under similar rationale.⁸²

Comparative approaches

In most Australian jurisdictions, a discrimination complaint must be made within 1- year. Northern Territory legislation and federal age, race, and disability laws have a 6-month time limit.⁸³ Discrimination complaints in the Australian Capital Territory and some complaints under the federal legislation have two-year time limits.⁸⁴

The Respect@Work report detailed the impacts of a 1-year time limit for people who have experienced sex discrimination at work.⁸⁵ In response to that report, sexual harassment and certain attributes⁸⁶ for discrimination complaints now have a two-year time limit under the Sex Discrimination Act.

The 1-year timeframe in Queensland⁸⁷ is much shorter than the limitations for the tort of personal injury (three years), other torts or contract (six years), or the general protections breaches under the *Fair Work Act 2009* (six years).⁸⁸ However, complaints to the Queensland Ombudsman have a time limit of one year.⁸⁹

76 Queensland Advocacy Incorporated submission, 22. Note that names have been changed and that we have edited this example.

77 Name withheld (Sub.026) submission; Vision Australia submission; Ethnic Communities Council of Queensland submission; Queensland Council for Civil Liberties submission; James Cook University submission; Australian Industry submission; Australian Association of Christian Schools submission.

78 Christian Schools Australia submission, 11.

79 Australian Association of Christian Schools submission, 10.

80 Australian Industry Group submission, 10.

81 James Cook University submission, 2.

82 Legal practitioners' roundtable, 10 February 2022.

83 *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b).

84 The Sex Discrimination and Fair Work (Respect at Work) Amendment Bill amends the *Australian Human Rights Commission Act 1986* s 46PH(1). This means that sexual harassment, sex, sexuality, gender identity and intersex status discrimination have a 2-year time limit but all other matters are subject to a 6-month timeframe.

85 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020), 493.

86 Sex, sexuality, gender identity and sex characteristics.

87 *Anti-Discrimination Act 1991* (Qld) s 138.

88 *Fair Work Act 2009* (Cth) s 544.

89 *Ombudsman Act 2001* (Qld) s 20(1)(c); *Information Privacy Act 2009* (Qld) s 168(f).

‘Out of time’ process

Current approach

Currently, a complaint can be accepted outside the 1-year time limit if the Commissioner is satisfied the complainant has shown ‘good cause’.⁹⁰ We will refer to complaints that include incidents that are alleged to have occurred more than 1 year before bringing the complaint to the Commission as ‘out-of-time’.

In practice, the ‘good cause’ process involves the Commission seeking submissions from the complainant and the respondent and then making an administrative decision about whether or not to accept the out-of-time portion of the complaint.

However, if a person makes a complaint that involves allegations within that 1-year period but also allegations outside that period, the Commission will do a conciliation in an effort to resolve the whole complaint. Only if it does not resolve, the Commission will then engage parties in the ‘good cause’ process.⁹¹

If a complaint contains only allegations older than 1-year, the Commission undertakes the ‘good cause’ process at the outset and only if good cause is shown will a conciliation conference occur.

Some reasons accepted by the Commission as being good cause are the complainant being a child at the time of the alleged incidents, or the complainant having mental health issues that meant making a complaint earlier was not possible.

The ‘good cause’ process is onerous for parties and uses significant Commission resources. Layering on this additional process further delays an already delayed matter – this may cause more unfairness to the parties as memories of the alleged conduct may fade further over time.

This is in contrast to the approach in many other jurisdictions where the onus is not on the complainant to show ‘good cause’ but timeliness is one of the discretionary factors to consider when accepting a matter to proceed to dispute resolution. We discuss this further below.

Of the number of out-of-time decisions made at the Commission in the last two financial years, around 50% are brought within two years.⁹²

Either party can ask for an internal review of any out-of-time decision. If they remain dissatisfied after internal review, the only step available is judicial review in the Supreme Court. As can also be seen in the table earlier in this section, ‘Comparison of statutory provisions and appeal rights,’ there are different approaches across Australia, with some being similar to Queensland and others allowing merits review to a tribunal or court.

In 2021, no applications for judicial review were made regarding Commissioner decisions on out-of-time complaints.⁹³ In 2020, one application for judicial review was made.⁹⁴

If a complaint that contains out-of-time allegations is referred to the tribunal, the tribunal can deal with the complaint if it considers that, on the balance of fairness between the parties, it is reasonable to do so.⁹⁵ This means that under the current system, parties potentially address the out-of-time issue twice. This results in a lack of certainty for the parties as to whether the complaint will continue past the preliminary stages at the relevant tribunal.

⁹⁰ *Anti-Discrimination Act 1991* (Qld) s 138.

⁹¹ *Anti-Discrimination Act 1991* (Qld) s 141A.

⁹² The Queensland Human Rights Commission keeps internal data on these decisions.

⁹³ The only decision that was reviewed under the *Judicial Review Act 1991* in 2019 was in relation to whether or not to accept or reject a complaint under section 139 of the *Anti-Discrimination Act*.

⁹⁴ *Ryle v Venables and Ors* [2021] QSC 60.

⁹⁵ *Anti-Discrimination Act 1991* (Qld) s 175.

Comparative approaches – out-of-time decisions at Commission stage

The current Victorian approach is that ‘the Commission can decline to resolve complaints...more than 12 months old, although in practice we almost never use this discretion.’⁹⁶ They see ‘a key strength of the Commission’s dispute resolution service is the capacity to offer a restorative and non-adversarial...process...reflected in broad discretion to accept complaints, low evidentiary threshold, practice of accepting complaints that may have occurred more than 12 months before the dispute was brought and victim-centric processes.’⁹⁷

There is little publicly available information about how other human rights agencies exercise this discretion.

The process set out in the Human Rights Act is also more flexible - the Commission ‘may refuse’ to deal with a human rights complaint if the complaint was not made within one year.⁹⁸ There may be some benefit in alignment with this process, considering most accepted human rights complaints are ‘piggyback’ complaints where a discrimination element is also present.

Comparative approaches - appeal options

As noted in the table above, ‘Comparison of statutory provisions and appeal rights’, in South Australia, Victoria, the ACT and federally, judicial review is not the avenue of appeal for these out-of-time type decisions.

In South Australia the appeal lies to the tribunal.

In Victoria and the ACT, the complainant can refer to the relevant tribunal regardless of any view held by the human rights agency that the complaint is out-of-time.

At a federal level, the complainant can proceed to court but needs to seek the court’s leave in out-of-time situations. Once at court, there may be legal costs awarded against an unsuccessful party.⁹⁹

Eight submissions¹⁰⁰ commented on this issue, with all agreeing that the current Supreme Court judicial review process is not preferable. The main reasons given were cost and complexity.¹⁰¹

However, Legal Aid Queensland note that if this sort of decision were to be reviewable in the relevant tribunal, current delays in QCAT would be problematic.¹⁰²

Children and people with impaired capacity

Complaints from children

Although children can make a complaint under the Act, they very rarely do so. In addition, the Commission can authorise a person to act on behalf of the complainant if they are unable to make or authorise a complaint.¹⁰³

96 Victorian Equal Opportunity and Human Rights Commission submission to the National Inquiry into Sexual Harassment in Australian Workplaces (February 2019), 39.

97 Victorian Equal Opportunity and Human Rights Commission submission to the National Inquiry into Sexual Harassment in Australian Workplaces (February 2019), 31.

98 *Human Rights Act 2019* (Qld) s 70(d).

99 See *Australian Human Rights Commission Act 1986* (Cth) ss 46PH(1)(b), 46PO and *Federal Court of Australia Act 1976* (Cth) s 43.

100 Australian Discrimination Law Experts Group submission; Equality Australia submission; Aged and Disability Advocacy Australia submission; Australian Industry submission; Queensland Law Society submission; Australian Lawyers Alliance submission; Queensland Council for Civil Liberties submission; Legal Aid Queensland submission.

101 Aged and Disability Advocacy Australia submission, Australian Discrimination Law Experts Group submission, Equality Australia submission, Australian Lawyers Alliance submission, Queensland Council for Civil Liberties submission, Australian Industry Group submission, Queensland Law Society submission, Legal Aid Queensland submission.

102 Legal Aid Queensland submission, 38.

103 *Anti-Discrimination Act 1991* (Qld) s 134(1)(c).

Whether or not a particular child is willing or able to make a complaint is a separate issue from whether or not they have a right to do so. Most submissions commented on whether children are willing and able to make a complaint.

12 submissions¹⁰⁴ recommended that the time limit for children to make a complaint should only commence when they turn 18. During the Young people's roundtable, we heard from 37 young people aged between 18 and 25 years old and 11 young people under 18 years. Most indicated that an increase in the 1-year time limit was preferable. One participant noted:

*I didn't know about discrimination, and I was around 14 years old - there's no way I would be able to make a complaint, I wouldn't even know how to do that - though even at 15, even maybe at 16. So you certainly need to think about some time - young kids, for people with disabilities, or mental health systems, who are in detention, for example. There's lots of different impacts, 12 months is a very short period of time.*¹⁰⁵

The most vulnerable children are less likely to have an adult assisting them in many aspects of life, including if they may have been discriminated against. Even if a child does have a supportive adult, that adult may or may not have the resources or ability to assist them in making a complaint. These issues mean that the Commission does not receive a large number of complaints from young people, despite them being a group which is likely to experience discrimination.

The Queensland Family and Child Commission submission refers to the Act as being 'adult-centric'.¹⁰⁶

One participant at the Young people's roundtable told us that:

*...when you feel like you're being discriminated against by the police, or by a system, it kind of deters you from going up and being like, 'Hey, you know...', because if they're sometimes that ones that are also causing the discrimination, it can really deter you from going up. And you feel like you're not going to be taken seriously.*¹⁰⁷

Legal Aid Queensland suggests¹⁰⁸ that applying a human rights approach to children's issues requires consideration of the reduced capacity of a child to bring a civil legal action and that this engages the right to recognition and equality before the law¹⁰⁹ and the protection of families and children.¹¹⁰

People with impaired decision-making capacity

Several submissions pointed out that those with impaired decision-making capacity have an extra barrier to being able to make a complaint and so should be given extra time to complain.¹¹¹

104 Vision Australia submission; Maurice Blackburn Lawyers submission; Women's Legal Service submission; Australian Discrimination Law Experts Group submission; TASC National Inc submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Youth Advocacy Centre Inc submission; Multicultural Advisory Council submission; Queensland Law Society submission.

105 Young peoples' roundtable, 17 February 2022.

106 Queensland Family and Child Commission submission, 3.

107 Young peoples' roundtable, 17 February 2022.

108 Legal Aid Queensland submission, 40.

109 *Human Rights Act 2019* (Qld) s 15.

110 *Human Rights Act 2019* (Qld) s 26(2).

111 See for example, Vision Australia submission; Queensland Advocacy Inc submission.

However, we note that a key reason often proffered to substantiate good cause is the incapacity of a complainant to make a complaint for a certain period due to mental or physical illness. In fact, this is one of the most common grounds on which the Commission has previously accepted there is 'good cause' to accept an out-of-time complaint.

Some submissions talked about particular barriers for people who are under financial administration orders with the Public Trustee as administrator.¹¹² As the basis of these issues fall outside our Terms of Reference, we have not considered this issue in this review.

Comparative approaches

None of the discrimination or human rights legislation in Australia has explicit dispensation from time limits for those who have impaired capacity.

In Tasmania, a litigation guardian¹¹³ can be appointed for a child or another person who is unable to make a complaint due to disability, age or other incapacity.¹¹⁴ Victoria deals with complaints by children and people with a disability in a similar way.¹¹⁵ A similar process already exists in Queensland.¹¹⁶ For these people, the time limit under the relevant Acts is not increased.

Certain time limits for those under a disability is extended by the Limitations of Actions Act.¹¹⁷ The idea of extended time limits in those instances is not new or novel.

Delays created by current backlog

The previous sections explored ways to alleviate some of the barriers to making a complaint. An obvious barrier to the early and effective resolution of disputes, and therefore access to justice, is the current wait times in matters being dealt with by the Commission.

Since 2020 the Commission has experienced a significant increase in the number of complaints it receives, in part because of complaints related to the COVID-19 pandemic. This has resulted in a backlog of complaints, with a delay of approximately six months between lodgement of complaints and their assessment by Commission staff.¹¹⁸

Legal Aid Queensland provided two case studies which demonstrate the difficulties their clients face with the current delays, one of which we include below:

An Aboriginal man from a remote community was diagnosed with potentially life-threatening cancer while in custody and his application for special circumstances parole was rejected. He made a complaint to the Commission, alleging indirect race discrimination and a breach of his cultural rights under the Human Rights Act. His complaint took 6 months to be allocated for assessment and then was initially rejected by the Commission. After requesting internal review, his discrimination complaint rejection was upheld, and he has applied for judicial review of that decision in the Supreme Court.¹¹⁹

The Review notes the Commission has obtained additional funding to reduce the backlog as soon as possible and has adapted its complaints handling processes to the extent permitted by the existing legislative requirements. We also note that the recommendations made by this report are, in part, designed to create a more efficient process.

¹¹² Office of the Public Guardian submission, 2.

¹¹³ Someone who acts on behalf of a party when that party is unable to conduct their own litigation due to mental or physical incapacity.

¹¹⁴ *Anti-Discrimination Act 1998* (Tas) s 60A.

¹¹⁵ *Equal Opportunity Act 2010* (Vic) ss 113(1)(b) and (c).

¹¹⁶ *Anti-Discrimination Act 1991* (Qld) s 134.

¹¹⁷ *Limitations of Actions Act 1974* (Qld) s29.

¹¹⁸ Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 2021) 13.

¹¹⁹ Legal Aid Queensland submission, 31 and 37. Note: this case study has been edited.

The Review's position

The Review considers that:

- Having a one-year time limit is a barrier to complaints being brought to the Commission.
- The current out-of-time process undertaken by the Commission to determine 'good cause' under s138 of the Act is unduly onerous.
- Canvassing of the out of time issue at the Commission stage and again at the tribunal is not beneficial because it adds a further point of contention and reduces certainty for the parties.
- Judicial review of a Commission decision to exercise discretion on the basis of 'good cause', is generally not an accessible review process.
- The time limit issue can best be dealt with by the Commission exercising discretion in whether or not to offer dispute resolution in a particular complaint.
- There should be special provisions for exercising discretion with respect to children.
- Time limits for people with impaired decision-making capacity can be adequately catered for by the Commission exercising discretion in whether or not to offer dispute resolution in a complaint that has been brought outside the ordinary time limit.

Recommendation 8

- 8.1** The Commission should have discretion to decline to provide or continue to provide dispute resolution if the alleged contravention occurred more than 2 years before the complaint was lodged. The Act should frame the time limit by way of giving the Commissioner discretion to provide dispute resolution.
 - 8.2** The Act should explicitly provide that a child can bring a complaint. If a complaint is brought in relation to allegations that occurred when the person was a child, the Act should allow that the 2 years referred to in the discretion only starts once the child turns 18, unless the respondent can show substantial prejudice.
 - 8.3** The Act should give the Tribunal the jurisdiction to make a merits review of decisions by the Commission in relation to the discretion to provide dispute resolution, and discretion to be able to award costs if an application is frivolous or vexatious.
 - 8.4** The Act should require that an application for review must not be made unless the tribunal has granted leave to make the application.
-

Filtering complaints

Current approach

Currently, the Commission undertakes an assessment to identify the priority of a matter, including if it is urgent, for example, if education or accommodation is at imminent risk.¹²⁰

- The Commission then considers whether:
 - there are reasonably sufficient details to indicate an alleged contravention of the Act¹²¹
 - the complaint has been made in time¹²²
 - to reject the complaint because it is frivolous, trivial or vexatious; or misconceived or lacking in substance¹²³
 - to reject or stay the complaint because it is being or should be dealt with elsewhere¹²⁴
 - the complaint would be more appropriately dealt with under the Human Rights Act.¹²⁵

The Commission ultimately decides whether to accept or reject a complaint within 28 days of receiving the complaint and must promptly notify the complainant of the decision.¹²⁶ If the complaint is accepted, the Commission must notify the respondent in writing of the substance of the complaint.¹²⁷

If a complaint is rejected in the first instance, the complainant has the opportunity to provide more information to establish that it should be accepted. Once a complaint is ultimately rejected through the process above, the complaint lapses and a complainant cannot lodge their complaint with the tribunal.¹²⁸

The Commission's filtering role

In the Discussion Paper we asked about whether the current system – in which a complaint is assessed by the Commission as to whether it falls under the Act, and then only if unresolved, the matter proceeds to tribunal, should be retained – or whether the Act should permit complainants to by-pass the Commission and proceed directly to the tribunals. We also asked whether there should be direct access to the Supreme Court in limited and defined circumstances.

We heard varying perspectives about the advantages and disadvantages of the Commission having a role in filtering out complaints through the assessment process. 12 submissions were in

120 The legislation does not expressly provide for this step.

121 *Anti-Discrimination Act 1991* (Qld) s 136. Note that sometimes the assessor may request further information from a complainant or may obtain information or documents under s 156 ADA to finalise this assessment.

122 *Anti-Discrimination Act 1991* (Qld) s 138.

123 *Anti-Discrimination Act 1991* (Qld) s 139.

124 *Anti-Discrimination Act 1991* (Qld) s 140.

125 *Anti-Discrimination Act 1991* (Qld) s 140A.

126 *Anti-Discrimination Act 1991* (Qld) s 141. Note that this section allows for a decision about whether to accept an out-of-time complaint to be made after conciliation has occurred if there are both in-time and out-of-time allegations in a complaint. Note also that the Commission has had a significant backlog of complaints since 2020 because of an increase in complaint numbers.

127 *Anti-Discrimination Act 1991* (Qld) s 143. Note that this section also stipulates other information which must be notified to the respondent, including a conciliation conference date which must be between 4 and 6 weeks from the date of notification.

128 *Anti-Discrimination Act 1991* (Qld) s 142. Note that a complainant can ask for internal review and then can make an application for judicial review of the Commission's decision under the *Judicial Review Act 1991* (Qld).

support of direct access as of right.¹²⁹ A further five submissions were in support of direct access in certain circumstances.¹³⁰ Eight submissions indicated direct access is not appropriate.¹³¹

Several submissions suggest that the tribunals risk being overwhelmed if the Commission no longer played a role and a direct right of access were granted.¹³² However, on this point, the Australian Discrimination Law Experts Group submission indicates that in Victoria, direct access has not led to an overwhelming number of claims.¹³³

The Queensland Civil and Administrative Tribunal sees benefit in the Commission identifying complaints that should not go further as it would 'allow limited resources to be allocated to more substantive matters.'¹³⁴ James Cook University identified that the process would become 'unnecessarily burdensome on all parties' if a direct right of access were given.¹³⁵

In other submissions, the disadvantages identified in the Commission's role in filtering complaints were:

- length of time taken from complaint lodgement¹³⁶
- potential that 'test cases' are not accepted because they do not fit within established jurisprudence¹³⁷
- lack of easily accessible merits appeal options and judicial review processes being onerous.¹³⁸

The Commission's data shows that, of the 3,152 complaints that were assessed between 1 July 2018 and 30 June 2021, the Commission accepted 1,536.¹³⁹

While there was some support for direct access to the Supreme Court in public interest cases,¹⁴⁰ this seemed to be outweighed by hesitation in stepping into a potentially costly and invariably more legally complex arena.¹⁴¹ The Youth Advocacy Centre told us:

The Supreme court is not a realistic option for the general member of the public, and certainly not for children. The costs associated with it are a major barrier and it is highly legalistic.¹⁴²

129 Queensland Council of Social Service submission; Public Advocate (Qld) submission; Australian Lawyers Alliance submission; Vision Australia submission; Women's Legal Service submission; Australian Discrimination Law Expert Group submission; Jenny King; Maternity Choices Australia submission; Queensland Council for Civil Liberties submission; Scarlet Alliance submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission.

130 Australian Association of Christian Schools submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Queensland Law Society submission.

131 Name withheld (Sub.026) submission; Medical Insurance Group Australia submission; Queensland Council of Unions submission; Queensland Catholic Education Commission; James Cook University submission; LawRight submission; Australian Industry submission; Queensland Civil and Administrative Tribunal submission.

132 See for example, Name withheld (Sub.026) submission, 4; James Cook University submission, 2.

133 Australian Discrimination Law Experts Group submission, 30.

134 Queensland Civil and Administrative Tribunal submission, 28.

135 James Cook University submission, 2.

136 Vision Australia submission, 4.

137 Caxton Legal Centre submission, 10.

138 Legal Aid Queensland submission, 31.

139 Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 2021) 33; Queensland Human Rights Commission, *Annual Report 2019-20* (Report, 2020) 31; Queensland Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 25. Note that in 2020-21 the number of complaints received and the number assessed was significantly different because of a backlog of complaints.

140 See for example, Women's Legal Service submission, 6; Vision Australia submission, 4; Respect Inc and DecrimQLD submission, 21.

141 See for example, Legal Aid Queensland submission, 29.

142 Youth Advocacy Centre Inc submission, 5.

Comparative approaches

There are four different approaches across the Australian human rights agencies. Queensland and the Northern Territory bodies having the most rigorous filtering process.

The extent of the filtering role resting with the agency is set out in the table below:

Assessment role	Jurisdictions
None	Victoria
Complaint must be made to Commission but rejection does not deprive complainant of right to lodge in tribunal	NSW ACT South Australia Western Australia
Complaint must be made to Commission and seek review or leave in tribunal/court if rejected	Tasmania Federal
Complaint must be made to Commission and review is by judicial review only	Northern Territory Queensland

Table: Comparison of assessment roles

In summary, in every jurisdiction but the Northern Territory and Queensland there are some appeal rights available outside of judicial review. In all but the federal jurisdiction, this allows a complainant to appeal a decision of the Commission in what is generally a simplified process.

If decisions were reviewed by the tribunals, this may also provide guidance to the Commission about factors to be considered in whether or not a complaint should be accepted.

The Review's position

The Review considers that:

- All complaints should be assessed by the Commission as to whether there are reasonably sufficient details to indicate an alleged contravention of the Act, rather than having a direct right of access to a tribunal. This assessment should include rejecting disputes which are frivolous, trivial, vexatious, misconceived or lacking in substance. This ensures resources are used for complaints that are within the jurisdiction of the Act.
- However, as we discuss below, in certain circumstances the Commission may decide not to offer dispute resolution services.
- Judicial review of a Commission decision to accept or reject a complaint, is generally not an accessible review process.

Resolving disputes

Are complaints investigated?

During the Review, some stakeholders shared perspectives with the Review that suggested they expected that the Commission conducts an inquiry into each complaint and uses its powers to carry out an investigation.

This may be because the current functions of the Commission include to:

- inquire into complaints and, where possible, to effect conciliation¹⁴³
- to carry out investigations relating to contraventions of the Act.¹⁴⁴

The Anti-Discrimination Act also allows the Commission to investigate a complaint at any time after it is received¹⁴⁵ and to obtain information and documents.¹⁴⁶ However, even if information is obtained, under the current Act there is very little that the Commission can do with information obtained during any investigation. This is one of the reasons the Commission's current approach focuses on complaint-handling.

In practice, these powers are only used in very limited circumstances, often in undertaking preliminary inquiries. For example, the Commission may contact an entity to identify people who may need to be named as a respondent to a complaint.

There therefore appears to be a disconnect between the current legislation, which focuses on inquiring into and investigating complaints – and the current approach – which focuses on complaint handling.

Conferences and early dispute resolution

Once a complaint has been accepted, in the vast majority of cases, the Commission conducts a conciliation conference involving all parties.¹⁴⁷ This is, in part, due to rigid procedural timeframes and processes required by the Act, which limit flexibility for conciliators, who are left without the ability to decide which is the best way to resolve a dispute.

This means that with few exceptions, every complaint is treated in the same way, regardless of whether a conciliation conference is in fact the best way to deal with a particular complaint.

Current approach

The Act creates set timeframes for accepting/rejecting complaints,¹⁴⁸ and for holding conciliation conferences.¹⁴⁹ It also contains a detailed provision that specifically requires the Commission to notify the respondent of a number of matters, including the date for a conciliation conference.¹⁵⁰ This creates disharmony with another section of the Act which implies that there is discretion to hold a conference by stating that the Commissioner must attempt conciliation if they believe it may be resolved in that way.¹⁵¹

¹⁴³ *Anti-Discrimination Act 1991* (Qld) s 235(a).

¹⁴⁴ *Anti-Discrimination Act 1991* (Qld) s 235(b).

¹⁴⁵ *Anti-Discrimination Act 1991* (Qld) s 154.

¹⁴⁶ *Anti-Discrimination Act 1991* (Qld) s 156.

¹⁴⁷ As outlined in the Discussion Paper, there is inconsistency within the provisions of the Act about whether a conciliation conference must be held but in practice one occurs in the vast majority of complaints.

¹⁴⁸ *Anti-Discrimination Act 1991* (Qld) s 141.

¹⁴⁹ *Anti-Discrimination Act 1991* (Qld) s 143.

¹⁵⁰ *Anti-Discrimination Act 1991* (Qld) s 143.

¹⁵¹ *Anti-Discrimination Act 1991* (Qld) s 158.

The detailed notification and timeframes provisions were introduced through amendments to the Act in 2002. These amendments were an attempt to deal with the fact that the process had become ‘unnecessarily protracted, and accordingly, expensive and frustrating for parties.’¹⁵²

Within the constraints of the current framework, Commission staff are able to, and often do, respond flexibly to the needs of the parties during conciliation, such as whether to have all parties in the same room at the same time or instead to conduct shuttle negotiations where parties are separated. Shuttle negotiations may continue after a formal conciliation conference has ended, but that this can only occur once the legislative requirements for setting down the conciliation conference have been met. However, a more flexible legal framework may leave room for further improvements.

Benefits of dispute resolution

When commenting on this issue, there was general consensus amongst submissions that, for most complaints, there is benefit in having dispute resolution processes available.

Some of the identified benefits included that conciliation conferences can be truth-telling,¹⁵³ supportive and practical.¹⁵⁴ Legal Aid told us that:

Queensland Human Rights Commission conciliators have specialist knowledge and skills which ensures that the conciliation process is generally conducted in a more sensitive and appropriate manner than in other forums... 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.¹⁵⁵

Australian Industry Group see value for employers in having access to a resolution process that ‘does not entrench an adversarial approach or lead to excessive legal fees.’¹⁵⁶

While there was general support for dispute resolution processes, some submissions agreed with comments by academics, which we included in the Discussion Paper,¹⁵⁷ that confidentiality clauses in conciliation agreements can lead to a lack of public exposure.¹⁵⁸

Conciliation conferences are confidential in that nothing said or done in a conference can be included in documents from the Commission if referral to a tribunal occurs.¹⁵⁹ The Act also stipulates that they happen in private.¹⁶⁰ However, there is no legislative requirement regarding confidentiality clauses in agreements negotiated through conciliation at the Commission. The Commission templates used to have standard confidentiality clauses in them. In response to the Respect@Work report,¹⁶¹ these clauses are now negotiable. In practice though, one of the advantages to respondents in resolving complaints through the Commission process is that they can avoid issues being made public, so confidentiality is often agreed to by complainants as part of the negotiation of an outcome.

152 Explanatory Notes, Discrimination Law Amendment Bill 2002 (Qld) 5-7.

153 Legal Aid Queensland submission, 27.

154 Queensland Catholic Education Commission submission, 5.

155 Legal Aid Queensland submission, 35.

156 Australian Industry Group submission, 8.

157 Queensland Human Rights Commission, Review of the *Anti-Discrimination Act 1991* (Discussion Paper, November 2021) 51.

158 Legal Aid submission, 28; Caxton Legal Centre submission, 11.

159 *Anti-Discrimination Act 1991* (Qld) s 208(2).

160 *Anti-Discrimination Act 1991* (Qld) s 161.

161 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) Recommendation 38.

More flexible processes

In the Discussion Paper, we asked how the law can be adapted to allow a more flexible approach to resolving complaints. The Review received 20 submissions on the questions of efficiency and flexibility of the process.¹⁶² 19 of these supported more flexibility in the Commission's approach to resolving complaints though one suggested retaining current timeframes for complaints.¹⁶³

The main reasons for supporting increased flexibility were that it could:

- better meet the needs of the parties
- preserve relationships where relevant
- reduce ongoing potential breaches of the Act
- deal with urgent situations.

Trauma-informed practice also requires processes to be adaptable, depending on the needs of parties, and may include having a liaison role in addition to that of the dispute resolution practitioner.¹⁶⁴ A submission from the Queensland Family and Child Commission discusses the concept of 'active efforts,' which includes taking a proactive approach to provide an appropriate environment for raising and resolving complaints.¹⁶⁵

Some submissions indicated that it is problematic for the Commission to treat all matters alike – especially in systemic, public interest or test cases.¹⁶⁶

Caxton Legal Centre's submission pointed out that there are times when significant time and energy has already been expended by parties in internal complaint processes so further dispute resolution through the Commission is not likely to advance the matter.¹⁶⁷

The Associated Christian Schools submission noted that 'early intervention promotes a swift resolution of complaints, in which relationships would be preserved, and systemic discrimination addressed'.¹⁶⁸ Vision Australia supported being able to 'tailor the complaint process to the needs of the parties and the nature of the dispute, including matters of priority and urgency'.¹⁶⁹ Legal Aid identified that a human rights approach would offer triage or scaled level of support rather than the same level of service for all complaints and that the Commission should be able to 'respond proactively where there is a risk of ongoing discrimination or sexual harassment'.¹⁷⁰

162 Legal Aid Queensland submission; Queensland Family and Child Commission submission; Queensland Network of Alcohol and Other Drug Agencies submission; Women's Legal Service submission; Australian Discrimination Law Experts Group submission; Maurice Blackburn Lawyers submission; Human Rights Law Alliance submission; Associated Christian Schools submission; Vision Australia submission; Jenny King submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; James Cook University submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission.

163 Legal Aid Queensland submission; Queensland Family and Child Commission submission; Queensland Network of Alcohol and Other Drug Agencies submission; Women's Legal Service submission; Australian Discrimination Law Experts Group submission; Maurice Blackburn Lawyers submission; Associated Christian Schools submission; Vision Australia submission; Jenny King submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; James Cook University submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission. Note that Associated Christian Schools submission supported retaining timeframes.

164 Community Legal Centres Queensland submission, 4.

165 Queensland Family and Child Commission submission, 6.

166 See for example, Caxton Legal Centre submission, 11; Equality Australia submission, 32.

167 Caxton Legal Centre submission, 10.

168 Associated Christian Schools submission, 1.

169 Vision Australia submission, 5.

170 Legal Aid Queensland submission, 27 and 37.

Australian Discrimination Law Experts Group submission points out that the Commission should be able to deal with complaints in a timely and flexible manner and suggests that setting outer time limits can ensure that complaints are dealt with.¹⁷¹ Queensland Council for Civil Liberties also highlight that people dealing with the Commission should be entitled to some level of certainty about how their complaints will be dealt with and that the Commission should publish policies, procedures and directions to achieve this.¹⁷²

Who should attend a conference?

The Commission currently directs all parties, including each individually named respondent, to attend the conciliation conferences it convenes.

We were told that, for some people, this approach can be valuable for complainants in being able to air their allegations directly to the other party.¹⁷³ This may not be the case for all complainants.

However, the Department of Education submission indicates that the conciliation process is not necessarily enhanced when it involves individual employees.¹⁷⁴ This point was also raised in consultation with lawyers who act on behalf of respondents.¹⁷⁵

We were also told that having a large number of respondents in a conciliation conference can feel unfair to complainants, even when the complainant is legally represented.¹⁷⁶

Comparative approaches

Most jurisdictions provide discretion as to how a discrimination or sexual harassment complaint is handled by the human rights agency, and none provide the prescriptive timeframes for notification and conferencing that are contained in the Queensland Act.¹⁷⁷

Human Rights Act approach

In Queensland, the Human Rights Act allows the Commission some discretion in dispute resolution service delivery, with indications of early success. In 2020-21, of the 47 complaints the Commission resolved under the Human Rights Act, 14 were by early intervention and 33 by conciliation.¹⁷⁸

The Human Rights Act allows for a flexible approach to resolving dispute and gives the Commissioner broad discretion in how to try to resolve the complaint.¹⁷⁹ The Commissioner can do what is considered appropriate, including asking the respondent to make submissions in response to the complaint, asking either party to give information, making enquiries of and discussing the complaint with the parties or conciliating. This means that the Commission staff have a broad discretion, including to be able to conduct shuttle negotiations, where the staff member acts as the go-between, without ever convening a formal conciliation conference.

Victorian and federal approaches

In Victoria, the 2008 Gardner Review found that the statutory processes were complex and formal.¹⁸⁰ The processes at that time were similar to what currently exists in Queensland under

171 Australian Discrimination Law Experts Group submission, 32.

172 Queensland Council of Civil Liberties submission, 7.

173 Legal Aid Queensland submission, 27.

174 Department of Education submission, 8.

175 Crown Law, consultation, 21 October 2021.

176 Aboriginal and Torres Strait Islander Women's Legal Service (NQ) consultation, 15 September 2021.

177 *Anti-Discrimination Act 1991* (Qld) ss 141, 143.

178 Queensland Human Rights Commission, *Human Rights Annual Report 2020-21* (Report, 2021) 138.

179 *Human Rights Act 2019* (Qld) s77.

180 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 'Gardner Review'.

the Anti-Discrimination Act. The Review used legislation in New Zealand¹⁸¹ as a model and made recommendations which were incorporated in the Equal Opportunity Act in 2010. Since then, the Victorian Commission has had a flexible process that allows it to select different dispute resolution processes, depending on the nature of the complaint and the needs of the parties.¹⁸² This is similar to the approach in the Human Rights Act.

In practice, this means that early dispute resolution, including early intervention, is offered when a complaint involves one attribute and one area (mainly in goods and services). Early intervention can include asking any party to give the commissioner information relevant to the complaint, making enquiries of or discussing the complaint with either or both parties, and may include conducting shuttle negotiations where a complaint handler is the go-between and there is no direct meeting of the parties.

The Victorian Commission aims to finalise these disputes within 28 days of receipt.¹⁸³

The Victorian Act also enshrines principles of dispute resolution. These include that dispute resolution should be voluntary, provided as early as possible, appropriate to the nature of the dispute, fair to all parties and consistent with the objectives of the Act.¹⁸⁴

With a higher level of discretion, the Victorian Commission has indicated that the dispute resolution principles underpin their processes and guide and inform their approach.¹⁸⁵

The Australian Human Rights Commission (AHRC) also has similar flexibility in what dispute resolution opportunities it provides to parties.¹⁸⁶ A key difference is that the AHRC can choose to either 'direct' or 'invite' a party to a conference – the person 'invited' rather than 'directed' can then elect whether to attend. While ensuring procedural fairness this allows flexible considerations about which parties need to be 'in the room' to resolve the dispute and may reduce the number of parties in attendance on the respondent's side who are not central to the matter. This may assist in reducing the impact of power imbalances during conciliation.

In our consultations with both the Victorian and Federal commissions, we identified that the flexible approach has had clear benefits for their complaint handling processes.¹⁸⁷ Increasing legislative discretion as to whether or not a conciliation conference is the best approach for resolving a dispute, means that, where the Commission has determined that there is benefit in offering dispute resolution, complaints can be resolved by a range of dispute resolution tools – including early dispute resolution, shuttle negotiations without any meeting of the parties, or conciliation conference.

Assoc Prof Dominique Allen has written about the Victorian dispute resolution services:

Overall, the interviewees were very positive about the dispute resolution services that the VEOHRC provides, particularly the flexibility. Conciliation can take place in person, by phone, or by shuttle, depending on the nature of the complaint and the parties' wishes. There is no standard way of conducting a conciliation and the conciliators will respond to the parties' needs. For example, if the complainant does not want to be in the same room as the respondent, the conciliator will separate them or if they think that it will be conducive for the parties to meet, rather than negotiating 'by paper', then they will arrange for a conciliation to take place in person. A conciliator said that they encourage the parties

¹⁸¹ *Human Rights Act 1993* (NZ).

¹⁸² *Equal Opportunity Act 2010* (Vic) s 122.

¹⁸³ Victorian Equal Opportunity and Human Rights Commission, consultation, 6 May 2022.

¹⁸⁴ *Equal Opportunity Act 2010* (Vic) s 112.

¹⁸⁵ Victorian Equal Opportunity and Human Rights Commission, consultation, 6 May 2022.

¹⁸⁶ *Australian Human Rights Commission Act 1986* (Cth) ss 46PF, 46PH.

¹⁸⁷ Victorian Equal Opportunity and Human Rights Commission, consultation, 6 May 2022; Australian Human Rights Commission, consultation, 2 February 2022.

to have a conversation about what happened, rather than just presenting their position on the events.¹⁸⁸

Other jurisdictions

In Western Australia,¹⁸⁹ Tasmania,¹⁹⁰ and New South Wales,¹⁹¹ the human rights agencies also have discretion whether or not to hold a conciliation conference and so have more flexibility compared with Queensland.

The Review's position

The Review considers that:

- In most disputes, there are benefits to all parties in participating in dispute resolution processes.
- Certain types of complaint may not always benefit from the Commission's dispute resolution processes, including if they are urgent, raise matters of public interest, are systemic in nature, or where other dispute resolution processes have already occurred.
- Balance could be achieved by providing the Commission with discretion about whether to undertake dispute resolution processes and what type of processes to offer.
- More flexibility in how the Commission deals with complaints, including allowing early intervention and removing any obligation on the Commission to provide a conference, would improve parties' experiences of the dispute process.
- Legislatively stipulating timeframes for interim steps during the dispute process is not beneficial in improving flexibility overall.
- Having principles of dispute resolution enshrined in the Act is beneficial.
- If dispute resolution processes at the Commission have finalised without an agreement between the parties, the person who brought the dispute should retain the option of referring the dispute to the tribunal.

Recommendation 9

- 9.1** The Commission's complaints process should remain compulsory but be reshaped into a more flexible and responsive dispute resolution process.
- 9.2** The Commission's function to inquire into complaints and, where possible, to effect conciliation should be replaced with a function to offer services designed to facilitate resolution of disputes.
- 9.3** Principles of dispute resolution should be enshrined in the Act. Those principles should include:
 - Dispute resolution should be provided as early as possible.
 - The type of dispute resolution offered should be appropriate to the nature of the complaint.
 - The dispute resolution process should be fair to all parties.

¹⁸⁸ Assoc Prof Dominique Allen, *Addressing Discrimination Through Individual Enforcement: A Case Study of Victoria* (2019) Monash Business School, Monash University, Victoria, 7.

¹⁸⁹ *Equal Opportunity Act 1984* (WA) s 88.

¹⁹⁰ *Anti-Discrimination Act 1998* (Tas) s 75.

¹⁹¹ *Anti-Discrimination Act 1977* (NSW) s 91A.

- Dispute resolution should be consistent with the objectives of the Act.
- 9.4** The Commission should have power to make preliminary enquiries about a complaint to decide whether or not to provide dispute resolution, or if necessary for dispute resolution processes.
- 9.5** The Commission must decline to provide dispute resolution if the Commissioner considers the complaint is frivolous, trivial, vexatious, misconceived or lacking in substance.
- 9.6** The Commission should have discretion to decline to provide or continue to provide dispute resolution for the following reasons:
- the alleged contravention occurred more than 2 years before the complaint was lodged
 - there are insufficient details to indicate an alleged contravention of the Anti-Discrimination Act
 - having regard to all the circumstances, the Commission considers it is not appropriate to provide or to continue to provide dispute resolution
- 9.7** The Act should give the tribunal:
- the jurisdiction to make a merits review of decisions by the Commissioner to decline to provide or continue to provide dispute resolution
 - discretion to be able to award costs if an application is frivolous or vexatious.
- 9.8** The Act should require that an application for review must not be made unless the tribunal has granted leave to make the application.
- 9.9** Once the Commission has decided to offer dispute resolution to parties for a complaint, the Commission should be able to take reasonable and appropriate action to resolve the dispute, including:
- Asking any respondent to make written submissions to be shared with the person bringing the complaint
 - Asking any party to give the Commission information relevant to the complaint
 - Making enquiries or discussing the complaint with either or both parties
 - Facilitating a conciliation conference
- 9.10** If a conciliation conference is convened, all parties must be given the opportunity to attend, but the Commission should have discretion to decide which parties are directed to attend.
- 9.11** The Act should not require the Commission to take certain steps within specified timeframes during the dispute resolution process. Instead, the Commission must use its best endeavours to finish dealing with a complaint within 12 months of its lodgement.
- 9.12** For matters that have met the threshold to proceed to dispute resolution, the Commission should give a notice to all parties to allow a complainant to elect to proceed to the tribunal once dispute resolution processes have finalised without an agreement, or if the Commission declines to provide, or continue to provide, dispute resolution.
- 9.13** Once the notice has been given to parties, the person bringing the complaint should retain the right to request referral to the tribunal for determination and this request must be made within the existing timeframe of 28 days.
- 9.14** If these recommendations are implemented, there should not be a direct right of access to the tribunal or court.

9.15 Once the new Act is in effect, the Commission should:

- develop a guideline to inform decision making about which dispute resolution actions to take in a particular complaint
 - publish information at least annually about timeframes within which it has finalised complaints.
-

Increasing access to justice

Complaints brought by organisations

Under the current law, a complaint must be made by the person who experienced discrimination, or by someone who has been authorised by the person or the Commission to make the complaint on their behalf.

An organisation can only bring a complaint under the Act in relation to vilification, or if they are acting as agent for a named complainant.¹⁹²

Benefits of complaints brought by organisations

During the Review, we asked whether an organisation should be able to make a complaint on behalf of a person who has experienced discrimination.

We received 47 submissions on this issue and of those, 43 submissions were in support of allowing organisations, including representative bodies or trade unions, to make a complaint of discrimination.¹⁹³

Of those that supported the approach, one submission favoured allowing complaints to be made by organisations, but only for trade unions, not other representative organisations.¹⁹⁴

Of the remaining submissions that addressed this issue:

- one was opposed to allowing complaints to be made by organisations, because it circumvents existing processes¹⁹⁵
- the remaining three submissions were not opposed or did not express an opinion.¹⁹⁶

In our initial consultations with organisations, the option for organisations to bring complaints as representative bodies was considered to have some merit, subject to resourcing constraints of organisations that represent groups protected by the Act.¹⁹⁷

192 *Anti-Discrimination Act 1991* (Qld) s 134.

193 Name withheld (Sub.022) submission; Prof. John Scott submission; Name withheld (Sub.026) submission; Rainbow Families Queensland submission; Independent Education Union - Queensland and Northern Territory Branch submission; Office of the Special Commissioner, Equity and Diversity (Qld) submission; PeakCare Queensland Inc submission; Queensland Network of Alcohol and Other Drug Agencies submission; Name withheld (Sub.062) submission; Name withheld (Sub.064) submission; Name withheld (Sub.066) submission; Name withheld (Sub.069) submission; Dr Zahra Stardust submission; Australian Lawyers Alliance submission; Stonewall Medical Centre submission; Alistair Witt submission; SIN (South Australia) submission; Jenna Love submission; Vision Australia submission; Name withheld (Sub.089) submission; Women's Legal Service Qld submission; Australian Discrimination Law Experts Group submission; Tenants Queensland submission; Sienna Charles submission; Jenny King submission; Maternity Choices Australia submission; Queensland Council for Civil Liberties submission; Sex Workers Outreach Project (SWOP) NSW submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Equality Australia submission; Abigail Corrin submission; Human Rights Law Alliance submission; Natasha submission; Community Legal Centres Queensland submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia; Scarlett Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Council for LGBTI Health submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Sex Workers Outreach Program (SWOP NT) and Sex Workers Reference Group (SWRG) submission.

194 Independent Education Union - Queensland and Northern Territory Branch submission.

195 James Cook University submission.

196 Office of the Public Guardian submission; Christian Schools Australia submission; Australian Industry Group submission.

197 Queensland Program of Assistance to Survivors of Torture and Trauma consultation, 23 August 2021; Queensland Indigenous Family Violence Legal Service consultation, 25 August 2021; AMPARO Advocacy Inc consultation, 8 September 2021; Just.Equal Australia consultation, 17 September 2021; Open Doors Youth Service consultation, 10 September 2021.

We were told that groups who would particularly benefit from allowing complaints to be made by organisations include tenants, sex workers, the LGBTIQ+ community, First Nations people, people of faith, people accessing maternity care, young people under child protection orders, and people with disability.

We heard that the key benefits of allowing organisations to bring complaints were:

- reducing the burden on people who have experienced discrimination and sexual harassment
- boosting the capacity to address systemic issues, particularly where they are in the public interest.

Reducing the burden on individual complainants

Submissions noted that involving organisations that work with marginalised and disadvantaged groups in the complaint process can significantly reduce the burden on individual complainants to enforce their rights under the Act.¹⁹⁸ These submissions raised a range of issues concerning barriers that people face in accessing the complaints system, including those that we discussed in chapter 2.

We were told that people who experience significant social marginalisation are often not aware that they are also experiencing unlawful discrimination, or it may be low a priority because of more immediate issues they are facing, including access to housing and food security. This may mean that complaints received by the Commission do not include the experiences of people who are at greatest risk of discrimination, or who are subjected to the most egregious forms of discrimination.¹⁹⁹

Karyn Walsh, CEO of Micah Projects, a large not-for-profit organisation that supports people experiencing adversity due to poverty, homelessness, mental illness, domestic violence, and discrimination, told the Review:

*I think it's very difficult to put the onus on the person who feels discriminated, to put their case by themselves... people will probably struggle, or wouldn't think it is worth it.*²⁰⁰

Allowing organisations to make complaints can reduce some barriers individuals face in making a complaint, such as a lack of resources, ability, or confidence.²⁰¹ Organisations might also be more likely to secure pro bono legal support and funding to make a complaint.²⁰² Complaints by organisations can address power imbalances that commonly exist at a personal level between complainants and respondents, and protect people who are reluctant to speak up for fear of identification.²⁰³

198 Australian Discrimination Law Experts Group submission, 35; Equality Australia submission, 37; Tenants Queensland submission, 4; Queensland Advocacy Incorporated submission, 23; Legal Aid Queensland submission, 43; Office of the Special Commissioner, Equity and Diversity (Qld) submission, 3; PeakCare Queensland Inc submission, 8; Queensland Network of Alcohol and Other Drug Agencies submission, 4; Natasha submission, 2.

199 Australian Discrimination Law Experts Group submission, 35. This is also reflective of issues identified through consultations: Queensland Indigenous Family Violence Legal Service consultation, 25 August 2021; Respect Inc consultation, 12 August 2021; Immigrant Women's Support Service consultation, 19 August 2021; Micah Projects consultation, 12 August 2021.

200 Micah Projects (Karyn Walsh), consultation, 12 August 2021.

201 Tenants Queensland submission, 4; Equality Australia submission, 37; Legal Aid Queensland submission, 43; Maternity Choices Australia submission, 8; Office of the Special Commissioner, Equity and Diversity (Qld), 3.

202 Equality Australia submission, 37.

203 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 8-9; Legal Aid Queensland submission, 45; Respect Inc and DecrimQLD submission, 26; People with disability roundtable, 4 February 2022.

Submissions told us that individuals fear victimisation if they make a complaint, and have concerns about their privacy during the process. Rainbow Families Queensland, a group that supports and advocates for LGBTIQ+ parents and their children, described the experience of systemic discrimination when completing the Census in 2021 in relation to many of the questions. However, families were hesitant to make a complaint, particularly where it involved putting a child forward as a complainant.²⁰⁴

Sex workers and people living with HIV alerted the Review to significant barriers to lodging a complaint. They said that disclosing their status brings with it a risk to personal safety, stigma, and potential for further discrimination.²⁰⁵ Responses to our online survey revealed that the most frequently reported reason for not making a complaint was concern about negative consequences from complaining.²⁰⁶

Some of these issues were raised in the Review's roundtable consultation with people with disability, where one participant told us that:

*People with disabilities, they are so scared of making any form of complaint. Because they're afraid they are going to lose the services.*²⁰⁷

We were told that reducing the individual burden of making a complaint by allowing an organisation to make the complaint instead should lead to more cases of unlawful discrimination being addressed. This is particularly important for matters involving the public interest.²⁰⁸

Sisters Inside endorsed this position, noting that:

*Well, if we make a complaint on behalf of someone else, for example, for women who are in prison... that would be a great assistance because staff can do that. They're in the prison every day. Things happen immediately... And so women don't have to be worried about what's the payback going to be inside. And also how long it's going to take and if they're released in the meantime...*²⁰⁹

Submissions from sex workers identified benefits from allowing people to feel more united and supported by their peers, and improving their sense of safety during a legal process.²¹⁰

Addressing systemic issues

Expanding the list of who may complain to include organisations may be particularly beneficial to addressing systemic discrimination.²¹¹ The Australian Discrimination Law Experts Group submitted that:

204 Rainbow Families Queensland submission, 3.

205 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia, 8; Respect Inc and DecrimQLD, 24; Prof John Scott submission, 2; Name withheld (Sub.064) submission, 2-3; Stonewall Medical Centre submission, 1; Alistair Witt submission, 1; Jenna Love submission, 1; Name withheld (Sub.089) submission, 1-2; Sienna Charles submission, 8; Sex Workers Outreach Project Inc (SWOP) NSW, 4; Name withheld (Sub.066) submission; Dr Zahra Stardust submission, 3-4; Name withheld (Sub.062) submission, 5; Name withheld (Sub.069) submission, 5; Natasha submission, 2; Sex Workers Outreach Program and Sex Workers Reference Group submission, 9; Scarlet Alliance, Australian Sex Workers Association submission, 18.

206 Of the survey respondents, 869 had not reported their experience, and the main reason for doing so was 'worried about negative consequences' which accounted for 287 responses. See also Tenants Queensland submission, 4.

207 People with disability roundtable, 4 February 2022.

208 Queensland Law Society submission, 15.

209 Sisters Inside Inc (Debbie Kilroy), consultation, 9 February 2022.

210 Jenny King submission, 3; Sex Workers Outreach Program and Sex Workers Reference Group submission, 9; Scarlet Alliance, Australian Sex Workers Association submission, 18.

211 Tenants Queensland submission, 4; Legal Aid Queensland submission, 43; Queensland Network of Alcohol and Other Drug Agencies submission, 4; Name withheld (Sub.062) submission, 5; Queensland Advocacy Incorporated submission,

Allowing advocacy bodies or trade unions to make complaints on behalf of affected people is an important way of improving the individual enforcement model adopted by discrimination laws, and better reflects the collective nature of inequality and discrimination.²¹²

Organisations that provide front line services to people who are at risk of experiencing discrimination have a thorough and nuanced understanding of the types of discrimination that affect their communities and are often the first point of contact when people experience discrimination. They may also be more likely to pursue cases that have an impact on a whole class of people and are best placed to advocate for systemic and structural change for the benefit of their communities.²¹³

The ability for organisations to make complaints would also facilitate use of representative complaint provisions, as we discuss below.²¹⁴

Should organisation complaints be confined to dispute resolution?

We asked for submissions on whether complaints by organisations and representative bodies should be confined to the Commission's dispute resolution process, or should also be able to proceed to the tribunal.

There was strong support for organisational complaints to have access to both the Commission process and a tribunal hearing. Thirty-five submissions²¹⁵ expressly or implicitly supported complaints by organisations having the same options for resolution and determination as other complaints because:

- Mechanisms are unlikely to be utilised if complaints could not proceed to the tribunal when dispute resolution by the Commission does not resolve the matter.²¹⁶
- Limiting organisational complaints to the dispute resolution process would not realise the benefits and purposes of the process, which is to address limitations of the individual complaints system.²¹⁷
- The risks associated with being identified at a conciliation carry through to the tribunal stage, which would be one reason some people and their representative bodies may choose to make an organisational complaint, including sex workers.²¹⁸

23; PeakCare Queensland Inc submission, 8.

212 Australian Discrimination Law Experts Group submission, 28.

213 Legal Aid Queensland submission, 44-45; Tenants Queensland submission, 4; Equality Australia submission, 37; Queensland Advocacy Incorporated submission, 23; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 9.

214 Queensland Council for Civil Liberties submission, 8.

215 Name withheld (Sub.022) submission; Prof John Scott submission; Office of the Special Commissioner, Equity and Diversity submission; PeakCare Queensland Inc submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Name withheld (Sub.062) submission; Name withheld (Sub.064) submission; Name withheld (Sub.066) submission; Name withheld (Sub.069) submission; Dr Zahra Stardust submission; Stonewall Medical Centre submission; Alistair Witt submission; SIN (South Australia) submission; Jenna Love submission; Vision Australia submission; Name withheld (Sub.089) submission; Australian Discrimination Law Experts Group submission; Tenants Queensland submission; Sienna Charles submission; Jenny King submission; Maternity Choices Australia submission; Queensland Council for Civil Liberties submission; Sex Workers Outreach Project (SWOP) NSW submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Equality Australia submission; Human Rights Law Alliance submission; Natasha submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Scarlett Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Council for LGBTI Health submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission.

216 Australian Discrimination Law Experts Group submission, 36.

217 Queensland Council for Civil Liberties submission, 9.

218 Eg. Prof John Scott submission, 2; Name withheld (Sub.069) submission, 5; Respect Inc and DecrimQLD submission, 24; Name withheld (Sub.064) submission, 3; Stonewall Medical Centre submission, 1; Alistair Witt submission, 1; Jenna Love submission, 1; Sienna Charles submission, 8; Natasha submission, 2; Sex Workers Outreach Program and Sex Workers Reference Group submission, 9; Dr Zahra Stardust submission, 3-4.

Two submissions suggested complaints by organisations only having access to the Commission's dispute resolution process, but not the tribunals.²¹⁹

The Australian Industry Group preferred this approach because it is consistent with federal law, which does not allow organisations to commence proceedings in the Federal Court.²²⁰

Professor Therese MacDermott takes different position and has identified the benefit of consistency between Commission and court processes, whereas having two approaches may encourage respondents not to resolve complaints at conciliation, where they are brought by an organisation.²²¹

Criteria for bringing an organisational complaint

Current approach

An organisation can make a complaint in relation to vilification,²²² but only if the organisation has a primary purpose to promote the interests or welfare of persons of a particular race, religion, sexuality, or gender identity. Under these provisions, the organisation is called a 'relevant entity.'

The Commission must also be satisfied that:

- the complaint is made in good faith; and
- the allegation is about conduct that has affected or is likely to affect people whose interests and welfare is a primary purpose of the organisation to promote; and
- it is in the interests of justice to accept the complaint.²²³

Relevant entity complaints were introduced through amendments to the Act in 2002 to allow access to protections for people who belong to an affected group, but may be reluctant to make a complaint for fear of being singled out for victimisation'.²²⁴ As we discuss in chapter 2, the Review heard that these concerns also occur with experiences of discrimination and sexual harassment.

The Commission's complaints data indicates that only five relevant entity complaints have been accepted under the vilification protections of the Act in the last 10 years. Of those:

- Four were made by community legal centres in relation to sexuality or gender identity vilification. Two of these did not resolve, and the remaining two were referred to the Queensland Civil and Administrative Tribunal. The outcomes of the tribunal proceedings are unknown.
- One was made by a community advocacy organisation alleging religious vilification in relation to posts made on Facebook. As the respondent failed to attend the compulsory conference, the tribunal made orders in default that the respondent had engaged in unlawful vilification under the Act.²²⁵

Complaints run by an organisation on behalf of a named complainant are already provided for under the Act. An organisation may act as an agent of a person, or can be authorised in writing by the Commissioner to act on behalf of the person subjected to the alleged contravention and who is unable to make or authorise a complaint. In practice, it is more common for an organisation to simply seek permission to represent a person in the conciliation process.²²⁶

219 Name withheld (Sub.026) submission, 5; Australian Industry Group submission, 10.

220 Australian Industry Group submission, 10.

221 Therese MacDermott, 'The collective dimension of federal anti-discrimination proceedings in Australia: Shifting the burden from individual litigants' (2018) Vol 18(1) *International Journal of Discrimination and the Law* 22, 25.

222 *Anti-Discrimination Act 1991* (Qld) s 124A.

223 *Anti-Discrimination Act 1991* (Qld) s 134(3)-(5).

224 Explanatory Notes, Discrimination Law Amendment Bill 2002, 16.

225 *Australian Muslim Advocacy Network & Islamic Council of Queensland v Anning* [2021] QCAT 452.

226 *Anti-Discrimination Act 1991* (Qld) s 134(1)(b) and (c) and s 163.

Comparative approaches

Under federal legislation, a representative body or trade union may make a complaint on behalf of an ‘aggrieved person’.²²⁷ However, these bodies generally cannot proceed to the court, which requires applicants to be an ‘affected person’ in relation to the complaint, and for bodies to demonstrate a special interest in those matters.²²⁸

Victoria and NSW have similar models that allow a representative body to make an application on behalf of a named person or persons if the Commission or tribunal is satisfied that:

- Each person is entitled to bring a dispute and has consented to the making of the application.
- The representative body has sufficient interest in the application, meaning that the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects, or has the potential to adversely affect, the interests of the body or the interests or welfare of the persons it represents.
- If the organisation represents more than one person, the alleged contravention arises out of the same conduct.²²⁹

In Tasmania, a trade union may make a complaint representing a class of members of that union, if the Commissioner is satisfied that a majority of those members are likely to consent. An organisation may also bring a complaint for alleged unlawful conduct directed towards them, if the Commissioner is satisfied the majority of members of the organisation are likely to consent.²³⁰

In Western Australia, a trade union can make a complaint on behalf of a member or members.²³¹

In the ACT a person with ‘sufficient interest’ can make a complaint. A person has ‘sufficient interest’ if the conduct complained about is a matter of genuine concern to the person and conduct of that kind adversely affects the interests of the person, or the interests or welfare of anyone the person represents.²³²

Consent and naming people involved

One potential drawback of allowing complaints by organisations is that the organisation may advocate for positions or outcomes not aligned with the best interests of individuals in the group of persons they purport to represent, or that the organisation may wish to proceed with a complaint when the people in the group don’t want to continue.

To safeguard against this possibility, some stakeholders suggested that having the consent of individuals would be an appropriate requirement for an organisation to bring a complaint.²³³ Some submissions supported the models from Victoria and NSW, which require that complainants be named and consent of each complainant given.²³⁴

227 *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(c).

228 *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1). See for example *Access for All Alliance v Hervey Bay City Council* [2007] FCA 615; and *Executive Council of Australian Jewry v Scully* [1998] 79 FCR 537.

229 *Equal Opportunity Act 2010* (Vic) ss 114 and 124; *Anti-Discrimination Act 1977* (NSW) ss 87A and 87C.

230 *Anti-Discrimination Act 1998* (Tas) s 60 (1)(c)-(d).

231 *Equal Opportunity Act 1984* (WA) s 83(1)(c).

232 *Human Rights Commission Act 2005* (ACT) s 43(1)(f) and (2).

233 Queensland Council for Civil Liberties submission, 8-9; Community Legal Centres Queensland submission, 4; Australian Lawyers Alliance submission, 11; Scarlett Alliance, Australian Sex Workers Association submission, 18.

234 Vision Australia submission, 5; Queensland Council for Civil Liberties submission, 8-9; Tenants Queensland submission, 4; PeakCare Queensland Inc submission, 8.

However, requiring complainants to be named would not address the victimisation and privacy concerns.

Caxton Legal Centre provided an example of how an organisational complaint might work where a private school's uniform policy contained prohibitions on what was described as 'afro hair'. In that case, it should not be necessary for a child of African descent to attend the school and be refused or reprimanded for their hair before a complaint can be lodged. Instead, it would be appropriate for a community organisation established for the benefit of African communities to make a race discrimination complaint about that policy and clear a path to an enrolment process free from discrimination and distress. Because of the particular vulnerability of children and young people, requiring individual students to be identified would present particular difficulties and risks.²³⁵

Consent is not a requirement under the Western Australian and ACT laws. Tasmania requires the Commissioner to be satisfied that a majority of the organisation's members are likely to consent.

The Review's position

The Review considers that:

- Allowing organisations to bring complaints about discrimination and sexual harassment reduces the burden on individual complainants and creates opportunities to address systemic issues.
- There is no justification for confining complaints by organisations to the Commission's dispute resolution process. Doing so may limit the benefits and purpose of enabling organisations to make a complaint in the first place and would be inconsistent with current provisions that allow for vilification complaints by 'relevant entities' to be referred to the tribunal.
- The criteria for an organisation to be considered a 'relevant entity' in order to make a vilification complaint require consideration of good faith, the appropriateness of the organisation to make the complaint, and the interests of justice. These criteria are unique in Australia, as other jurisdictions require the organisation to demonstrate a 'sufficient interest' and/or that they have the consent of their members.
- We consider that 'sufficient interest' is already encompassed in the criteria that requires the Commission be satisfied that the alleged conduct has affected or is likely to affect people whose interests and welfare is a primary purpose of the organisation.
- Although 'consent' would ensure that the organisation only makes complaints supported by people who are affected, the practical difficulties this presents would undermine the purpose of organisation complaints. The criterion of 'good faith' sufficiently addresses this concern.

Recommendation 10

10.1 The Act should allow organisations to make complaints in relation to any unlawful conduct under the Act, rather than only in relation to vilification. Organisation complaints should have the same options and outcomes as individual complaints.

²³⁵ Caxton Legal Centre submission, 15.

Representative complaints

A representative complaint is one that is made on behalf of a ‘class’ or ‘category’ of people who are not named as complainants and are not parties to the proceeding, but may be entitled to the final remedy determined by the tribunal. This is different to the situation where a complaint is made by an agent on behalf of an individual, or by a person who has been authorised to act on behalf of an individual, such as a parent on behalf of a child.²³⁶

A well-known example of a representative complaint is the matter of *Cocks v State of Queensland*, which found that the failure to provide equal access for people with disability to the front entrance of the Convention Centre was unlawful discrimination and ordered the construction of a lift to allow access through the front entrance.²³⁷ This is an example of a successful representative complaint under the current Act where the parties agreed that the matter proceed as a representative complaint.

While there are identifiable benefits to the overall approach in the Act, which we discuss below, there have been very few successful representative complaints since the introduction of the Anti-Discrimination Act.

In the Discussion Paper, we asked whether changes are needed to would improve the accessibility and utility of representative complaints, and what factors influence the capacity for affected people to assert their rights through a representative complainant.

The Review received 14 submissions about representative complaints.²³⁸ All supported the continuation of a representative complaints process, but suggested changes to make the process more accessible and useful.

Current approach

The Act currently provides that if a complaint alleges that a number of people were subjected to discrimination or another contravention by the respondent, the Commissioner must determine whether to deal with the complaint as a representative complaint. The tribunal may subsequently make its own determination.²³⁹

The criteria for determining whether a complaint is a representative complaint are the same for the Commissioner and the tribunal, and are that:

- the complainant is a member of a class of people, the members of which have been affected, or are reasonably likely to be affected, by the respondent’s conduct; and
- the complainant has been affected by the respondent’s contact; and
- the class is so numerous that joinder of all of its members is impracticable; and
- there are questions of law or fact common to all members of the class; and
- the material allegations in the complaint are the same, similar or related to the material allegations in relation to the other members of the class; and
- the respondent has acted on grounds apparently applying to the class as a whole;

236 *Anti-Discrimination Act 1991* (Qld) s 134(1)(b) and (c).

237 *Cocks v State of Queensland* [1994] QADT 3.

238 Name withheld (Sub.026) submission; Public Advocate (Queensland) submission; Vision Australia submission; Women’s Legal Service Qld submission; Australian Discrimination Law Experts Group submission; Tenants Queensland submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Equality Australia submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission.

239 *Anti-Discrimination Act 1991* (Qld) ss 146, 194.

or alternatively, if the Commissioner or tribunal is satisfied that:

- the complaint is made in good faith as a representative complaint; and
- the justice of the case demands that the matter be dealt with by means of a representative complaint.²⁴⁰

To make a representative complaint, the named complainant (or complainants) must be eligible to make the complaint themselves, either as an affected person or an agent of the person, or a 'relevant entity' in relation to a vilification matter.²⁴¹

Each complainant to a representative complaint must choose whether to proceed as a party to the representative complaint or make their own individual complaint. A representative complaint does not prevent another person from bringing their own non-representative complaint about the same situation or conduct.²⁴²

Benefits of representative complaints

All submissions supported the continuation of a representative complaints process, including because of the benefits of:

- dealing with one complaint rather than many separate complaints about the same issue
- creating efficiencies
- providing access to justice
- reducing the burden on individual complainants to take the complaint forward themselves
- addressing systemic discrimination.²⁴³

Have these benefits been achieved?

While supporting the continuation of representative complaints, submissions observed that under the current Act these benefits have not been realised in practice.

There were two main aspects to this issue:

- The legislative criteria for representative complaints are complex and create too high a threshold, which places a heavy burden and expense on individual complainants.
- Greater community awareness and education about representative complaints is needed.

We reviewed the last 10 years of Commission complaint data to determine how often representative complaints are made. This revealed that three matters during that time were considered as potential representative complaints.²⁴⁴ Of those, only one matter was accepted by the Commission and proceeded as an individual complaint at the election of the complainant.

240 *Anti-Discrimination Act 1991* (Qld) ss 146-152, 194-200.

241 *Anti-Discrimination Act 1991* (Qld) s 134. Generally speaking, a complaint must be made by, or on behalf of, an individual complainant. However, sections 134(3)-(5) allow for a 'relevant entity' to make a complaint on its own behalf in relation to alleged vilification under section 124A, provided certain criteria are met.

242 *Anti-Discrimination Act 1991* (Qld) ss 151-152, 199-200.

243 Legal Aid Queensland submission, 40-41; Respect Inc and DecrimQLD submission, 24; Queensland Advocacy Incorporated submission, 22. See also Community Legal Centres Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <<https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>>.

244 The Commission complaints database does not have a field to record whether complaints are dealt with as a representative complaint or not.

In contrast, data we obtained from the Australian Human Rights Commission indicated the federal Commission received 41 representative complaints over the last 10 years.²⁴⁵ We were told that while disability discrimination complaints were initially the most common, in the past five years, most representative complaints have been made under the Racial Discrimination Act.²⁴⁶

The greater number of representative complaints in the federal jurisdiction could reflect differences in the legislative criteria for commencing representative complaints under Australian Human Rights Commission Act, or because in that jurisdiction, unresolved complaints are referred to the Federal Court, a costs jurisdiction, which may allow for greater access to litigation funding or no win no fee arrangements with legal representatives. Both of these potential barriers are discussed below.

The case of *Harris v Transit Australia Pty Ltd* demonstrates these issues.²⁴⁷ In that case, a complaint had been brought by people unable to use Transit Australia's buses because they are dependent on wheelchairs for mobility because of their quadriplegia. They sought orders that would require Transit Australia to purchase new low floor ramp buses. As a preliminary issue, the tribunal considered the complainants' request to have the matter dealt with as a representative complaint, which was opposed by Transit Australia. The tribunal declined to deal with the matter as a representative complaint on the basis that the complainants had not identified the class of affected people 'with sufficient particularity'. For example, there were no particulars on how the class members would be affected by Transit Australia's conduct, and questions of law and fact that would be common to all members.

The legislative requirements

In the Discussion Paper, we asked for submissions on what changes would improve the accessibility and utility of representative complaint provisions.

Current complexity of legislative criteria

We were told that the current criteria under the Act are too complex, and nearly impossible to use effectively.²⁴⁸

Stakeholders emphasised that potential complainants do not have a clear understanding of the requirements that must be met for a complaint to be dealt with as a representative complaint. Submissions indicated that any changes to improve accessibility in this regard would be a positive.²⁴⁹

Comparative approaches

Some submissions²⁵⁰ referred to the model found in Part IVA the Federal Court of Australia Act²⁵¹, which has been used with success in claims under the Racial Discrimination Act.²⁵²

A representative proceeding can be commenced in the Federal Court where:

²⁴⁵ Australian Human Rights Commission, consultation, 5 May 2022.

²⁴⁶ *Racial Discrimination Act 1975* (Cth).

²⁴⁷ *Harris v Transit Australia Pty Ltd* [1999] QADT 1.

²⁴⁸ Caxton Legal Centre submission, 15; Queensland Advocacy Incorporated submission, 22. See also Community Legal Centres Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <<https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>>.

²⁴⁹ Public Advocate (Queensland) submission, 5; Community Legal Centres Queensland submission, 3; Equality Australia submission, 36.

²⁵⁰ Public Advocate (Queensland) submission, 4; Legal Aid Queensland submission, 41; Caxton Legal Centre submission, 15; Respect Inc and DecrimQLD submission, 24. See also Community Legal Centres Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <<https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>>.

²⁵¹ *Federal Court of Australia Act 1976* (Cth).

²⁵² *Racial Discrimination Act 1975* (Cth). See eg, *Wotton v State of Qld (No 5)* [2016] FCA 1457 and *Pearson v State of Queensland (No 2)* [2020] FCA 619.

- seven or more persons have claims against the same person;
- the complaints of all those persons are in respect of, or arise out of, the same, similar or related circumstances;
- the claims of all those persons give rise to a substantial common issue of law or fact.²⁵³

With regard to standing, a person who has a sufficient interest to commence a proceeding on their own behalf against another person has a sufficient interest to commence representative proceedings on behalf of other persons. Consent is not required to be a group member, although group members may opt out of a representative proceeding. The final judgment binds all identified group members other than those who have opted out of the representative proceedings.²⁵⁴

Submissions also referred to Part 13A of the Civil Proceedings Act,²⁵⁵ which is based on Part IVA of the Federal Court Act.²⁵⁶

Better alignment of the Anti-Discrimination Act's provisions with federal and Queensland civil procedure regimes would mean that court decisions could help to guide and develop the law on representative complaints under the Act, which in turn would provide better guidance to potential complainants, the Commission, and the tribunals.²⁵⁷

Before a person can commence a representative complaint for discrimination in the Federal Court, the person must first lodge a complaint with the Australian Human Rights Commission. The three criteria required to commence a representative proceeding in the Federal Court are also required are also required for a complaint with the Australian Human Rights Commission.²⁵⁸

The complaint must also:

- describe or otherwise identify the class members, although it is not necessary to name them or specify how many there are; and
- specify the nature of the complaints made on behalf of the class members; and
- specify the nature of the relief sought.²⁵⁹

Consent of the class members is not required, and a class member may withdraw from the representative complaint. However, a person who is a class member for a representative complaint is not entitled to lodge a separate complaint in respect of the same subject matter.²⁶⁰

Burden on individual complainants

Submissions also raised the practical challenges faced by a person seeking to bring a representative case on behalf of a class of affected people. We heard that many aspects make this an unattractive option, including the cost and complexity of the requirements, and this can reduce access to justice.

²⁵³ *Federal Court of Australia Act 1976* (Cth) s 33C.

²⁵⁴ *Federal Court of Australia Act 1976* (Cth) ss 33D, 33E, 33J, 33ZB.

²⁵⁵ *Civil Proceedings Act 2011* (Qld).

²⁵⁶ *Federal Court of Australia Act 1976* (Cth). Legal Aid Queensland submission, 41-42; Queensland Council for Civil Liberties submission, 8; Caxton Legal Centre submission, 15. See also Community Legal Centres Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <<https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>>.

²⁵⁷ Legal Aid Queensland submission, 41; Caxton Legal Centre submission, 15.

²⁵⁸ *Australian Human Rights Commission Act 1986* (Cth) ss 46PB(1), 46PB(3). Note that in a complaint to the Australian Human Rights Commission, it is only necessary to demonstrate that the class members have complaints against the same person, not that seven or more persons have those complaints.

²⁵⁹ *Australian Human Rights Commission Act 1986* (Cth) s 46PB(2).

²⁶⁰ *Australian Human Rights Commission Act 1986* ss 46P(3), 46PB(4), 46PC.

One solution suggested was that standing be given to organisations to advocate on behalf of an affected group.²⁶¹ In the section above, we have recommended expanding the scope of complaints that can be brought by organisations. If implemented, this change would allow organisations to make complaints as a representative complaint, provided the necessary criteria have been met.

Legal representation and costs

While creating more flexible criteria for commencing representative complaints may improve accessibility, it does not address the overarching complexity inherent in pursuing these types of matters. Complainants require legal advice and representation²⁶² which increases costs for a complainant who is not entitled to, or cannot gain access to, the limited legal aid or community legal centre assistance available.

Some submissions noted that the prospect of recovering legal costs, which is possible in the federal jurisdiction, may increase accessibility to legal representation, as legal representatives could conduct these matters under ‘no win no fee’ arrangements or through litigation funding.²⁶³ This could be achieved by allowing representative complaints to apply to the Supreme Court, using Part 13A of the Civil Proceedings Act.²⁶⁴

On the other hand, a costs jurisdiction is accompanied by a risk of a costs order, which can deter people from bringing a complaint. Retaining a no-costs jurisdiction therefore has merit, particularly where the remedy sought does not involve significant awards of monetary damages and the complainants are unable to attract litigation funding.²⁶⁵

Enhancing access

Community awareness and guidance

As well as discussing improvements to the legislative framework for representative complaints, submissions identified that greater community awareness of representative complaints is required to increase use of these provisions. We were also told that guidance on commencing and managing representative actions under the Act should be provided.²⁶⁶

Aligning the approach of the Act with the federal system and Queensland’s civil procedure would also allow for cross-jurisdictional guidance, and increased knowledge of the law.

In chapter 6, we discuss the importance of education and awareness in the context of the introduction of a positive duty to the Act, as well as to increase the Commission’s proactive role in monitoring compliance and eliminating discrimination, including systemic discrimination. In chapter 9 we consider the extent to which awareness of the law has an impact on how effective it is, and the resourcing required to ensure education keeps pace with legislative changes and the needs of stakeholders.

Joining complaints as a representative complaint

Legal Aid Queensland suggested that the Act should allow the Commission to join complaints as a representative matter where multiple complaints are made about the same respondent with similar facts and legal issues.²⁶⁷

261 Equality Australia submission, 36; Legal Aid Queensland submission, 43; Queensland Law Society submission, 15.

262 Legal Aid Queensland submission, 42-43; Equality Australia submission, 37; Name withheld (Sub.026) submission, 5.

263 Legal Aid Queensland submission, 42; Women’s Legal Service Qld submission, 6; Caxton Legal Centre submission, 15.

264 *Civil Proceedings Act 2011* (Qld).

265 Legal Aid Queensland submission, 42.

266 Legal Aid Queensland submission, 41-42; Equality Australia submission, 36; Caxton Legal Centre submission, 15.

267 Legal Aid Queensland submission, 42.

The Commission's practice has been, in certain circumstances, to conciliate multiple complaints together with the agreement of all parties. The opportunity to do this is limited, as complaints must have the same respondent and be lodged with the Commission at a similar point in time. Privacy issues for the parties also adds to the complexity.

Identifying representative complaints for the Commission may not be straight forward, as classes of people and commonality of issues may only coalesce as a matter progresses.

Resolving representative complaints

Equality Australia's submission and our consultation with the Australian Human Rights Commission identified difficulties with representative complaints when there is not shared agreement about when and how to resolve a complaint.²⁶⁸ This issue presents complexities for resolving matters that does not require legislative change. We have not taken this to mean the issue should or can be addressed through legislative amendment.

The Review's position

The Review considers that:

- The criteria for bringing a representative complaint to the Commission or tribunal should be replaced with criteria based on the Australian Human Rights Commission Act,²⁶⁹ particularly section 46PB, because of its proven effectiveness and the benefits of aligning with federal and state civil procedure laws. However, a representative complaint should not prevent another person from commencing a non-representative complaint.
- Given the complexity and costs involved with bringing a representative complaint, and the benefits that flow from bringing an action to ensure systemic outcomes, organisations should be able to make representative complaints provided they meet the criteria to make a complaint as an organisation.
- Where the complaint cannot be resolved through the Commission's dispute resolution processes, the complainant in a representative complaint should be able to elect to lodge their complaint either in the tribunal, a no costs jurisdiction, or to the Supreme Court, a costs jurisdiction.
- The current requirement for the Commission to proactively identify representative complaints is unrealistic and, with recommended changes to the law and increased focus on community awareness, may be unnecessary. The Commission may refer possible representative complaints for legal advice.

Recommendation 11

- 11.1** The Act should replace the criteria for bringing a representative complaint to the Commission or tribunal with criteria similar to section 46PB of the *Australian Human Rights Commission Act 1986* (Cth).
- 11.2** The existence of a prior representative complaint should not prevent another person from commencing a non-representative complaint.
- 11.3** Organisations should be able to have their complaint dealt with as a representative complaint, provided they are able to bring the complaint on their own behalf.

²⁶⁸ Equality Australia submission, 37; Australian Human Rights Commission, consultation, 5 May 2022.

²⁶⁹ *Australian Human Rights Commission Act 1986* (Cth) s 46PB.

11.4 Where the complaint cannot be resolved through the Commission's dispute resolution processes, the complainant in a representative complaint may elect to lodge their complaint either in:

- the tribunal, a no costs jurisdiction, or
- the Supreme Court, a costs jurisdiction.

Complaints by prisoners

The Terms of Reference ask us to consider:

- ways to improve the process and accessibility for bringing discrimination complaints, including how the complaints process should be enhanced to improve access to justice for victims of discrimination.²⁷⁰

During the Review, we identified that people who are serving a term of imprisonment or on remand in prison can be at risk of experiencing discrimination, but face specific legislative barriers to making a complaint to the Commission.

In 2007, a Supreme Court decision affirmed a previous decision that failure to provide fresh halal meat in prison was unlawful discrimination.²⁷¹ In direct response to that case,²⁷² legislative amendments created a two-step internal complaint process in the Corrective Services Act²⁷³ that required complaints to be made to the Chief Executive Officer and the Official Visitor where the respondent is a protected defendant, that is, Queensland Corrective Services (QCS) and service providers in prisons or community correction.²⁷⁴ This section of the report will refer to this requirement as the 'Corrective Services Act internal process'.

We also discuss exceptions that apply to prisoners in chapter 8.

Current approach

Since 22 July 2022, a prisoner must comply only with the first step of the Corrective Services Act internal process, which involves writing to the Chief Executive Officer and waiting up to four months for a response.²⁷⁵ There is no longer a requirement to raise the matter with the Official Visitor, which reduces the time for the internal process down from five to four months.²⁷⁶

In contrast, the Human Rights Act makes no distinction between prisoners and any other complainant. Under that Act, a prisoner is required to make an internal complaint and wait 45 days for a response from the relevant public entity before making a complaint to the Commission.²⁷⁷ As

²⁷⁰ Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(l).

²⁷¹ *State of Queensland v Mahommed* [2007] QSC 18. By the time of the hearing of this complaint, all Muslim prisoners in Queensland prisons were being provided with halal food and it has been observed in *Ali v State of Queensland* [2013] QCAT 319 that halal diets are now generally available in Queensland correctional centres.

²⁷² Explanatory Notes, Corrective Services and Other Legislation Amendment Bill 2008 (Qld) 15-16. The Notes refer to difficulties with storing, preparing, and cooking kosher meals as causing 'administrative and operational burden'.

²⁷³ *Corrective Services Act 2006* (Qld)

²⁷⁴ *Corrective Services Act 2006* (Qld) ss 319G, 319E, 319F.

²⁷⁵ *Corrective Services Act 2006* (Qld) s 319E. Note - the waiting periods are reduced if the Chief Executive Officer notifies the prisoner in writing that they have finished dealing with the complaint earlier.

²⁷⁶ Now repealed s 319F required a prisoner to undertake a second step in bringing the matter to an Official Visitor if dissatisfied with the response of the Chief Executive Officer. Section 319F was repealed on 22 July 2022 because twelve months elapsed from the passing of the Corrective Services and Other Legislation Amendment Act 2020 which 'omits' this provision.

²⁷⁷ *Human Rights Act 2019* (Qld) s 65.

the subject matter of prisoners' human rights and discrimination complaints frequently overlaps, this creates an additional layer of complexity and confusion.²⁷⁸

In the Discussion Paper, we asked for submissions about whether these additional requirements imposed on prisoners since 2008 strike the right balance between ensuring access to justice while encouraging early resolution of complaints between prisoners and QCS and service providers. The Review received 14 submissions about this topic,²⁷⁹ and all recommended the removal of this requirement.

In consultations with QCS, they preferred not to comment on substantive government policy issues but observed that any changes to the complaint model may have an operational impact.

The key reasons that stakeholders thought the Corrective Services Act's internal process should be removed were:

- There is insufficient justification for different processes that apply only to 'protected defendants' (the State of Queensland and its contractors).²⁸⁰
- The process creates an unjustifiable barrier to justice, compounded by the vulnerability of the cohort involved.²⁸¹
- The process acts as a deterrent to making complaints,²⁸² which reduces transparency and removes an opportunity to identify issues and make improvements to policy and procedures on a systemic level.²⁸³
- Repeal of the provision would be a positive step in supporting prisoner's human rights.²⁸⁴
- The presumed benefits of early resolution are not being achieved and it is instead creating an administrative burden on the State, the parties, the tribunals, and the Commission.²⁸⁵
- To infer that a person is not entitled to access complaints processes because they have been convicted of a criminal offence or are on remand is inconsistent with Queensland's human rights obligations.²⁸⁶
- The lengthy delays required by the process are not feasible as most people are incarcerated for short periods.²⁸⁷

Seriousness and urgency

The blanket approach of requiring that all complaints first undergo an internal process may act as a barrier to complaining about serious conduct, such as sexual assault and sexual harassment.²⁸⁸

278 *Human Rights Act 2019* s 15 protects a prisoner from discrimination by a public entity, so will almost always apply where there is also a complaint which meets the threshold for acceptance under the *Anti-Discrimination Act 1991*.

279 Queensland Advocacy Incorporated submission; Sisters Inside Inc submission; Aged and Disability Advocacy Australia submission; Equality Australia submission; Legal Aid Queensland submission; Queensland Law Society submission; Queensland Council for Civil Liberties submission; PeakCare Queensland Inc submission; Australian Lawyers Alliance submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Australian Discrimination Law Experts Group submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Youth Advocacy Centre Inc submission.

280 Queensland Advocacy Incorporated submission, 9.

281 Queensland Law Society submission, 15; Aged and Disability Advocacy Australia submission, 7; Equality Australia submission, 37; Queensland Advocacy Incorporated submission, 9.

282 Caxton Legal Centre submission, 16.

283 Sisters Inside Inc submission, 4.

284 PeakCare Queensland Inc submission, 9.

285 Australian Lawyers Alliance submission, 11; Respect Inc and DecrimQLD submission, 25; Legal Aid Queensland submission, 49-50.

286 Legal Aid Queensland submission, 46.

287 Sisters Inside Inc submission, 4, referring to Queensland Productivity Commission, *Inquiry into imprisonment and recidivism* (Final Report, August 2019).

288 Sisters Inside Inc submission, 4.

If a prisoner does make a complaint using the prescribed process, they may continue to experience unlawful and potentially inhumane treatment in the care of the State while waiting for an outcome from their complaint. Like other complainants, many prisoners are concerned about making internal complaints because of fears of reprisal.²⁸⁹

Inflexible timeframes don't accommodate urgent situations in which a long delay would be detrimental. For example, if a complaint is about seeking to breastfeed a child in prison, a four-month delay in resolution is not feasible.²⁹⁰

Accessibility

Many stakeholders were concerned that the existing paper-based process is not suitable for the prison setting, because written records in prison are unreliable.²⁹¹ Preparing and storing paperwork while in prison is difficult, due to the lack of resources available to incarcerated people.²⁹² Inability to duplicate, store, and retrieve paperwork becomes a particular problem where the complainant is required to prove they have been through the internal process, but are often unable to make or retain a copy of their complaint.

In 2019, the Commission's *Women in Prison* report stated that:

The Commission is aware of several cases in which a prisoner complainant says they have complied with these pre-conditions, but the respondent State says they cannot locate the relevant paperwork. On some occasions, the respondent State has conceded that forms may have been lost or misfiled.²⁹³

Practical challenges are present for prisoners trying to bring their complaint to the Commission in a 12-month timeframe, while engaging in the four-month internal process. Where people have been released from custody before bringing a complaint, additional challenges exist when engaging in processes essentially designed for internal resolution of complaints within the prison system.²⁹⁴

Several submissions noted the additional challenges for people with disability, low literacy, and/or Aboriginal and Torres Strait Islander people to comply with the requirements of the Corrective Services Act that are onerous and paper based.²⁹⁵ These issues are magnified for people who experience intersectional discrimination. The impact of an inaccessible process is significant when considering that around half of prisoners have a disability²⁹⁶ and 28% of prisoners are of Aboriginal or Torres Strait Islander descent.²⁹⁷

An additional burden on the State?

The original purpose of creating the Corrective Services Act's internal process was to avoid needlessly spending Queensland Corrective Services' finite resources on matters that might easily be resolved, or were seen as lacking in merit.²⁹⁸

289 Legal Aid Queensland submission, 49.

290 Sisters Inside Inc submission, 4.

291 Legal Aid Queensland submission, 49; Sisters Inside submission, 4.

292 Sisters Inside Inc submission, 5.

293 Anti-Discrimination Commission Queensland, *Women in prison 2019: a human rights consultation report* (2019) 186.

294 Caxton Legal Centre submission, 16; Legal Aid Queensland submission, 49.

295 Queensland Advocacy Incorporated submission, 9; Legal Aid Queensland submission, 48; Aged and Disability Advocacy submission, 7; Legal Aid Queensland submission, 48-49.

296 Aged and Disability Advocacy Australia submission, 7.

297 Legal Aid Queensland submission, 49.

298 Explanatory Notes, Corrective Services and Other Legislation Bill 2008, 7. The notes suggest that correctional authorities thought that complaints could have been resolved through internal processes with 'significantly less burden on public and correctional resources.'

However, the Anti-Discrimination Act requires the Commission to reject or lapse complaints that are frivolous, trivial, vexatious, misconceived, or lacking in substance.²⁹⁹ Creating more flexible and responsive complaints processes at the Commission, as contemplated by this Review, may also mitigate the risk of increased use of prison resources.

We are unaware of the success rate of internal processes in resolving matters, and it may be that prisoners are receiving satisfactory outcomes in many cases which may not need to be escalated to the Commission.

On the other hand, the State and its contractors may be unnecessarily devoting resources to matters through the internal process that may not fall within the jurisdiction of the Act. With limited ability to access information in prison, a complainant may not understand what constitutes a breach of the Act, but must proceed through the internal process before the Commission can assess the complaint. In the ordinary course of events, the Commission filters out more than half of matters in the assessment phase.

Human rights considerations

Several submissions questioned whether the prerequisite internal complaint provisions are compatible with prisoners' human rights protected under the Human Rights Act.³⁰⁰ Legal Aid Queensland pointed to key changes in the area of prison management since 2008, including:³⁰¹

- **2017:** *Optional Protocol to the Convention against Torture* (OPCAT) was ratified by the Australian government, which requires creation of independent National Preventative Mechanisms (Article 17-18).
- **2018:** Taskforce Flaxton report, which recommended an independent inspector.
- **2019:** Introduction of the Human Rights Act.
- **2021:** Detention Services Bill 2021 (which establishes an independent inspector).

We observe that the internal process created by the Corrective Services Act internal process may be inconsistent with the right to equality before the law³⁰² under the Human Rights Act as prisoners, including those on remand, do not share an equal right of access to make complaints about serious conduct. Restricting access to an effective complaints process may also limit the right of prisoners to humane treatment when deprived of liberty³⁰³ by reducing the ability, in practical terms, of prisoners to raise concerns about their treatment and lessening the opportunity for external oversight of discrimination and other unlawful conduct.

The Explanatory Notes to the Human Rights Bill 2018 states that the principle underlying humane treatment is:

that a person's rights should only be curtailed to the extent necessary due to the confinement, reflecting that the punishment is intended to be limited to the deprivation of liberty.³⁰⁴

Consistent with this, the Queensland Supreme Court has found that the Human Rights Act 'mandates good conduct towards people who are incarcerated'.³⁰⁵ Relying on Victorian authority, the court suggested that:

299 *Anti-Discrimination Act 1991* ss 139, 168.

300 Sisters Inside Inc submission, 5-6; Youth Advocacy Centre Inc submission, 4; Legal Aid Queensland submission, 47-48.

301 Legal Aid Queensland submission, 47.

302 *Human Rights Act 2019* (Qld) s 15.

303 *Human Rights Act 2019* (Qld) s 30.

304 Explanatory Notes, Human Rights Bill 2018, 25.

305 *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [18]. 'Owen-D'Arcy'.

The starting point for analysing the scope of this right should be that persons who are detained must not be subject to hardship or constraint other than that which results from the deprivation of their liberty.³⁰⁶

The Human Rights Act permits consideration of international instruments to assist in interpreting its provisions.³⁰⁷ The 'Nelson Mandela rules' set out the minimum standards for treatment of prisoners. The most relevant rules being that:

- prisoners promptly be provided information on prison rules and procedures for making complaints (r 54)
- procedures for making complaints be in a form that prisoners can understand (r 55)
- prisoners can raise complaints internally and to relevant external authorities (r 56)
- any complaint should be promptly dealt with (r 57(1))
- prisoners should be able to raise complaints safely, confidentially, and without risk of 'retaliation, intimidation or other negative consequences' (r 57(2)).³⁰⁸

As prisoners may be deterred by the current internal process, and face additional practical barriers to bringing a discrimination complaint, the Corrective Services Act internal process may not comply with rule 55. The Review also considers that limiting the right of a prisoner to raise concerns directly with the Commission may be in breach of rule 56, and the delays in dealing with complaints may infringe rule 57(1).

Human rights may only be limited in a reasonable way that can be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.³⁰⁹ Determining whether a limitation on rights is reasonable and justifiable involves considering various factors to strike the right balance between protecting human rights and achieving a lawful and legitimate purpose.³¹⁰

The Review's position

The Review considers that:

- While the Corrective Services Act complaint process has been reduced to a single-step internal process, the Review is concerned about ongoing inefficiencies and barriers to equitable access that will continue unless the Corrective Services Act's internal process is removed.
- We consider that strategies to improve efficiency and encourage early resolution of complaints is a legitimate purpose the State may seek to achieve. However, that purpose is not being achieved by the current framework, at the expense of the most vulnerable individuals in the prison population.
- The capacity for continuous improvement of services and operations in prisons may be being undermined by the complexity and inaccessibility of the complaint framework.
- While removal of the internal complaint requirement is the best way to ensure compatibility with human rights, an alternative option in which the purpose can be achieved in a 'less restrictive' way has been suggested below.

306 *Owen-D'Arcy* [245].

307 See *Human Rights Act 2019* s 48(3).

308 General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 70th sess, UN Doc A/RES/70/175 (17 December 2015).

309 *Human Rights Act 2019* (Qld) s 13(1)

310 *Human Rights Act 2019* (Qld) s 13(2).

- If an internal complaint requirement is retained, it should be made more efficient and adaptable to exceptional and urgent situations, and consistent with the procedural requirements in the *Human Rights Act 2019*.

Recommendation 12

12.1 Section 319E of the *Corrective Services Act 2006* (Qld), that requires a person detained in a corrective services facility who is making a complaint against a ‘protected defendant’ to first make a complaint to the chief executive before lodging a complaint with the Commission, should be repealed.

12.2 If an internal complaint mechanism is retained for complaints about protected defendants, the process should be made consistent with the Human Rights Act by:

- requiring an internal complaint be made prior to complaining to the Commission
 - allowing the complainant to lodge a complaint with the Commission after 45 days have elapsed
 - providing the Commission with a discretion to defer dealing with a complaint if the protected defendant did not have an adequate opportunity to deal with the complaint
 - providing the Commission with a discretion to waive the internal complaint requirement if there are exceptional circumstances.
-

The hearing process

Proving discrimination

The Terms of Reference ask us to consider:

- whether the Anti-Discrimination Act should reflect protections, processes and enforcement mechanisms that exist in other Australian discrimination laws³¹¹
- ways to improve the process and accessibility for bringing and defending a complaint of discrimination, including how the complaints process should be enhanced to improve access to justice for victims of discrimination.³¹²

If a complaint cannot be resolved by the Commission, the complainant can elect to have the matter referred to the tribunal. The tribunal may attempt to resolve the matter early through a further conference. If not resolved in this way, the matter will proceed to a hearing where the tribunal will hear the evidence and determine the matter. The tribunal is not bound by the rules of evidence.³¹³ At the hearing, the Act determines which party is required to provide the matter, and to what standard.³¹⁴

The Discussion Paper asked stakeholders to tell us whether the onus (or ‘burden’) of proof should shift at any point during the process of hearing a complaint, and if so, what would be the appropriate approach.

The Review received 34 submissions that responded to these questions,³¹⁵ of which most supported changing the current approach, six did not support any change or expressed reservations,³¹⁶ and two did not provide a settled opinion.

Overall, there was support for adjusting the current approach in order to reduce the burden on complainants to prove their case under the Act, while still ensuring the process is fair and balanced.

311 Queensland Human Rights Commission, Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(g).

312 Queensland Human Rights Commission, Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(l).

313 *Anti-Discrimination Act 1991* (Qld) s 208.

314 *Anti-Discrimination Act 1991* (Qld) ss 204-206.

315 Name withheld (sub.026) submission; Assoc Prof Dominique Allen submission; Vision Australia submission; Women’s Legal Service submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Queensland Council for Civil Liberties submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Law Society submission; Public Advocate (Qld) submission; Medical Insurance Group Australia submission; Independent Education Union - Queensland and Northern Territory Branch submission; Sikh Nishkam Society of Australia submission; Human Rights Law Alliance submission; Multicultural Australia submission; Jenny King submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Aged and Disability Advocacy Australia submission; Scarlett Alliance, Australian Sex Workers Association submission; Name withheld (Sub.135) submission; FamilyVoice Australia submission; Queensland Advocacy Incorporated submission; Youth Advocacy Centre Inc submission; Australian Association of Christian Schools submission; Multicultural Queensland Advisory Council submission; Department of Education (Qld) submission; Queensland Civil and Administrative Tribunal submission.

316 FamilyVoice Australia submission; Medical Insurance Group Australia submission; Human Rights Law Alliance submission; Department of Education (Qld) submission; James Cook University submission; Australian Industry Group submission; Queensland Council for Civil Liberties.

Current approach

Under the current Act:

- the complainant has the responsibility of proving that the respondent contravened the Act (the onus or burden of proof).³¹⁷
- in a case involving an allegation of indirect discrimination, the respondent must prove that a term complained of is reasonable (the reasonableness defence).
- if the respondent wishes to rely on an exemption, the respondent must raise the issue and prove that it applies (raising an exemption).³¹⁸

The standard of proof is ‘on the balance of probabilities.’ This means it must be more probable than not that the conduct the subject of the allegations occurred. This contrasts with the more onerous criminal test of ‘beyond reasonable doubt’.

Jurisdictions with reverse onus

Reverse onus is where the burden of proof shifts from the complainant to the respondent to prove that they did not contravene the Act. A reverse onus applies in legislation that regulates discriminatory conduct in the area of industry relations.

Since 1904, employers have been subject to a reverse onus of proof when defending a claim of dismissal on the basis of trade union activity. This approach is now incorporated in the Fair Work Act³¹⁹ in relation to general protections on the basis of all protected attributes. Significant overlap exists between the Anti-Discrimination Act and the Fair Work Act, in which discrimination is a form of unlawful ‘adverse action’, and many of the protected ‘grounds’ in the Fair Work Act are the same, or similar to, the protected attributes in the Anti-Discrimination Act.³²⁰

In the federal jurisdiction, the Work Health and Safety Act³²¹ also creates several offences to discourage discriminatory, coercive, and misleading conduct, which includes where a person is discriminated against because they have raised a work health and safety issue.³²² Under this Act, discrimination is presumed to be the reason for the conduct and the defendant has the burden of proving otherwise, on the balance of probabilities.³²³ The Explanatory Memorandum justifies this reversal of the onus of proof because, ‘it will often be extremely difficult, if not impossible, for the prosecution to prove that the person engaged in discriminatory conduct for a prohibited reason’.³²⁴

Reasons to change the approach

Stakeholders in favour of changing the onus of proof provided justifications including that:

- People from disadvantaged and marginalised groups find proving discrimination especially difficult.³²⁵

317 *Anti-Discrimination Act 1991* (Qld) s 204.

318 *Anti-Discrimination Act 1991* (Qld) s 205 and s 206.

319 *Fair Work Act 2009* (Cth) s 361.

320 The *Fair Work Act 2009* (Cth) s 351 prohibits adverse action on the following grounds, many of which are also protected attributes under the Anti-Discrimination Act – race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

321 *Work Health and Safety Act 2011* (Cth).

322 *Work Health and Safety Act 2011* (Cth) ss 104-108.

323 *Work Health and Safety Act 2011* (Cth) s 110.

324 Explanatory Memorandum, *Work Health and Safety Bill 2011* (Cth), [408].

325 See for example: Public Advocate (Qld) submission 3; Queensland Nurses and Midwives Union submission, 13; Jenny King submission, 2.

- The current provisions, in effect, require the complainant to prove matters relating to the ‘state of mind of the respondent’, and often the complainant does not know whether ‘discriminatory rationales’ were part of the reason for the conduct.³²⁶
- Evidence about the reason for the treatment often resides only with the respondent.³²⁷
- Where the cause of discrimination is unconscious bias, the respondent themselves may not have recognised or clearly articulated the reason for the treatment.³²⁸
- Discrimination based on certain attributes is more likely to succeed because explicit reasons are more often provided, whereas with other attributes explicit reasons are rarely given.³²⁹
- Shifting the burden from the complainant to the respondent would get to the heart of the issue, rather than relying on assumptions, and so increase efficiency and improve transparency.³³⁰

We were also told that partly shifting the onus away from the complainant would acknowledge and address the power imbalance often inherent in discrimination cases.³³¹

A shifting or shared burden of proof is established in overseas jurisdictions, including Canada, the United Kingdom, and the European Union.³³²

Challenges for certain attributes

Race complaints

The Review was told about the challenges of proving race discrimination. We heard that First Nations people and culturally and linguistically diverse people may lack trust and confidence that the system will work for them.³³³ This is compounded by the requirement to prove the treatment was because of the person’s race where the treatment is less overt, or where the respondent claims that everyone is treated the same.³³⁴ These issues were reflected in research with First Nations women, where it was found that this group did not confront discrimination they encountered because of a keen sense it would be very difficult to prove.³³⁵

The Queensland African Community Council told us about a situation where a student was suspended because it was falsely assumed he had stolen a phone, until it was proved through security camera footage that he had nothing to do with the incident. In another case, a highly skilled and experienced worker was invited to attend a job interview, but when the panel saw him in person they exhibited disinterested and disengaged body language.³³⁶ We also heard from young people of colour about their experiences of being followed in shops, and instances of being refused jobs because of Muslim-sounding names or wearing hijab.³³⁷

326 Equality Australia submission, 30.

327 Queensland Nurses and Midwives Union submission, 13; Dominique Allen submission, 2; Respect Inc. submission, 19-20; Basic Rights Queensland consultation, 15 September 2021.

328 Queensland Advocacy Incorporated submission, 19. See also Assoc Prof Dominique Allen, ‘Reducing the Burden of Proving Discrimination in Australia’ [2009] *Sydney Law Review* 24; (2009) 31(4) *Sydney Law Review* 579, 1.A.

329 Caxton Legal Centre submission, 7. The submission put forward that respondents are more likely to provide explicit reasons for the treatment when it comes to pregnancy, breast feeding, family responsibilities, mental illness, and lawful sexual activity. But this is less likely with race, gender, and age, and so these attributes are harder to establish.

330 Community Legal Centres Queensland submission, 2; Caxton Legal Centre submission, 7.

331 See for example: Women’s Legal Service submission, 4; Scarlett Alliance submission, 21.

332 Australian Discrimination Law Experts Group submission, 26.

333 Aboriginal and Torres Strait Islander Women’s Legal Service North Queensland Consultation, 15 September 2021; Queensland African Community Council consultation, 8 August 2021.

334 Aboriginal and Torres Strait Islander Women’s Legal Service North Queensland Consultation, 15 September 2021.

335 Alexis Goodstone, Patricia Ranald, Public Interest Advocacy Centre, Wirringa Baiya Aboriginal Women’s Legal Centre, *Discrimination... have you got all day? Indigenous women, discrimination and complaints processes in NSW* (2001), 56.

336 Queensland African Community Council consultation, 8 August 2021.

337 Young peoples’ roundtable, 17 February 2022; Queensland Program of Assistance to Survivors of Torture and Trauma consultation, 23 August 2021.

Some stakeholders said that requiring the complainant to take on the entire burden of proof is a genuine deterrent to making complaints about race or religion. Some felt it gave the impression that the complainant themselves was the wrongdoer.³³⁸

Academic literature supports these views. Instancing the low numbers of successful complaints made under the Racial Discrimination Act, Jonathan Hunyor, an academic and lawyer, observed:

We know that racism exists, why is it so hard to prove?

Hunyor refers to a reluctance of courts and tribunals to draw inferences of racial discrimination despite acknowledging its systemic nature, and suggests that courts and tribunals should:

- scrutinise the reasons proffered by respondents for their decisions, being sensitive to the systemic bias (both conscious and unconscious) which may underlie them
- recognise that the evidential burden should rest on the employer to provide an explanation for conscious or unconscious reasoning.³³⁹

Dr Fiona Allison, an academic researcher in the area of First Nations access to justice, considers that placing the whole onus of proof on the complainant makes race discrimination cases ‘virtually impossible to win’, in part because the respondent controls all the relevant information. Allison provides this scenario:

A complainant claiming direct racial discrimination when turned down for a job, for example, needs to establish that the decision of the employer in question was based on race. The respondent need only suggest, however, that the job application was declined based on merit to rebut the allegation and without further evidence from the complainant, the case will be dismissed as unsubstantiated.³⁴⁰

Allison argues that the current burden of proof on complainants deters Aboriginal and Torres Strait Islander people from even taking the first step of making a complaint. But if they do make a complaint, they are then faced with often insurmountable barriers to proving their case.³⁴¹

Disability complaints

We also heard that disability complaints are hard to prove, and in particular when a person is seeking employment. In a roundtable discussion with people with disability, we heard about the lack of availability of meaningful employment, with one participant commenting that:

*People jump to conclusions. When they see the outside of your body, they see that you're not going well at the moment. And they go, ah, no, you wouldn't be able to do that. So that's preconceived ideas.*³⁴²

Another participant in the roundtable told us that:

*A key barrier to lodging a complaint is the challenge of 'evidencing' unconscious bias, for example, in job applications, rental accommodation applications, etc.*³⁴³

338 Sikh Nishkam Society of Australia submission, 4.

339 Jonathan Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review* 535.

340 Dr Fiona Allison, 'A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians Through An Access To Justice Lens', (2013/2014) 17(2) *Australian Indigenous Law Review*, 14-15.

341 Dr Fiona Allison, 'A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians Through An Access To Justice Lens', (2013/2014) 17(2) *Australian Indigenous Law Review*, 15.

342 People with disability roundtable, 4 February 2022.

343 People with disability roundtable, 4 February 2022.

Vision Australia commented that people with blindness and low vision often feel they have been filtered out unfairly because of their disability, but do not hold the evidence about the basis for the decision. Vision Australia considers it is reasonable for the respondent to have to provide these reasons.³⁴⁴

Queensland Advocacy Incorporated noted the low rates of employment for people with disability, and commented:

It is only by reversing the onus of proof and asking employers and potential employers, as well as educators and potential educators, gatekeepers to goods and services, etc, to explain why they did not employ, enrol, admit or assist the person with disability that this will start to change culture and cause unconscious and conscious bias to be placed in the spotlight. It is time to stop asking people with disability to bear the burden of proving something that goes on behind closed doors, a process they can only guess at.³⁴⁵

Concerns with changing the burden of proof

Unfair burden on respondents

Of the submissions that did not support changing the current onus of proof, a key concern was the potential for an unfair or unreasonable burden on certain respondent groups. These included:

- small to medium businesses without in-house human resource management staff or legal expertise³⁴⁶
- health care providers³⁴⁷
- churches, non-profit organisations, and charities³⁴⁸
- education providers.³⁴⁹

Other submissions were concerned that reversing the onus could lead to an increase in vexatious claims, costs, and time spent in litigation.³⁵⁰

The Australian Industry Group told the Review that they often hear from employers that it is not unusual for unfounded and erroneous perceptions to arise that employment decisions have been made for discriminatory reasons. Many employers feel that the low threshold under the Fair Work Act leads to unfair situations where the employer needs to prove they did not discriminate.³⁵¹

Commenting on the potential impact of a reverse onus on schools, the Queensland Catholic Education Commission suggested a balanced approach. They stressed that schools need certainty about their obligations under the Act, and so it is 'appropriate that such an allegation is able to be substantiated in a meaningful way by the complainant, initially, so that the respondent can appropriately investigate and meaningfully respond to the matter.'³⁵²

344 Vision Australia submission, 4.

345 Queensland Advocacy Incorporated, 19.

346 Australian Industry Group submission, 3.

347 Medical Insurance Group Australia submission, 3.

348 Human Rights Law Alliance submission, 3.

349 Australian Association of Christian Schools submission, 8; James Cook University submission, 1; Department of Education submission, 8; Queensland Catholic Education Commission submission, 5; Queensland Law Society submission, 7.

350 Australian Association of Christian Schools submission 8; James Cook University submission, 1

351 Australian Industry Group submission, 3-4.

352 Queensland Catholic Education Commission, 5.

Presumption of innocence

Three submissions questioned whether changing the burden of proof displaced the presumption of innocence,³⁵³ which is a fundamental principle of criminal law.³⁵⁴ This was also raised in our roundtable with legal practitioners.³⁵⁵

As the Anti-Discrimination Act relates to civil and not criminal action, this principle does not directly apply. While a fundamental legislative principle in the Legislative Standards Act³⁵⁶ includes ensuring that legislation does not reverse the onus of proof without justification, this only applies to criminal proceedings.³⁵⁷

The Queensland Law Society considered that it is a fundamental tenet of the legal system that the prosecution or plaintiff bear the onus of proof, but acknowledged the principle could be displaced for a good reason. Queensland Law Society noted a diversity of views among their members about whether there were sound reasons to disrupt the general principle in this context.³⁵⁸

The Queensland Council for Civil Liberties was concerned about dispensing with procedural safeguards on the basis of the proposition that the person who makes an accusation should be responsible for proving that accusation. They did not accept there was any justification for changing the current position.³⁵⁹

FamilyVoice provided a detailed submission about the legal principle of ‘innocent until proven guilty’, which as noted above, applies in a criminal rather than civil context. However, they acknowledged that shifting the burden is not rare, and it has been permitted by the High Court when displaced for a good reason. Changes in the onus of proof that may allow vexatious litigation in civil cases, however, was a concern to them.³⁶⁰

Given there was some general hesitancy with the approach, some stakeholders suggested³⁶¹ that improving disclosure requirements might be an alternative way to achieve the objective sought by shifting the onus of proof.³⁶² While the Act currently specifies that the tribunal is not bound by the rules of evidence,³⁶³ the tribunals may already make orders requiring the production of documents.³⁶⁴

Is the presumption of innocence a relevant consideration?

The burden of proof is generally on the plaintiff in civil claims.³⁶⁵ This is different from the premise that the prosecution should bear the onus of proof in criminal matters, where the consequences are generally more serious and may include terms of imprisonment.

353 FamilyVoice Australia submission; Queensland Council for Civil Liberties submission; Queensland Law Society submission.

354 *The CCH Macquarie Dictionary of Law* (rev ed, 2001) ‘presumption of innocence’.

355 Legal practitioners’ roundtable, 10 February 2022.

356 *Legislative Standards Act 1992* (Qld).

357 *Legislative Standards Act 1992* (Qld) s 4(3)(d).

358 Queensland Law Society submission, 7.

359 Queensland Council for Civil Liberties submission, 4-5.

360 FamilyVoice submission, 8-10.

361 Queensland Council for Civil Liberties submission, 4; Queensland Law Society submission, 8; Aboriginal and Torres Strait Islander Legal Service consultation, 19 August 2021.

362 Disclosure is the delivery or production of documents by a party to a case to the other parties in the case (*Uniform Civil Procedure Rules 1999* (Qld) r 210).

363 *Anti-Discrimination Act 1991* (Qld) s 208.

364 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 63, 97; *Industrial Relations (Tribunals) Rules 2011* sub div 7A, r 115.

365 *Currie v Dempsey* (1967) 69 SR (NSW) 116, 125.

The Queensland Human Rights Act provides that a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.³⁶⁶ This provision does not apply in a civil complaints process.

The presumption of innocence is not absolute, and even in criminal matters. The High Court has said that the principle is an ‘important incident of the liberty of the subject’ but is not ‘unqualified’,³⁶⁷ and ‘it has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof...’.

A 2015 Australian Law Reform Commission Report (ALRC Report), in considering the burden of proof, acknowledged that there may be a blurring between criminal and civil penalties, such that some civil laws are effectively criminal in nature.³⁶⁸ The ALRC Report, citing the United Nations Human Rights Committee, stated matters to consider in assessing whether a civil penalty is ‘criminal in nature’, which includes:

- the classification and nature of the penalty
- whether the penalty is intended to be punitive or deterrent in nature
- whether the proceedings are instituted by a public authority with enforcement powers
- the severity of the penalty.³⁶⁹

These considerations would generally not apply to a complainant seeking resolution of a complaint against an individual respondent or an organisation through conciliation. At the tribunal stage, the award of damages is compensatory, rather than punitive or deterrent in nature.³⁷⁰

Comparative approaches

While most submissions supported shifting the burden of proof, there were different views about the best approach.

Submissions received by the Review considered the extent to which the complainant should first have to establish their case before the onus shifts to the respondent. The two approaches most commonly put forward were the:

- UK Equality Act approach
- Fair Work Act approach

There was approximately equal support for each model.³⁷¹

³⁶⁶ *Human Rights Act 2019* (Qld) s 32(1).

³⁶⁷ *Momcilovic v The Queen* (2011) 245 CLR 1 [44].

³⁶⁸ Australian Law Reform Commission, *Traditional Rights And Freedoms—Encroachments By Commonwealth Laws* (Report No 129, December 2015) [9.7].

³⁶⁹ Australian Law Reform Commission, *Traditional Rights And Freedoms—Encroachments By Commonwealth Laws* (Report No 129, December 2015) [9.107]–[9.112].

³⁷⁰ *Hehir v Smith* [2002] QSC 92; *Edwards v Hillier & Educang Ltd* [2006] QADT 34; *Gray v Queensland Rail* [2000] QADT 3.

³⁷¹ Those in support of Fair Work model included: Caxton Legal Centre submission; Multicultural Queensland Advisory Council submission; Queensland Council of Unions submission; Queensland Nurses and Midwives Union submission; Queensland Advocacy Incorporated submission. See also Community Legal Centers Queensland, ‘Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland’, (Web page) <<https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>>. Those in support of the UK Equality Act approach included: Australian Discrimination Law Experts Group, Name withheld (Sub.135), Queensland Catholic Education Commission, Equality Australia, Associate Professor Dominique Allen, Youth Advocacy Centre Inc, Legal Aid Queensland.

Fair Work model – reversal of the burden of proof

The federal Fair Work Act contains general protections for certain rights (workplace rights, industrial action, and discrimination). In Queensland most employees except for the state government fall under the Fair Work Act. To commence an action, an employee or prospective employee only needs to establish that adverse action was taken and that the employee had one of the relevant attributes. It is then presumed that the adverse action was taken because of the attribute unless the employer can prove otherwise.³⁷²

Some stakeholders with experience in this jurisdiction felt that implementing the Fair Work model would have the benefit of improving respondents' record-keeping and leading to fairer tribunal outcomes, but not increase litigation.³⁷³ It was also suggested that a reversal of the onus of proof was the best way to address power differentials inherent in the process, and to avoid erroneous assumptions to the detriment of complainants.³⁷⁴

However, members of the Queensland Law Society provided different views about the effectiveness of the Fair Work model. Some were concerned about an increase in unmeritorious or vexatious claims, as well as 'unintended consequences for the complainant from this reform, including that a respondent may call a number of witnesses or present a number of documents which may be a significant impost on the complainant and result in additional costs.'³⁷⁵

Further concerns raised about the Fair Work model included:

- The outcomes may be unfair, as an entirely unmeritorious claim might succeed because the respondent either fails to present the evidence to rebut the presumption or is practically unable to do so because the relevant witness is unavailable or deceased.³⁷⁶
- Reports of anecdotal experience of the Fair Work jurisdiction suggest that the process of reversing the onus has made cases longer and more difficult.³⁷⁷

Uncovering unconscious bias

Some submissions supported an approach in which tribunals examine the reasons for alleged contraventions at a deeper level and consider the possibility of unconscious bias. However, courts have been reluctant to consider unconscious discrimination when interpreting the Fair Work Act's burden of proof provision.

The Full Federal Court in *Barclay* determined that the reason for a person's conduct is not necessarily the reason they assert it to be, and so discrimination may be either conscious or unconscious.³⁷⁸ However, the High Court later rejected this reasoning, and said that while 'state of mind, intent and purpose' will be relevant, the key question remains 'why was the adverse action taken?' Therefore, all that is required to discharge the burden of proof on the employer is 'direct testimony from the decision-maker which is accepted as reliable',³⁷⁹ although more recent cases have made it clear that a decision-makers' direct evidence will not be automatically accepted, particularly if it has inconsistencies.³⁸⁰

372 *Fair Work Act 2009* (Cth) s 361(1).

373 Caxton Legal Centre submission, 7.

374 Queensland Law Society submission, 7, commenting on the views of some members; Community Legal Centers Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) 4 <<https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>>.

375 Queensland Law Society submission, 8.

376 Name withheld (Sub.135) submission, 18-19.

377 Queensland Civil and Administrative Tribunal submission, 7.

378 *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (9 February 2011) [28].

379 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 [44-45].

380 *Ross v RC Mackenzie and Sons Pty Ltd* [2013] FMCA 31.

This contrasts with the approach taken in the United Kingdom (UK) where the courts have shown more willingness to look at unconscious reasons, and acknowledge the challenges in proving discrimination in circumstances where:

...those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them.³⁸¹

UK Equality Act model – a shared burden of proof

While the Fair Work Act approach can be seen as a reversal of the onus of proof, the UK model represents a shift towards a shared burden of proof between the parties.

Under the UK Act, the claimant must be able to make a prima facie case³⁸² that the treatment would amount to direct or indirect discrimination on the basis of a prohibited ground.³⁸³ This may be established by relying on inferences drawn from the primary facts. A two-stage test was established in the case of *Igen v Wong*³⁸⁴ in 2005 and later codified in the Equality Act.³⁸⁵

Summary of two-stage test

Stage one: Is there a prima facie case?

- The claimant has the burden of proof and must present facts from which the tribunal can conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of an attribute. The tribunal should consider what inferences could be drawn from the facts and assume there is no adequate explanation at this stage. The tribunal can consider any evidence before it in determining whether the complainant has a prima facie case, but should not take the respondent's explanation into account.

Stage two: Was the less favourable treatment for a reason other than discrimination?

- The burden of proof moves to the respondent to present facts from which it could be concluded that the treatment was in no way on the grounds of a protected attribute.³⁸⁶

In contrast to the Fair Work approach, the UK model requires the claimant³⁸⁷ to show causation (or a link between the attribute and the unfair treatment) to establish a prima facie case.

The Equality Act (UK) includes the words 'if there are facts'³⁸⁸ which may allow the court to draw the causal link from either what the claimant asserts, or from other sources available to it:

136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

381 *Strathclyde Regional Council v Zafar* [1997] UKHL 54 (Lord Browne-Wilkinson).

382 A prima facie case is one in which a party produces 'enough evidence to allow the fact-trier [ie a judge or jury] to infer the fact at issue and rule in the party's favour'. From *Black's Law Dictionary* (abridged 7th ed, 2000) 'prima facie case' (def 4).

383 *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] EAT 18-03-0304; [2003] ICR 1205 [20]; *Igen Ltd & Ors v Wong* [2005] EWCA Civ 142; [2005] All ER 812 [76] Annex (9).

384 *Igen Ltd & Ors v Wong* [2005] EWCA Civ 142; [2005] All ER 812.

385 *Equality Act 2010* (UK).

386 We draw attention to the annex in the judgement of *Igen Ltd v Wong* [2005] ICR 931, which presents a detailed 13-step guide to assist the tribunal in applying the two-stage test.

387 'Claimant' in the language used in UK case law.

388 Overturning an earlier decision that found that 'if there are facts' meant that there was no burden on the claimant at the first stage, the UK Supreme Court in *Royal Mail Group v Efofi* [2019] EWCA Civ 18 has confirmed that the claimant must first establish a prima facie case.

...

Nonetheless, the claimant must do more than make a mere assertion that is not backed up by a factual foundation.³⁸⁹

This approach aligns with the current approach of the Commission in accepting only those complaints that meet a threshold for acceptance under the current Act.³⁹⁰

Benefits of the UK approach

Analysis of case law indicates that the UK Equality Act approach is established and working well.³⁹¹ In recommending the UK approach, the Australian Discrimination Law Experts Group (ADLEG) considers it has the following advantages:

- taking the tribunal straight to the key issues of what happened and why
- avoiding time-consuming and costly preliminary technical issues
- enabling the respondent to volunteer what they know about the allegations.

ADLEG anticipates that adopting the approach in the UK Act would lead to more focus on the central issues of whether there was discrimination or not, and lead to clearer case law.³⁹² However, ADLEG concluded that the impact of burden of proof should not be overstated, and that it would 'only likely to be determinative in finely balanced cases with very particular fact scenarios.'³⁹³

Some submissions thought that this approach was fairer, and less likely to result in unmeritorious or vexatious claims, compared with the Fair Work approach.³⁹⁴

The Act operates across a breadth of areas compared with industrial law. Requiring a large, well-resourced employer to prove why they acted for a non-discriminatory reason may be reasonable, whereas placing this onus a small shop owner, a volunteer chairperson of a club, or a committee secretary of a body corporate may not be.

One submission commented that shifting the burden of proof was the only way in which underlying unconscious biases could be revealed.³⁹⁵ In determining whether a prima facie case has been established, the UK has looked below surface level explanations for the treatment. The court noted in *Barton*:

*It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".*³⁹⁶

389 *Royal Mail Group v Efobi* [2019] EWCA Civ 18 at [59].

390 Anti-Discrimination Act 1991 (Qld) s 136. Section 136 requires that a complaint contains 'reasonably sufficient details to indicate an alleged contravention of the Act'.

391 See also Assoc Prof Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' [2009] *Sydney Law Review* 24; (2009) 31(4) *Sydney Law Review* 579.

392 Australian Discrimination Law Experts Group submission, 26.

393 Australian Discrimination Law Experts Group submission, 27.

394 Youth Advocacy Centre submission, 3; Name withheld (Sub.135) submission, 17. We note that the Commission may lapse or reject complaints that are frivolous, trivial etc under ss 139, 168.

395 Name withheld (Sub.135) submission, 17-19.

396 *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] UKEAT 18_03_0304 [18] quoting *King v GB China Centre* [1992] ICR 516 [528F] (Neill LJ).

The UK model is consistent with the approach of other international human rights jurisdictions including the European Union³⁹⁷ and Canada.³⁹⁸ Two Australian inquiries have recommended the UK approach:

- ACT Law Reform Commission³⁹⁹
- Consolidation of Commonwealth discrimination laws inquiry.⁴⁰⁰

This approach, along with the Fair Work Act model, is currently being considered by the Western Australian Law Reform Commission.⁴⁰¹

A similar approach exists in relation to discrimination matters determined by the ACT Civil and Administrative Tribunal,⁴⁰² but the drafting is more complex and this test is less well established, with limited case law to guide how it may apply in practice.

The Review's position

The Review considers that:

- There are sound reasons to depart from the Act's current approach to burden of proof and to adopt a shared burden of proof because:
 - respondents are often the only people holding key information about reasons for the treatment, or the state of mind that led to the treatment
 - significant power imbalances characterise many discrimination cases
 - retaining the whole burden of proof is too onerous for complainants, especially if unrepresented
 - time and costs may be saved by adopting an approach that gets quickly to the key issues.
- Overall, the UK model appears to be the most consistent with equality jurisdictions and is fairer and more balanced when considering the range of potential respondents – all with varying levels of knowledge and resources – who interact with the law across the numerous areas of activity protected by the Act.
- Under the Fair Work Act, the focus shifts immediately to establishing the 'real reasons' of the respondent, which may mean less, rather than more, focus on the complainant's experiences, including the impact of the discrimination. It may reduce the educative value of the law if the focus of key tribunal and court decisions rests primarily on the respondent's reasons why they did not discriminate.
- The Fair Work Act model may also be less likely to address underlying unconscious motives for discrimination than the UK Act since the High Court decision in *Barclay*.
- The Fair Work Act approach may result in skewed outcomes in which a complainant's case succeeds because the tribunal does not hear evidence from a particular witness who could rebut the presumption. In practice, this may lead to large witness lists, particularly if many decision-makers are involved. The effect of this might be to overload tribunals and increase delays and costs for all parties.

397 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16, 31.

398 *Ontario Human Rights Commission v Simpson-Sears Limited* [1985] 2 SCR 536, 28.

399 ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015) 143.

400 See the Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill (Clause 124) and Explanatory Memorandum.

401 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Discussion Paper, August 2021) 176-177.

402 *Human Rights Commission Act 2005 (ACT)* s 53CA.

- The current requirement under the Act that the respondent should be required to prove reasonableness for indirect discrimination, or to prove that an exception applies should remain unchanged.

Recommendation 13

13.1 The Act should introduce a shared burden of proof in which the burden shifts to the respondent once the complainant has established a *prima facie* case. The provision should be based on section 136 of the Equality Act 2010 (UK), and informed by the guide in the Annex to the UK case of *Igen Ltd & Ors v Wong* [2005] EWCA Civ 142.

Standard of proof

Some submissions expressed concern about the challenge of proving discrimination in circumstances where courts and tribunals have determined that the appropriate standard of proof is the *Briginshaw* standard.⁴⁰³ The case of *Briginshaw v Briginshaw*⁴⁰⁴ confirmed that the standard of proof is ‘on the balance of probabilities’ for civil claims, but clear or cogent evidence is required where the allegations are more serious in nature.

One submission took the contrary view and said that they would ‘strenuously oppose any departure’ from the *Briginshaw v iiNet* standard.⁴⁰⁵

While some matters in this jurisdiction are of an extremely serious nature, such as sexual assault, if the *Briginshaw* standard is applied to all matters, it could result in unfair burdens on the complainant.

Previous Australian cases have determined that drawing an inference of race discrimination is not something to be done lightly, applying the *Briginshaw* standard.⁴⁰⁶

However, in the 2008 case of *Qantas Airways Ltd v Gama* the Full Federal Court determined that applying the ‘onerous’ *Briginshaw* standard to racial discrimination complaints can lead to errors, and that:

The correct approach to the standard of proof in a civil proceeding in a federal court is ... that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved — and, I would add, the circumstance in which it is sought to be proved.⁴⁰⁷

The result of this case is that in the federal jurisdiction not all cases of racial discrimination (or other forms of discrimination such as disability, sex, or age) will necessarily be of the gravity or seriousness that requires evidence of a higher persuasive value.⁴⁰⁸

In Queensland, cases have referred to applying the *Briginshaw v iiNET Ltd* standard in a similarly measured way with due consideration of the seriousness of the allegations.⁴⁰⁹

403 Queensland Nurses and Midwives Union submission, 13; Legal Aid Queensland submission, 19-20.

404 *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34.

405 Queensland Council for Civil Liberties submission, 5.

406 *Department of Health v Arumugam* [1988] VR 319; *Sharma v Legal Aid (Qld)* [2002] FCAFC 196.

407 *Qantas Airways Ltd v Gama* [2008] FCAFC 69 [139].

408 Australian Human Rights Commission, *Federal Discrimination Law* (2016) 534-538 [6.19].

409 See for example, *Bell v iiNET Ltd* [2017] QCAT 114 refers in footnotes to the case and reasoning Branson J in *Gama*.

The Review's position

The Review considers that:

- As this issue is mostly settled, no legislative change is required.

The tribunals

The Terms of Reference ask the Review to consider:

- the functions, processes, powers and outcomes of the Queensland Civil Administrative Tribunal and the Queensland Industrial Relations Commission under the Anti-Discrimination Act⁴¹⁰
- ways to improve the process and accessibility for bringing and defending a complaint of discrimination, including how the complaints process should be enhanced to improve access to justice for victims of discrimination.⁴¹¹

Two Queensland tribunals deal with matters under the Anti-Discrimination Act. For work-related matters the tribunal is the Queensland Industrial Relations Commission (the QIRC) and for all other matters the tribunal is the Queensland Civil and Administrative Tribunal (QCAT).

Until December 2009, matters under the Act were dealt with by the Anti-Discrimination Tribunal. The Anti-Discrimination Tribunal ceased when QCAT was established and became responsible for dealing with anti-discrimination matters. Since 2017, the QIRC has been responsible for work-related anti-discrimination matters, and QCAT continues to be responsible for all other anti-discrimination matters.

When conducting a hearing for matters arising under the Anti-Discrimination Act, QCAT is constituted by one legally qualified member.⁴¹² In *Owen v Menzies & Ors*, the Court of Appeal held that QCAT is a court with the power to determine constitutional questions,⁴¹³ which sets it aside from other tribunals hearing discrimination matters in Australia.⁴¹⁴

The tribunal may arrange for certain persons to assist it in its proceedings, including a solicitor or barrister, or an officer of the Commission.⁴¹⁵ Where an officer of the Commission assists the tribunal, that officer is under the control and direction of the tribunal.

Functions and powers

In this section, we consider whether the functions and powers of the tribunals remain appropriate. We also include discussion on Commission powers to intervene in court proceedings.

Functions of the tribunals

Under the Anti-Discrimination Act, the tribunals have the following functions in relation to complaints about contraventions of the Act:

- to make injunctive orders
- to review decisions to lapse
- to enforce conciliation agreements

410 Review of the Anti-Discrimination Act 1991 (Qld), Terms of Reference 3(k).

411 Review of the Anti-Discrimination Act 1991 (Qld), Terms of Reference 3(l).

412 *Anti-Discrimination Act 1991* (Qld) s 176.

413 *Owen v Menzies & Ors*; *Bruce v Owen*; *Menzies v Owen* [2012] QCA 170.

414 In contrast, see: *Burns v Corbett & Ors* (2018) ALJR 423; *Citta Hobart Pty Ltd & Anor v Cawthorn* [2022] HCA 16.

415 *Anti-Discrimination Act 1991* (Qld) ss 185-186.

- to hear and decide complaints
- to grant exemptions and
- to provide opinions about the application of the Act.⁴¹⁶

Elsewhere in this chapter, we recommend that a complainant be able to seek leave to appeal to the tribunal against the Commission's decision not to accept a complaint. If this recommendation is implemented, the tribunals would have the jurisdiction to make merits reviews of the Commission's administrative decisions to accept or reject a complaint, and whether to offer dispute resolution services.

Powers of the tribunals

Orders the tribunals may make

The orders a tribunal may make if a complaint is proven in the tribunal are set out in the Act.⁴¹⁷ The potential orders include:

- requiring the respondent to pay to the complainant or another person, within a specified period, an amount the tribunal considers appropriate as compensation for the loss or damage caused by the contravention
- requiring the respondent to make a private apology or retraction
- requiring the respondent to implement programs to eliminate unlawful discrimination.

The breadth of the potential remedies is a strength of Queensland's laws.

In 2002, the Act was amended to provide additional remedies if a complaint is proven, which expanded the options to include private or public apologies or an 'order requiring the respondent to implement programs to eliminate unlawful discrimination'.⁴¹⁸

In 2003, the Anti-Discrimination Tribunal decided the case of *Bellamy v McTavish & Pine Rivers Shire Council*.⁴¹⁹ In that case, the complainant had bipolar affective disorder and the respondent banned him from a certain place as a result of an incident that occurred when he had a manic episode as part of his disorder. The Tribunal found that the discrimination in that case was 'significant', 'deliberate' and 'nasty', and ordered that a written apology be made to the complainant and shared with the Chief Executive Officer, Mayor and every councillor of the Pine Rivers Shire Council.

In 2004, QCAT decided the case of *Sailor v Village Taxi Cabs Pty Ltd and Markwick*.⁴²⁰ In that case, QCAT found that in saying certain words to the complainant, who was an Aboriginal woman, the respondent had treated her less favourably in the supply of taxi services than a non-Aboriginal person, and using this remedy power, ordered the taxi company to develop an anti-discrimination policy and provide training to its drivers.

These cases demonstrate how the existing powers of the tribunals have the capacity to promote outcomes that seek to address systemic discrimination, and it is important that the Act retains these provisions.

416 *Anti-Discrimination Act 1991* (Qld) ss 174A, 174B.

417 *Anti-Discrimination Act 1991* (Qld) s 209.

418 *Anti-Discrimination Act 1991* (Qld) s 209(d)-(g).

419 *Bellamy v McTavish & Pine Rivers Shire Council* [2003] QADT 15.

420 *Sailor v Village Taxi Cabs Pty Ltd and Markwick* [2004] QADT 15.

Other powers

The tribunals also have various other powers to be able to execute their functions, including the power to join a person as a party,⁴²¹ to allow a complainant to amend a complaint,⁴²² or in relation to anonymity.⁴²³

The power to make an order prohibiting the disclosure of a person's identity in certain circumstances was commented on as being critically important by the Respect Inc and DecrimQLD submission.⁴²⁴ That submission supported strengthening the protection by taking any discretion away from the tribunal.⁴²⁵

Commission interventions

The Commission's functions under the Act include intervening in a proceeding that involves 'human rights issues with the leave of the court'.⁴²⁶ The definition of human rights is tied to that in the Australian Human Rights Commission Act,⁴²⁷ which refers to international human rights instruments.

The intervention function was included when the Act first came into force and Queensland did not have its own Human Rights Act, as it does now.

Six submissions commented on this issue, with general support for the Commission to be able to intervene, either with or without leave.⁴²⁸ The reason for support was generally that the Commission's experience would be valuable in proceedings.

The Review's position

The Review considers that:

- Generally, the functions and powers currently granted to the tribunals do not need to be changed.
- Potential orders currently available to the tribunals remain appropriate and necessary.
- Allowing the Commission to intervene in proceedings as of right when a question of law arises that relates to the application of the Act is beneficial, and would allow the Commission to provide assistance to the tribunal.
- The definition of human rights should no longer refer to the Australian Human Rights Commission Act but rather align with the Human Rights Act given that it is now law in Queensland.

Processes and outcomes

Although we did not identify any issues with the functions and powers of the tribunals under the Anti-Discrimination Act, we heard that in certain circumstances, the processes of the tribunals could be enhanced and that, in turn, this may improve outcomes.

421 *Anti-Discrimination Act 1991* (Qld) s 177.

422 *Anti-Discrimination Act 1991* (Qld) s 178.

423 *Anti-Discrimination Act 1991* (Qld) s 191.

424 Respect Inc and DecrimQLD submission, 27.

425 Respect Inc and DecrimQLD submission, 28.

426 *Anti-Discrimination Act 1991* (Qld) s 235(j).

427 *Australian Human Rights Commission Act 1986* (Cth).

428 Australian Discrimination Law Experts Group submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Caxton Legal Centre submission; Queensland Civil and Administrative Tribunal submission.

In the Discussion Paper we asked questions focused on the processes of the tribunals, including specialisation, consistency, and publishing outcomes and data. These topics reflected the issues raised during our initial consultations.⁴²⁹

There are practical limitations to harmonising the processes of the two tribunals or tailoring the process for matters arising under the Anti-Discrimination Act. As observed by QCAT in their submission:

QCAT handles multiple jurisdictions and in order to seek to promote consistency and efficiencies throughout QCAT, we need to be able to develop and alter our own procedural manuals and documents as needed.⁴³⁰

We understand those considerations and have therefore sought to ensure that, in addressing this aspect of the Terms of Reference, we present practical and workable options to improve the processes and outcomes of matters determined by the tribunals under the Anti-Discrimination Act.

Current approach

Complaints that are not resolved in the Commission may be referred to the relevant tribunal for hearing and determination.

A complainant may ask for a complaint to be referred after a conciliation conference,⁴³¹ or if the Commissioner gives written notice that the complaint cannot be resolved through conciliation.⁴³² A respondent may ask for a complaint to be referred if it has not been finalised within six months.⁴³³

In 2020-21, the Commission finalised 284 complaints, and of those 186 were resolved through conciliation. The Commission referred 125 complaints to either QCAT or the QIRC, which was a decrease from 157 in the previous year.⁴³⁴ Not all referred complaints proceed to a final hearing and determination.

Dealing with matters under the Anti-Discrimination Act forms one relatively small part of the tribunals' responsibilities. This is illustrated by the proportion of lodgements in both tribunals. Of their total caseload between 1 July 2019 and 30 June 2021, 0.2% of QCAT matters⁴³⁵ and 3.4% of QIRC matters⁴³⁶ were from referrals made by the Commission under the Anti-Discrimination Act.

Specialisation

Experience in discrimination law

In the Discussion Paper, we asked whether there should be a specialist list within the tribunals for discrimination matters. There were 18 submissions that touched on this issue.⁴³⁷ Of those, 15 said that a specialist tribunal or list would be beneficial.⁴³⁸

429 See for example: Legal assistance sector, consultation, 6 October 2021; Caxton Legal Centre, consultation, 11 August 2021.

430 Queensland Civil and Administrative Tribunal submission, 2.

431 *Anti-Discrimination Act 1991* (Qld) s 164A.

432 *Anti-Discrimination Act 1991* (Qld) s 165.

433 *Anti-Discrimination Act 1991* (Qld) s 167.

434 Queensland Human Rights Commission, *Annual report 2020-21* (Report, 2021) 43.

435 Queensland Civil and Administrative Tribunal, *Annual Report 2020-21* (Report, 2021) 11.

436 Queensland Industrial Relations Commission, *Annual Report 2020-21* (Report, 2021) 40.

437 Fibromyalgia ME/CFS Gold Coast Support Group submission; Rainbow Families Queensland submission; Women's Legal Service submission; NEAMI submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; [name withheld] Sub.135 submission; LawRight submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission; Queensland Civil and Administrative Tribunal submission.

438 Fibromyalgia ME/CFS Gold Coast Support Group submission; Rainbow Families Queensland submission; Women's Legal Service submission; Neami National submission; Australian Discrimination Law Experts Group submission;

Support for specialisation was for the following reasons:

- it would reduce inconsistent approaches by different decision makers to foundational anti-discrimination law concepts
- discrimination cases are often legally, conceptually and factually complex
- non-legal concepts such as ‘unconscious bias’ require relevant expertise and understanding⁴³⁹
- creating a fair and inclusive environment for the vulnerable and marginalised people to have complaints decided⁴⁴⁰
- increased ability to recognise systemic discrimination.⁴⁴¹

QCAT outlined in their submission that Anti-Discrimination Act and Human Rights Act matters are currently managed by a designated list manager who is a Member of QCAT, and that the professional experience of Members is taken into account when allocating matters.⁴⁴²

An alliance of Queensland lawyers and advocates have suggested a stand-alone Anti-Discrimination Tribunal or at least a specialist division of QCAT and the QIRC. They say that this would lead to clearer and more consistent decisions, which would make it easier to predict how a case will be determined, which in turn leads to fewer disputes and more early resolutions.⁴⁴³

However, LawRight, the Queensland Council for Civil Liberties, and QCAT did not support a specialist list as contemplated by the Discussion Paper. The Queensland Council for Civil Liberties suggested that the creation of specialist tribunals can lead to ‘tunnel vision’ by decision-makers.⁴⁴⁴

The QCAT submission agreed that discrimination law is complex and technical, but pointed out that, fundamentally, it involves application of a legal test to facts.⁴⁴⁵ QCAT also noted that tribunal members deal with other sensitive matters, such as end of life decisions.

Understanding experiences of discrimination and minority communities

When answering the Discussion Paper question about specialisation, six submissions raised the benefits of direct experience of discrimination, as opposed to discrimination law, amongst tribunal Members.⁴⁴⁶

Submissions indicated that this could be achieved through single Members having lived experience of discrimination,⁴⁴⁷ or a panel where there might be a legal expert and a person with lived experience,⁴⁴⁸ or through training for Members.⁴⁴⁹

Community Legal Centres Queensland submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; [name withheld] Sub.135 submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission.

439 Community Legal Centres Queensland, ‘Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland’, (Web page) <https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>, 6.

440 Neami National submission, 3.

441 Legal Aid Queensland submission, 14; Caxton Legal Centre submission, 20.

442 Queensland Civil and Administrative Tribunal submission, 5.

443 Community Legal Centres Queensland, ‘Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland’, (Web page) <https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>, 7.

444 Queensland Council for Civil Liberties submission, 11.

445 Queensland Civil and Administrative Tribunal submission, 4.

446 Rainbow Families Queensland submission; Vision Australia submission; Women’s Legal Service submission; Australian Discrimination Law Experts Group submission; Equality Australia submission; Legal Aid Queensland submission.

447 Equality Australia submission, 41.

448 Queensland Law Society submission, 11.

449 See for example, Rainbow Families Queensland submission, 4; Vision Australia submission, 6.

Some submissions emphasised the need for development of cultural competence in tribunal members to deal with issues affecting vulnerable minority communities, including First Nations and LGBTIQ+ people.

Caxton Legal Centre provided an example of a recent race discrimination case determined in Townsville:⁴⁵⁰

The local QCAT member hearing the matter considered a volume of ‘character evidence’ about whether the respondent was generally racist, provided by a number of his friends from diverse backgrounds who did not experience racism from him.

This evidence apparently carried some considerable weight. However, allegations made by the complainant regarding historical and ongoing treatment of Aboriginal and Torres Strait Islander people in Townsville received less sympathetic, indeed relatively patronising, treatment as though the complainant simply failed to convince the decision-maker any such problem exists. This demonstrates an unusual view of the operation of the [Anti-Discrimination Act] as a technical piece of law, as well as [an] extraordinary position on the social context for First Nations people in that part of Queensland.⁴⁵¹

Legal Aid Queensland also gave an example of the original tribunal decision in *Tafao v State of Queensland and Ors*⁴⁵² where the Member showed limited understanding of the concepts of sex and gender and the experience of transgender persons.⁴⁵³

The Review’s position

The Review considers that:

- The tribunals should continue to endeavour to allocate discrimination matters to Members who have experience in discrimination law because of its technicality.
- When tribunal members exhibit the diversity of the community that comes before them, the cultural competency of the tribunal generally is enhanced.

Consistency of process between the tribunals

Very few submissions commented on the procedural issues that arise as a result of having a split jurisdiction between the QCAT and the QIRC, and those that did noted the difficulty with achieving uniformity.

In their submission, QCAT said that they are not in favour of a uniform set of rules and procedures across the two tribunals (QCAT and QIRC) when dealing with complaints under the Act, because QCAT handles multiple jurisdictions and so relies on internal consistency and efficiency.⁴⁵⁴

450 *Cassady v Hardings N.Q. Pty Ltd and Anor* [2021] QCAT 353

451 Caxton Legal Centre submission, 20.

452 *Tafao v State of Queensland and Ors* [2018] QCAT 409.

453 Legal Aid Queensland submission, 64.

454 Queensland Civil and Administrative Tribunal submission, 2.

Publishing decisions and outcomes

Tribunals

Only a small number of matters are referred to tribunals under the Act, and not all matters that are referred proceed to a final hearing and decision.⁴⁵⁵

Published reasons for decisions show how the Act is interpreted, and what protection the Act ultimately affords. These published decisions provide precedent and can be used to:

- educate the community and frame community expectations
- allow lawyers to give more definitive advice to clients about pursuing remedies under the Act
- assist in advising potential respondents about what they must do to comply with the Act.

While a number of submissions refer to the fact that not all QCAT decisions are published, we did not receive any detail about when this has occurred – which is consistent with the limited publicly available information on this jurisdiction. QCAT indicate that reasons for decisions are still being published, but acknowledge that this is not always the case, due to resource constraints.⁴⁵⁶

Under the Human Rights Act, which came into effect in 2020, the right to a fair hearing requires that decisions must be publicly available.⁴⁵⁷

Commission

About half of the complaints accepted by the Commission are resolved through the Commission's conciliation process. If a complaint is resolved by conciliation, the commissioner must record the terms of the agreement and have the documents signed by the complainant and the respondent,⁴⁵⁸ many of which include a confidentiality clause.

Caxton Legal Centre indicated that resolving complaints on a confidential basis can be a barrier to achieving systemic change because the resolution happens in private and no one outside the dispute knows anything about it.⁴⁵⁹

Similar to published tribunal decisions, there is also a potential educative value in parties and/or lawyers, academics, and the community more broadly having access to outcomes of complaints resolved through the Commission. The Commission currently does this for some complaints in a de-identified way published on the Commission's website.

Publishing data and information

Only five submissions discussed the issue of data collection and/or sharing.⁴⁶⁰ While there was support for the general notion of having access to good data and information sharing between the Commission and the tribunals, the QCAT submission pointed out that it is important to know the purpose of the data in order to make decisions in this area.⁴⁶¹

Overall, understanding more about the matters that enter the tribunals, including how many matters proceed to conciliation, and to hearing, is important. Data may provide useful insights that

455 For example, this could be because the complainant withdraws or the matter resolves.

456 Queensland Civil and Administrative Tribunal submission, 3.

457 *Human Rights Act 2019* (Qld) s 31(3).

458 *Anti-Discrimination Act 1991* (Qld) s 164.

459 Caxton Legal Centre submission, 11.

460 Assoc Prof Dominique Allen submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Legal Aid Queensland submission; Community Legal Centres Queensland submission.

461 Queensland Civil and Administrative Tribunal submission, 3.

could be shared with parties during Commission dispute resolution processes, helping them to understand the journey of a complaint if it does not resolve within in the Commission.

The Review's position

The Review considers that:

- All reasons for decisions in matters heard under the Act by the tribunals should be published, or made publicly available as this provides greater guidance on how the law will be interpreted. This is also required by the Human Rights Act in relation to the right to a fair hearing.
- Providing information to the public about discrimination disputes and outcomes through the Commission enhances understanding of the process and possible outcomes.

Recommendation 14

- 14.1** The Act should enable the Commissioner to intervene as of right in a proceeding before a court or tribunal in which a question of law arises that relates to the application of the Act, and the Commission should publicly report annually on the number and type of interventions it has conducted. The definition of human rights should reflect the Human Rights Act.
- 14.2** The tribunals should ensure that, wherever possible, members who deal with matters under the Act have demonstrated knowledge and experience in discrimination law.
- 14.3** When considering appointments to the tribunals, the Queensland Government should have regard to the benefits associated with tribunal membership reflecting the diversity of the community that comes before them.
- 14.4** The Tribunals should ensure that members undertake regular training on cultural competency.
- 14.5** Tribunals should provide written reasons for all final decisions and significant interlocutory decisions, and should publish those decisions and reasons.
- 14.6** The Commission and tribunals should publicly report annually on the number, type, and outcomes of matters they have dealt with under the Act. The type of matter should include the attribute and area, if an allegation of discrimination was made.
-



Chapter 6:

Eliminating discrimination

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Positive duty

The Terms of Reference ask us to consider:

- whether a more positive approach is required to eliminate discrimination and other prohibited conduct;¹ and
- whether the Anti-Discrimination Act should contain a positive duty on organisations to eliminate discrimination and other objectionable conduct prohibited by the Act, similar to the duty contained in the *Equal Opportunity Act 2010* (Vic).²

The Terms of Reference also direct us to include options for legislating a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation as far as possible.³

Throughout the Review, we asked stakeholders if the Anti-Discrimination Act is effective in eliminating discrimination in Queensland, or whether the law needs to change.

The consistent theme that emerged throughout our consultations and submissions was that the current system lacks a preventative focus.

Overall, stakeholders strongly supported the introduction of a positive duty within the Anti-Discrimination Act. They told the Review it is imperative the law does more to ensure that everyone takes active steps to prevent discrimination and promote equality.

In the Discussion Paper, we invited responses to questions about whether a positive duty should be introduced. We received 52 submissions on this subject. We also held focused consultations on positive duties during our roundtables, including with small business and industry, government agencies, legal practitioners, and in meetings with government agencies from other states.

Having analysed all submissions, consultation and research on this topic, we have concluded that introducing a positive duty into the Anti-Discrimination Act is required to best protect and promote equality, non-discrimination, and the realisation of human rights in Queensland.

Later in this section, we consider whether the statutory framework should be changed to include regulating compliance with the positive duty, and providing support to duty holders. We look at the role of the regulator, and evaluate whether the Commission, or another entity, should undertake this function.

We conclude that a regulatory approach that focuses on education and awareness should be adopted, and that the Commission should undertake this role.

What is a positive duty?

A positive duty is an obligation on a person or organisation to take active steps to prevent discrimination and sexual harassment before it happens. These steps are a proactive means to ensure that organisations are working to protect people from discrimination.

Enforcement of the Anti-Discrimination Act currently relies on resolving complaints made by individual people about conduct that has already happened. Given the difficulty of making a complaint, and the barriers that many people face, this approach has limited the effectiveness

1 QHRC Review of the Anti-Discrimination Act, Terms of Reference item 3(b).

2 QHRC Review of the Anti-Discrimination Act, Terms of Reference item 3(f).

3 QHRC Review of the Anti-Discrimination Act, Terms of Reference item 5. We consider other aspects of the Respect@ Work report in relation to sexual harassment in chapter 4.

of the Act to protect people from discrimination. Systemic discrimination has remained largely unaddressed.

A positive duty would focus on promoting cultural change rather than reacting to individual complaints.

An organisation could take active steps by:⁴

- familiarising itself with the Anti-Discrimination Act
- ensuring leaders and managers are aware of their obligations through formal and informal education and training
- developing a prevention plan based on guidance material
- considering the extent to which the organisational culture models respectful behaviour
- reviewing internal complaints procedures and outcomes
- monitoring and evaluating any systemic issues.

The types of steps that organisations take will depend on factors such as the size and nature of the business or operation, the resources available, business and operational priorities, the practicability and costs of the measures, and other relevant factors.

Comparative approaches

Positive duties are an emerging feature of discrimination and sexual harassment laws.

Recommendations of past inquiries

While Victoria is currently the only Australian state to have a positive duty in its discrimination Act, a positive duty has been recommended by recent Australian reviews and inquiries.

At the federal level, in 2008 a Senate inquiry was conducted into the effectiveness of the *Sex Discrimination Act 1984* (Cth) in eliminating discrimination and promoting gender equality. The final report recommended that the Commonwealth Sex Discrimination Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements and to accommodate family or carer responsibilities.⁵ It also recommended that further consideration is given to amending the Sex Discrimination Act to create positive duties on public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment, and promote gender equality.⁶

The Gardner Review recommended that the Victorian Equal Opportunity Act should contain a duty to eliminate discrimination as far as possible.⁷ This recommendation was adopted by the Victorian Government, and the law was amended to include a positive duty.⁸

In 2015, the Australian Capital Territory Law Reform Advisory Council's inquiry into the *Discrimination Act 1991* (ACT) recommended that the law be amended to include a positive duty

4 Victorian Equal Opportunity and Human Rights Commission, 'Positive duty', (Web page) <<https://www.humanrights.vic.gov.au/for-organisations/positive-duty/>>.

5 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Report, December 2008), Recommendation 14 (11.34).

6 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Report, December 2008), recommendation 40 (11.102).

7 Julian Gardner, *An Equality Act for a Fairer Victoria (Equal Opportunity Review Final Report, June 2008)*, recommendation 9.

8 *Equal Opportunity Act 2010* (Vic) s15.

to eliminate discrimination, and that the positive duty should apply to public authorities immediately and apply to private bodies and community organisations after a period of three years.

In 2020 the Australian Human Rights Commission's *Respect@Work* report recommended that the Sex Discrimination Act be amended 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. It also recommended that the Australian Human Rights Commission be given the functions of assessing compliance with the positive duty, and of enforcement.

In 2021 the Victorian Legislative Assembly Legal and Social Issues Committee's Inquiry into anti-vilification recommended that the existing positive duty for discrimination, sexual harassment, and victimisation matters should be expanded to vilification.

Other similar legislation

Other state and territory discrimination laws contain elements or objectives similar to positive duties. Tasmania contains a duty for an organisation to take reasonable steps to ensure that no member, officer, employee, or agent of the organisation engages in discrimination or prohibited conduct.⁹

In 2020 Victoria introduced the *Gender Equality Act 2020* (Vic) which imposes a positive duty on the public sector, councils, and universities to take positive action towards achieving workplace gender equality.

The Queensland Office of the Special Commissioner, Equity and Diversity told the Review that it is in the process of strengthening the Queensland public service, in its capacity as an employer, to address inequalities and is examining options to introduce complementary obligations through the Public Service Act Review.¹⁰

The Victorian approach

The only jurisdiction to enact a positive duty in its discrimination law is Victoria. That Act provides that a person must take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible.

In determining whether a measure is reasonable and proportionate, a number of factors must be considered, including:

- the size of the person's business or operations
- the nature and circumstances of the person's business or operations
- the person's resources
- the person's business and operational priorities
- the practicability and the cost of the measures.¹¹

⁹ *Anti-Discrimination Act 1998* (TAS) s 104.

¹⁰ Office of the Special Commissioner, Equity and Diversity (Qld) submission, 2.

¹¹ *Equal Opportunity Act* (Vic) s 15(6)(a)–(e).

International approaches

Some international jurisdictions have introduced positive duties into their equality and discrimination laws in the employment area. These include:

- The *Equality Act 2010* (UK) expressly recognises the need to advance equality through imposing a duty on public authorities to eliminate discrimination, harassment, victimisation and other prohibited conduct.¹² The *Disability Discrimination Act 2005* (UK) sets out a general duty to promote equality, and regulations require authorities to publish disability equality schemes that set out how the authority will carry out the general duty.
- The *Northern Ireland Act 1998* (UK) provides a duty for public authorities to have regard to the need to promote equality of opportunity between various groups.¹³
- The Canadian *Employment Equity Act 1995* (CA) imposes an obligation on employers, including private sector employers, to implement employment equality by identifying and eliminating employment barriers for designated groups of people, instituting positive policies and practices, and making reasonable accommodations to ensure people in the designated groups are represented.¹⁴

Benefits of a positive duty

Across the course of the Review, there was strong support for the introduction of a positive duty. Of the submissions that addressed this subject, more than two-thirds¹⁵ either supported the introduction of a positive duty or provided qualified support.¹⁶

Our analysis of material gathered through submissions and consultations revealed four key reasons why stakeholders supported the introduction of a positive duty:

- **Prevention** – A positive duty aims to stop discrimination and sexual harassment before it happens, which goes further than attempting to respond to conduct that has already happened.
- **Education and awareness** – The steps required for organisations to meet their obligations promotes a better understanding of the causes and impacts of discrimination, as well as increasing awareness about the Anti-Discrimination Act.
- **Shared responsibility** – Requiring employers and organisations to take steps to prevent discrimination and sexual harassment shares the responsibility for enforcement of the Act with duty holders, rather than resting largely with the people the Act is designed to protect.

12 *Equality Act 2010* (UK) s 149.

13 *Northern Ireland Act 1998* (UK) s 75.

14 *Employment Equity Act*, SC 1995, c 44, s 5.

15 A total of 52 submissions responded to this section of the discussion paper, and of those, 40 supported the introduction of a positive duty or provided qualified support. This level of support for a positive duty was reflected in our consultation process.

16 See for example: Queensland Council of Social Service; Queensland Public Advocate; Fibromyalgia GC Support Group; Rainbow Families Queensland; Office of the Special Commissioner Equity and Diversity (Qld); Assoc Prof Dominique Allen; Life Without Barriers; Queensland Network of Alcohol and Other Drug Agencies Ltd; Sikh Nishkam Society of Australia; LGBTI Legal Service Inc; Maurice Blackburn Lawyers; Sisters Inside Inc; Vision Australia; Queensland Mental Health Commission; Queensland Department of Transport and Main Roads; Multicultural Queensland Advisory Council; Queensland Rugby League (majority of survey participants); Queenslanders with Disability Network; TASC National Limited; Tenants Queensland; Scarlet Alliance, Respect Inc and DecrimQLD; Aged and Disability Advocacy Australia; Jenny King; Maternity Choices Australia; Queensland Nurses and Midwives Union; Australian Discrimination Law Experts Group; Queensland Council for Civil Liberties; Community Legal Centres Queensland; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia; Queensland Council of Unions; Equality Australia; Queensland Advocacy Incorporated; Queensland Council of LGBTI Health; Legal Aid Queensland; Women's Legal Service Queensland.

- **Systemic focus** – Requiring a proactive approach provides better protection from discrimination because it aims to achieve systemic change.

Prevention

Throughout the Review, we repeatedly heard that stakeholders support a positive duty because it requires a proactive approach in which the objective is to reduce the potential for discrimination.¹⁷ This was seen as an opportunity to avoid discrimination and sexual harassment occurring in the first place.¹⁸

While helping prevent individual cases of discrimination and sexual harassment, a positive duty was also seen as an opportunity to prevent systemic discrimination by informing and influencing the culture in organisations and creating safer environments that actively encourage diversity and seek to prevent mistreatment.¹⁹

Many academics in this field consider that introducing a positive duty in discrimination laws marks the important next phase of enforcement. In evaluating the effectiveness of discrimination laws, researchers have repeatedly identified that the current approach is not meeting its aims because it is not focused on prevention or addressing systemic issues.²⁰ Associate Professor Belinda Smith, who researches primarily in anti-discrimination law, comments that:

The imposition of a negative rule alone creates a fault-based system whereby an organisation is not required to do anything unless fault can be identified and attributed to it... The negative, tort-like rule enables redress but does not require preventative or positive measures to be taken.²¹

There is substantial agreement that prevention should be the focus of amendments to the Act, and that imposing a positive duty will go some way towards achieving this.

Education and awareness

Through consultations and submissions, we heard that imposing a positive duty has an educative value and the potential to raise awareness about discrimination and sexual harassment and the environments in which they are more likely to occur.

Some submissions emphasised that education about a positive duty may help to reduce stigma and attributes about people with particular attributes, and so reduce discrimination that can occur as a result of conscious or unconscious prejudice.²²

For example, the HIV/AIDS Legal Clinic said that in their work representing people living with HIV, they have observed that most complaints result from a misunderstanding about HIV and

17 See for example: Queensland Public Advocate submission; Anti-Discrimination Law Experts Group submission; Equality Australia submission; Queensland Network of Alcohol and Other Drug Agencies submission; Vision Australia submission; Tenants Queensland submission; Queensland Council of Unions submission; Caxton Legal Centre submission.

18 See for example: Queensland Law Society submission; Queensland Nurses and Midwives Union submission.

19 The Joint Churches submission submitted that 'while legal and regulatory measures can generate external and formal compliance, they are unable to address the underlying causes of prejudice and discrimination' and consider that 'it is on a much smaller scale that – within families, neighborhoods, schools, workplaces and religious communities that human motivations, priorities and values are shaped and formed'. The Review observes that most of these environments are where the Anti-Discrimination Act applies and therefore the environments in which a positive duty would have a role in shaping attitudes and culture.

20 See for example: Allen, Dominique, *Strategic enforcement of anti-discrimination law: A new role for Australia's equality commissions* (2011), Monash University law review, 1-26; Allen, Dominique, *Barking and Biting: The equal opportunity commission as an enforcement agency* (2016) Federal Law Review, 311-335; MacDermott, Therese, *The collective dimension of federal anti-discrimination proceedings in Australia: Shifting the burden from individual litigants* (2018), International Journal of Discrimination and the Law, 22-39.

21 Belinda Smith, *It's About Time – For a New Regulatory Approach to Equality*, Federal Law Review, 132.

22 For example, Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Consultation with Islamic College of Queensland, 20 Aug 2021; Queensland Council of LGBTIQ Health, 10.

transmission risks. When resolving their complaints through conciliation, their clients often requested that the organisation undertake education and training about HIV and blood borne viruses and their management within the organisation's setting.²³ Another person who made an online submission told the Review:

I was taken into a private room by a registered nurse... I was asked how I got HIV, did I do prostitution or use needles? I asked her why it was relevant... She stated that the referring [doctor] had phoned the surgical ward and notified them that someone with AIDS was coming in for surgery so that they would all adhere to "extra precautions". I asked her why they would need extra precautions as HIV is a universal standard PPE precaution.

She said HIV is respiratory and she must know whether I got it from prostitution or needle in order to protect herself and others. I was treated like a bio hazard and my life experiences were pre-determined due to my HIV status. I was unable to explain to the nurse, I am undetected U=U on medication and as per the universal standard precautions no increased risk to anyone during a surgical procedure. She would not accept my words due to me being HIV positive and as she seen me I was "untrustworthy" and unworthy of patient centred care and, well, care at all. I sat there with tears rolling down my eyes which continued as I was being anaesthetised.²⁴

We also heard that a positive duty could have a broader role in promoting inclusive social values, such as cohesion and belonging, and increase awareness of existing obligations not to discriminate. Reflecting on the benefits of a positive duty, the Special Commissioner for Equity and Diversity said:

[Positive duties] also supports the reframing of equity discussions towards not only how we prevent discrimination, harassment and victimisation but also how we advance the rights of groups that have historically experienced disadvantage.²⁵

Research that evaluates the positive duty introduced in the Victorian Equal Opportunity Act indicates that those provisions are being used as an educative tool, and 'set the tone' of the Act.²⁶

Shared responsibility

We were told by stakeholders that introducing a positive duty would ensure that responsibility for enforcing the Act does not only rest with individuals who make complaints, but is shared with those who have responsibilities under the Act. This should result in organisations leading the way to create the change needed to eliminate discrimination and sexual harassment.

This approach shifts the burden of enforcement from individuals who often face a range of barriers to reporting discrimination or sexual harassment, including fear of speaking up.²⁷

23 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 9.

24 Name withheld (Form.25) survey response.

25 Office of the Special Commissioner, Equity and Diversity (Qld) submission, 2-3.

26 For example: Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2) Melbourne University Law Review 459, from 494. See also Dominique Allen submission, 4.

27 Office of the Special Commissioner, Equity and Diversity (Qld) submission; Maurice Blackburn Lawyers submission; Qld Nurses and Midwives submission; Australian Discrimination Law Experts Group submission; Equality Australia submission.

A positive duty may empower organisations to become drivers of change to eliminate discrimination, and to seek guidance from the Commission on actions to take that would support this cultural change.²⁸ Vision Australia said that, in their experience, individuals and organisations are not motivated to adopt inclusive practices merely by the possibility of a complaint against them. They commented that:

It is necessary to balance this with positive obligations so as to encourage changed behaviours, and to address areas of systemic discrimination.²⁹

In support of this perspective, we heard that a positive duty may encourage organisations to devote resources to prevent discrimination even in the absence of any complaints.³⁰ In practical terms, resources may be more productively spent on preventative measures to improve the overall culture of an organisation, rather than responding to individual complaints as they arise.

As we observe in chapter 2, under-reporting and reluctance to report discrimination may result from fear of retribution, mistrust of government agencies based on previous traumas in a person's country of origin, or because of stigma around the issue and process of engaging with an agency.

For example, during our roundtable with people with disability, one person told us:

I just have to deal. And I feel uncomfortable with the, with the complaint procedure. I just, I'm not one to, to put in complaints. Maybe I need to change that about myself... Or maybe the complaint procedures need to [change].³¹

A shift towards a positive approach would provide the Commission with the mandate to identify themes or trends that contribute to systemic discrimination through community and strategic engagement, and therefore allow the Commission to moderate the impacts of under-reporting.

This mandate is reflected in our recommended objects of the new Act, which include:

- to prevent and eliminate discrimination, sexual harassment, and other objectionable conduct to the greatest extent possible
- to encourage identification and elimination of systemic causes of discrimination.

Systemic focus

The Review was told that stakeholders see a positive duty as an opportunity to provide greater protection to people who experience discrimination and sexual harassment.

This includes protecting people from discrimination experienced on an individual basis, as well as systemic discrimination experienced at a broader level, through playing a 'dual role'³² – allowing for a preventative approach alongside and in addition to the complaints process.

Positive duties are largely aimed at structural change.³³ As we identified in chapter 2, the current Act has a limited capacity to address systemic discrimination.

28 See for example: Queensland Council of Social Service submission; Maurice Blackburn Lawyers submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission.

29 Vision Australia submission, 5.

30 Office of the Special Commissioner, Equity and Diversity (Qld) submission, 1.

31 People with disability roundtable, 4 February 2022.

32 Queensland Council of Social Service submission, 4.

33 Australian Discrimination Law Experts Group submission, 40.

Many organisations who engaged with the Review considered that the potential to address systemic discrimination by introducing a positive duty would be beneficial, including because changing the cultural and organisational practices of a workplace helps to address the causes of discrimination.

A community legal centre in regional Queensland, TASC National Limited, told us that, in their experience, racism is one form of discrimination that highlights the need for systemic change which can only be achieved through addressing not only the behaviour or conduct when it arises, but also the environment from which those behaviours arise.³⁴

The Queensland Council for LGBTIQ Health also said that a positive duty may provide a greater sense of protection for people more likely to experience discrimination:

*Our communities have told us stories where they feel they may be discriminated against in different settings. [A positive duty] will assist our communities to feel more secure at their workplaces, services and organisations that they attend.*³⁵

Potential limitations

A minority of stakeholders³⁶ did not support introducing a positive duty in the Anti-Discrimination Act or adopted a qualified position and raised concerns about potential disadvantages or limitations of this proposed reform.

Regulatory burden

Increased regulatory burden was a key concern raised by this group of stakeholders.

A complex regulatory environment can create specific challenges for organisations, and some sectors already experience more regulation than others. Avoiding an unnecessary regulatory burden on business, individuals, and community organisations was a key concern raised with the Review.³⁷

Stakeholders who raised this issue wanted to ensure that any legislative change did not greatly increase resources required to comply with the duty, including the time and costs of training. Submissions focused on the regulatory environment of particular sectors, including religious and charitable organisations, schools, and in small and medium-sized businesses.

Industry specific considerations

Religious organisations, charities, and welfare organisations

In relation to religious organisations, charities, and welfare organisations, we were told that the Review should ensure that unreasonable regulatory burdens and associated administrative work are not imposed, given the beneficial, charitable purposes of these organisations, their limited resources, dependence on donations and volunteers, and not-for-profit³⁸ status.³⁹

³⁴ TASC National Limited submission, 3.

³⁵ Queensland Council for LGBTI Health submission, 10.

³⁶ Of the 52 submissions that responded to this discussion question, seven either did not support the introduction of a positive duty or provided no position with comments that suggested a lack of support.

³⁷ As recognised by the Australian Government Office of Best Practice Regulation, *Australian Government Guide to Regulatory Impact Analysis*, March 2020, and the Queensland Office of Best Practice Regulation, *Queensland Government Guide to Better Regulation*, May 2019.

³⁸ The scope of the current exemptions from duties under the existing Act for not-for-profit organisations is considered in this report.

³⁹ Joint Churches submission; Human Rights Law Alliance submission; Australian Christian Lobby submission; Australian Association of Christian Schools submission.

Education settings

Consultations and submissions raised concerns about the ‘increasing bureaucratic burden’ on independent schools that operate in an environment that is already highly regulated.

In our initial consultation phase, we heard from independent schools that it would be important to ensure that any duty, and the corresponding approach to compliance, is balanced and proportionate, and recognises the overlapping regulatory environment of the education sector.⁴⁰ This concern was reflected by Independent Schools Queensland, who submitted that:

The increasing bureaucratic burden on schools adds significantly to the cost of independent schools and means that scarce financial and staffing resources are directed away from schools’ core business of educating students. In independent schools, the cost burden is inevitably borne directly by parents, families, and school communities... Research undertaken within the independent sector has identified high levels of concern on the part of principals and board members about the amount of time and stress external compliance requirements are placing on school communities.⁴¹

A number of independent schools said that recommendations from inquiries such as the Royal Commission into Institutional Responses to Child Sexual Abuse had created layers of regulation over time that was increasingly complex to navigate.

Ensuring a responsive regulatory approach that takes account of existing and relevant obligations could go some way to reducing the compliance burden and ensuring that a positive duty within anti-discrimination law addresses a clear and distinct gap, rather than covering well-trodden ground.

Independent Schools Queensland made the point that their member schools are ‘highly accountable to their school communities’ and operate within an ‘environment of choice and diversity’.⁴²

Small and medium-sized business

The cost to business caused by increased regulation was raised in consultations and submissions.⁴³ The Australian Industry Group, who do not support the introduction of a positive duty, noted that a discrimination law framework should be sensitive to the regulatory burden on employers, including larger businesses complying with up to 12 separate anti-discrimination statutes nationally, and the limited resources of small business.⁴⁴

Barriers to meaningful change

As well as these industry-specific perspectives, we heard that there may be a risk of organisations drifting towards a ‘tick box’ approach to compliance, instead of meaningful engagement with the purpose of the duty.

In addressing this issue, Queensland Catholic Education commented that ‘compliance actions that organisations would be required to undertake would become the focus rather than the positive duty’.⁴⁵

This concern was shared by Legal Aid Queensland, who note:

40 See for example Queensland Catholic Education Commission consultation, 20 August 2021.

41 Independent Schools Queensland submission, 3.

42 Independent Schools Queensland submission, 3.

43 See for example: Australian Industry Group submission; Small business roundtable, 7 March 2022; Chamber of Commerce and Industry Queensland submission.

44 Australian Industry Group submission, 2.

45 Queensland Catholic Education Commission submission, 6-7.

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.⁴⁶

The requirement for staff training and the associated financial cost to organisations was also raised as a concern.⁴⁷ Some stakeholders reflected on their experiences with training in the workplace, and told us that training requirements can be costly,⁴⁸ burdensome,⁴⁹ and may not necessarily achieve the intended outcomes, particularly in sectors where knowledge of the Anti-Discrimination Act is limited.

Later in this section, we discuss how drafting the positive duty to include a requirement to take reasonable and proportionate measures to eliminate discrimination may moderate the burden of responsibilities and ensure that relevant factors are taken into account when determining the adequacy of the steps taken by those responsible.

In the next section of this report, we consider the features of a regulatory approach needed to achieve compliance with a positive duty.

Consistency with other regulation

Stakeholders who did not support the introduction of a positive duty, or provided qualified support, were concerned about potential inconsistency between a new positive duty in the Queensland Anti-Discrimination Act and existing duties under other laws and regulations at a state and federal level.

If a new positive duty duplicated other obligations, they felt this would create further fragmentation of legislative and regulatory frameworks and may dilute efforts to comply with other obligations.⁵⁰ In considering this issue, the Review noted that some duty holders raised issues with regulatory fatigue, and most expressed that they were genuinely doing their best to ensure good working environments and service delivery. These stakeholders thought that tailoring the approach to specific industries was essential to making it work.

The interface between work, health, and safety (WHS) Acts and regulations and a new positive duty in the Anti-Discrimination Act was a primary concern and is addressed below.

⁴⁶ Legal Aid Queensland submission, 60.

⁴⁷ Small business roundtable, 7 March 2022.

⁴⁸ Small business roundtable, 7 March 2022.

⁴⁹ Australian Association of Christian Schools submission, 5.

⁵⁰ Australian Industry Group submission, 6.

Other potentially overlapping obligations raised by stakeholders included:

- Professional codes of practice, such as the Medical Board of Australia's *Good Medical Practice: a code of conduct for doctors in Australia*, which are enforceable through professional regulatory and disciplinary action and state and federal oversight agencies.⁵¹
- Regulation of independent schools through the *Education (Accreditation of Non-State Schools) Act 2017* and *Education (Accreditation of Non-State Schools) Regulation 2017*, especially provisions that relate to students with disability, and oversight by the Non-State Schools Accreditation Board.⁵²
- Government strategies for state schools, including the '*We all belong: embracing workplace inclusion and diversity*' strategy.⁵³
- National Disability Standards under the federal Disability Discrimination Act that ensure proactive elimination of discrimination based on disability.⁵⁴
- The Child Safe Standards and Reportable Conduct Scheme which require organisations involving children to have policies, procedures, and practices to protect children from abuse.

None of these Acts, legislative instruments, regulations, or policies have the same scope or purpose as the positive duty contemplated by this Review.

Confusion and complexity

While acknowledging the potential benefits of a positive duty in the Act, some submissions emphasised the need to ensure that the duty is well understood. Knowledge of the new law should extend not only to businesses, but individuals, and duty holders who already have some familiarity with regulatory regimes under WHS laws.⁵⁵

Most stakeholders agreed on the need for the Anti-Discrimination Act to be clear and easy to understand, including the positive duty obligations.⁵⁶

Enforceability

Ensuring the law is enforceable is vital for its effectiveness. Consultations and submissions frequently raised this point in relation to including a positive duty in the Act.⁵⁷

Later in this section, we consider how compliance with a positive duty could be supported and enforced, and by which entity. Having considered all the factors, we recommend the Queensland Human Rights Commission's functions be expanded to include that the Commission guides and oversees compliance with a new positive duty in the Anti-Discrimination Act. In chapter 9 we discuss the resourcing implications that apply to ensure implementation of these recommendations are effective.

In a resource-constrained environment, it would not always be possible for the Commission (or another entity) to monitor the actions of every organisation subject to the positive duty,⁵⁸ particularly given the breadth and diversity of duty holders under the Anti-Discrimination Act.

51 Medical Insurance Group Australia submission, 2.

52 Independent Schools Queensland submission, 2.

53 Department of Education (Qld) submission, 8.

54 Queensland Catholic Education Commission submission, 7.

55 Queensland Law Society submission, 12.

56 See for example: Australian Industry Group submission; REIQ consultation, 31 August 2021.

57 See for example: Rainbow Families Queensland submission; Community Legal Centres Queensland submission; Australian Discrimination Law Experts Group submission.

58 Australian Discrimination Law Experts Group submission, 41.

It would also not be possible to explore every suggestion for proactive work raised by individuals, organisations, or the community.

However, we consider resource limitations can be minimised through:

- focusing on providing guidance and education
- taking a proportionate, not heavy-handed approach
- directing resources to the most serious systemic issues or high-risk environments, including a strategic application of mechanisms available to promote compliance.

Contrary to religious beliefs

A small number of submissions⁵⁹ said that complying with a positive duty to eliminate discrimination would require religious institutions and their staff to act contrary to their religious beliefs, and that this may breach their right to freedom of religion.⁶⁰

Three submissions put forward the view that any introduction of positive duties must include balancing provisions or protections for religious organisations, so that they are not required to undertake affirmative action contrary to their religious beliefs.⁶¹

The requirement not to discriminate is already contained in the Anti-Discrimination Act. On one view, a positive obligation would reinforce rather than expand existing obligations, and ensure all organisations better understand their current legal requirements. If a matter is not unlawful discrimination under the Act because an exception clearly applies, there would not be a duty to take reasonable and proportionate steps to prevent it.

Will existing obligations be duplicated?

During our initial consultations, some stakeholders told us that they considered a positive duty was not required because the obligation to take steps to prevent discrimination was already contained in either the Anti-Discrimination Act, or other laws and policies.

We have examined the extent of duplication and considered whether the existence of such obligations is sufficient justification for not recommending the introduction of a positive duty in the Anti-Discrimination Act, given the potential benefits it offers.

Work health and safety laws

The work health and safety regime developed by Safe Work Australia, known as the model WHS laws, provides an instructive example of the use of positive duties. The model WHS laws comprise the: Model WHS Act, Model WHS Regulations, and 24 Model Codes of Practice, which are maintained by Safe Work Australia. To be legally binding, each jurisdiction must implement them as their own WHS laws. The model laws have been implemented in all jurisdictions except Victoria.

The Respect@Work report considered the model WHS laws are a useful example of building a preventative practice through positive duties and clear understanding of workplace responsibilities.

59 Human Rights Law Alliance submission; Australian Christian Lobby submission; Australian Association of Christian Schools submission; Australian Christian Lobby Group submission.

60 Some submissions framed this argument as contrary to Article 18 of the ICCPR. This argument is closely connected to the tension between freedom of religion and the right to non-discrimination, both of which are protected by the Anti-Discrimination Act and the Human Rights Act. Given the similarity of that argument to those explored in chapter 8 with respect to exceptions that apply to religious bodies, this section does not present an in-depth analysis of those issues.

61 Human Rights Law Alliance submission; Australian Christian Lobby submission; Australian Association of Christian Schools.

All Australian WHS laws have adopted the three-tiered approach outlined in the 'Robens model',⁶² which recommends:

- broad overarching general duties (set out in WHS laws)
- more detailed provisions (set out in regulations)
- codes of practice.

While the obligations are framed as outcome-based, organisations can tailor their approach to fit their circumstances and available resources.

A key element of the Model WHS Act is the obligation on duty holders to eliminate or minimise risks arising from work. The primary duty is to identify, control, and address hazards and risks that may affect the physical and psychological health or safety of staff, so far as is reasonably practicable.

Under the model WHS laws there is an obligation to manage the health and safety risks of workplace sexual harassment. Safe Work Australia has issued guidelines on how employers should manage their WHS statutory duties to prevent sexual harassment, released a model psycho-social hazard regulation, and is developing an associated Code of Practice.

Are the duties the same?

In our initial consultation phase, the relationship between a positive duty in the Anti-Discrimination Act and existing requirements under the *Work Health and Safety Act 2011* (Qld) was discussed. We invited submissions about the extent of any overlap between WHS laws and a positive duty under the Anti-Discrimination Act, and considerations for the interface between these two legislative regimes.

Positive obligations under WHS laws are only imposed on employers, and so only apply in the workplace. The Anti-Discrimination Act applies to a broad range of areas of activity in public life including education, the provision of goods or services, accommodation, club memberships and affairs, and the public sector. Any potential overlap with WHS is therefore necessarily confined to the area of work.

Almost all submissions that addressed this issue consider that potential overlap is limited because the two Acts have distinct orientations and focuses. The specific focus of WHS creates a gap in coverage for a positive duty to address discrimination and sexual harassment. Submissions also noted that any overlap would not present inconsistencies and would be mutually reinforcing.⁶³

The duty of care under WHS laws is:

- focused on assessment of the likelihood of a hazard or risk occurring compared to the degree of harm that might result
- influenced by the objectives of the WHS Act, which are different to the Anti-Discrimination Act
- focused on risk assessment and prevention measures to manage risk.⁶⁴

Submissions also note that federal and state regulators focus on compliance with employment and WHS laws, rather than addressing the causes and impact of discrimination and sexual

62 The three-tiered approach was recommended by the 1972 British Robens Report that sought to streamline the WHS regulatory system while recognising practical limitations. The report emphasised the importance of a systematic, preventative, risk management approach to health and safety.

63 See for example: Equality Australia submission, 38; Queensland Council of Unions submission, 19; Vision Australia submission, 6.

64 Queensland Council of Unions submission.

harassment, and a specialist agency with expertise in discrimination law that would be enforcing a positive duty under the Anti-Discrimination Act would be beneficial.⁶⁵

The Australian Industry Group, which does not support the introduction of a positive duty, provided a different view. They submit that if the psycho-social hazard regulation and associated Code of Practice is adopted by the Queensland Government, the WHS framework that currently provides positive duties on employers to ensure safe workplaces (including sexual harassment) will extend more explicitly to steps employers are to take to prevent psychosocial hazards such as sexual harassment.⁶⁶

There is an important distinction between laws and regulations that *overlap* and laws that are *inconsistent* – the first is about coverage and the second is about the extent to which two or more regimes can operate consistently in parallel. This may cause confusion and conflict when trying to comply, and it would be necessary to ensure that awareness and education are sufficient to clarify and simplify this interface to duty holders. Where WHS and a positive duty might overlap, we expect that the two regimes would be complementary, not inconsistent.

In supporting the introduction of a positive duty, Legal Aid Queensland commented that the current WHS exemption in the Anti-Discrimination Act⁶⁷ should be retained, and this would allow WHS measures to prevail in the event of any inconsistency between the duties.⁶⁸

Vicarious liability

Under the Anti-Discrimination Act, a person who contravenes the Act is civilly liable for the contravention. This carries an implied requirement that people, and organisations not discriminate.

If a person's worker or agent contravenes the Act in the course of work, both the person and the worker or agent are liable for the contravention.⁶⁹ However, it is a defence if an employer can prove that they took reasonable steps to prevent the worker or agent from contravening the Act. The liability for indirect discrimination also creates an implied obligation on the employer to make reasonable accommodations for people with an attribute.

While these provisions require an employer to take reasonable steps to prevent unlawful discrimination or sexual harassment from happening, this defence is raised in response to conduct that has already happened, rather than requiring proactive, preventative actions. This creates a fault-based system in which the onus is on the aggrieved party to prove the contravention of the Act happened, and there is a limited obligation to take positive steps.

It also means that, to a limited extent, the Act already requires positive steps to be taken to demonstrate compliance unless the defence provisions apply.⁷⁰ However, no action can be taken about a failure to meet this requirement unless a person lodges a complaint.⁷¹

Relying on employers to take reasonable steps to prevent discrimination and thereby defend potential complaints does not achieve the core objectives of a positive duty. Defences cannot be proactively enforced, and the effectiveness of this approach in eliminating discrimination is unable to be tested. The reactive nature of vicarious liability provisions therefore provides limited capacity to meet the aims and benefits identified with a positive duty.

65 Equality Australia submission; Queensland Council of Unions submission; Legal Aid Queensland submission, 59.

66 Australian Industry Group submission, 6.

67 *Anti-Discrimination Act 1991* (Qld) s 108.

68 Legal Aid Queensland submission, 59.

69 *Anti-Discrimination Act 1991* (Qld) s 133.

70 *Anti-Discrimination Act 1991* (Qld) s 133(2).

71 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008), 38.

Framing the duty

In considering whether to recommend the introduction of a positive duty, it is necessary to determine what the scope and coverage of that duty should be. This section considers who should owe the duty, what forms of prohibited conduct it should cover, and in what settings it should apply.

When thinking about the framing of a positive duty, we have been guided by the objectives that the positive duty seeks to achieve. These objectives include prevention, educating organisations, sharing responsibility for enforcement with duty-holders, and greater protection for people who experience discrimination or sexual harassment.

In what contexts should the duty apply?

Prohibited conduct and attributes

Of the submissions that considered this issue, all agreed that a positive duty should cover all forms of conduct prohibited by the Anti-Discrimination Act, including discrimination and sexual harassment,⁷² and cover all attributes.⁷³

Covering all attributes would prevent forming a 'hierarchy' of attributes, simplify the law, and reduce confusion about the application of the duty. The Human Rights Act also requires laws to provide equal and effective protection against discrimination.⁷⁴

Ensuring all attributes are subject to the same protection would better reflect the intersectional nature of discrimination,⁷⁵ an aspect of discrimination that is difficult to adequately protect.

Who has the duty?

There are two options:

- the positive duty should apply to anyone who has an obligation under the current Act; or
- the positive duty should be confined to certain duty holders, such as the public sector, or employers.

In our Discussion Paper, we asked stakeholders to tell us if they thought a positive duty should apply to all duty holders in all areas. Of the submissions that addressed this point, most said that a positive duty should apply to anyone who has an obligation under the Act.⁷⁶

The Queensland Law Society took a qualified position. In addition to their comments about the burden on particular groups, they consider that for employers, businesses, educational institutions and other similar bodies, imposing a duty is appropriate.⁷⁷

Equality Australia recommended that the public sector could have the extra duty of promoting equality of outcomes, such as requirements to remove or minimise disadvantages experienced by people because of protected attributes.⁷⁸

72 Queensland Nurses and Midwives Union submission; Australian Discrimination Law Expert Group submission; Queensland Council of Unions submission; Equality Australia submission; Caxton Legal Centre submission; Legal Aid Queensland submission.

73 Queensland Nurses and Midwives Union submission; Assoc Prof Dominique Allen submission; Australian Discrimination Law Experts Group submission.

74 *Human Rights Act 2019* (Qld) s 15.

75 Qld Nurses and Midwives Union submission, 16.

76 Assoc Prof Dominique Allen submission; Maurice Blackburn Lawyers submission; TASC National Limited submission; Jenny King submission; Australian Discrimination Law Experts Group submission; Equality Australia submission; Legal Aid Queensland submission.

77 Queensland Law Society submission, 13.

78 Equality Australia submission, 26.

The Independent Schools Queensland submission suggested that a positive duty be confined to employment, or alternatively to exclude the area of education in recognition of the significant regulatory framework that schools currently operate within.⁷⁹

The Queensland Council for Civil Liberties submission suggested that a positive duty be confined to employment and education because, in their view, these are the only areas that might have the power and resources to comply with the duty.⁸⁰

None of the submissions discussed which organisations should be exempted from obligations under a positive duty.

Recommendations of past inquiries

The Australian Capital Territory Law Reform Commission review of the Anti-Discrimination Act recommended that the positive duty apply to public authorities immediately and should apply to all duty-holders within three years.⁸¹

The Gardner Review in Victoria recommended that the duty apply to all sectors that hold obligations under the Act. It reasoned that, given the Act already covers public and private sectors (with exceptions to moderate the balance between public and private life) such a duty already exists, albeit implied, and so the duty should apply to all sectors that hold obligations under the Act.⁸²

We agree with this reasoning and could not identify any clear justification for scaling back or confining the application of the positive duty only to particular areas of public life.

Concerns about resourcing of steps to eliminate discrimination can be mitigated by ensuring the drafting of the legislative provision clarifies that a duty holder is only required to take reasonable and proportionate measures, meaning that the obligations imposed by the duty are effectively scaled depending on the size and resources of the organisation.

Reasonable and proportionate measures

The Victorian Act only requires duty holders to take measures that are ‘reasonable and proportionate’, having regard to a non-exhaustive list of factors that should be considered in determining whether a measure is reasonable and proportionate.

The Victorian approach was supported by all submissions that addressed this issue.⁸³

The Respect@Work report recommended the same set of factors as the Victorian Act, but added an additional factor that ‘all other relevant facts and circumstances’ be included. In discussing the justification for this additional criterion, the Australian Human Rights Commission said:

In determining whether a measure is reasonable and proportionate, the factors that must be considered could draw on the positive duty under the Victorian Equal Opportunity Act, as well as *all other relevant facts and circumstances*, which may include systemic issues within that industry or workplace [emphasis added]. The impact on both employers and workers should be considered when assessing each of these factors.⁸⁴

⁷⁹ Independent Schools Queensland submission, 2.

⁸⁰ Queensland Council for Civil Liberties submission, 10.

⁸¹ ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015), 48-49.

⁸² Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 40.

⁸³ Vision Australia submission; TASC National Limited submission; Qld Council for Civil Liberties submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Queensland Council of Unions submission; Legal Aid Queensland submission.

⁸⁴ Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020), 479.

Together, these approaches allow the duty to be scaled depending on the size and structure of an organisation and any industry-specific considerations including risk profiles.

The Review's position

The Review considers that:

- Introducing a positive duty to take active steps to prevent discrimination and sexual harassment before it happens has the ability to reorientate the Act towards prevention and to extend responsibility for enforcement to duty holders, rather than that responsibility resting solely with individuals who experience discrimination and sexual harassment.
- The potential benefits of a positive duty outweigh the limitations. However, limitations identified by the Review, particularly the increased regulatory burden, should be actively managed by the entity with responsibility for promoting compliance and enforcement.
- Justification for confining the duty to a particular form of conduct, area of activity, or limited number of duty holders, was not sufficient to create different obligations for certain types of organisations.
- Ensuring compliance with the duty should focus on addressing the underlying causes of discrimination and sexual harassment.
- Overlap between the positive duty in WHS laws and under the Anti-Discrimination Act is likely to be limited, and to the extent that overlap exists, is likely to be mutually reinforcing.
- Drafting of the positive duty should draw on the approach taken in the *Equal Opportunity Act 2010* (Vic) s 15(6), together with additional criteria recommended by the Respect@Work report.

Recommendation 15

15.1 The Act should include a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, and other prohibited conduct as far possible.

15.2 The duty should apply to anyone who has a legal obligation under the Act, and for all attributes and areas covered by the Act.

15.3 Drawing on the Victorian approach and the additional criteria recommended by the Respect@Work report, in determining whether a measure is reasonable and proportionate, the Act should prescribe that the factors that must be considered are:

- the size of the person's business or operations
 - the nature and circumstances of the person's business or operations
 - the person's resources
 - the person's business and operational exigencies
 - the practicability and the costs of the measures
 - all other relevant facts and circumstances.
-

Mechanisms to promote compliance

The Terms of Reference ask us to consider:

- whether the Anti-Discrimination Act should reflect protections, processes and enforcement mechanisms that exist in other Australian discrimination laws⁸⁵
- 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 Anti-Discrimination Act, to the greatest extent possible.⁸⁶

Throughout the Review, we considered whether the Anti-Discrimination Act contained sufficient enforcement mechanisms to actively promote and require compliance with the legislation, and to protect and promote equality, and non-discrimination and the realisation of human rights.⁸⁷

During consultations, we consistently heard from communities who experience high rates of discrimination that the Commission should have a greater role in proactively encouraging and enforcing compliance with the Act, and should respond more effectively to systemic discrimination.

We were told that if a positive duty to eliminate discrimination and sexual harassment was introduced, it must be enforceable. Without additional tools to enforce compliance, there was real concern that a positive duty would be ineffective.

In the Discussion Paper, we invited responses about whether the statutory framework should incorporate a role in regulating compliance with the Act to eliminate discrimination. Of the submissions received, 41 addressed this topic. We also consulted with small business stakeholders, government agencies, legal practitioners, and interstate human rights agencies about this topic.

We have concluded that additional mechanisms are required to promote compliance with the Act and with a positive duty to eliminate discrimination. These mechanisms should focus on guiding and supporting compliance, but also include powers to enforce compliance that could be used as a last resort if attempts to encourage compliance fail. We also conclude that the Commission is the agency best placed to undertake this role.

As we explain below, we recommend changing the Anti-Discrimination Act to reflect enforcement mechanisms in other Australian discrimination laws, and to incorporate additional tools to ensure the Commission can effectively further the objective of eliminating discrimination to the greatest possible extent.

Getting the balance right

A consistent theme that emerged through consultations and submissions was that to be effective, a positive duty must be enforceable.⁸⁸ We also identified that stakeholders expect a more proactive approach to enforcement of the Act.

In the Discussion Paper, we asked whether the statutory framework should incorporate a role in regulating compliance in the Anti-Discrimination Act to support the elimination of discrimination.

85 QHRC Review of the Anti-Discrimination Act, Terms of Reference item 3(g).

86 QHRC Review of the Anti-Discrimination Act, Terms of Reference item 3(j).

87 QHRC Review of the Anti-Discrimination Act, Terms of Reference item 2.

88 See for example: Rainbow Families Queensland submission; Community Legal Centres Queensland submission; Australian Discrimination Law Experts Group submission.

Of the 30 submissions that actively addressed this question, 21 endorsed a change in the law to create further mechanisms for regulating compliance.⁸⁹ Two submissions provided qualified support.⁹⁰

Two key messages emerged from our analysis of information gathered by the Review:

- The primary purpose of introducing a regulatory role should be to support compliance **through education and cooperation**, rather than taking a punitive approach.
- In addition to the educative approach, the legislation should contain clear accountability and enforcement mechanisms to address **non-compliance** in only very serious circumstances or as a last resort.

We consider these elements are necessary to ensuring the Anti-Discrimination Act achieves the right balance between supporting organisations to comply and ensuring that regulation is not overly burdensome.

We recognise that, in most circumstances, enforcement of the Act is best achieved through persuasion and education, rather than punitive measures.

Education and cooperation

We heard that for a positive duty to be effective, the entity with responsibilities to promote and enforce compliance should develop, publish, and actively promote guidance resources to simplify and contextualise the law. Clear and industry-specific information about what steps organisations need to take to comply is required.⁹¹

We were told that an important part of supporting organisations to meet their obligations should include clarifying the relationship between the positive duty in the Anti-Discrimination Act and obligations under other laws – for example, Work Health and Safety laws – would assist with compliance and minimise the additional regulatory burden.

A focus on engagement, education, and collaborating with particular sectors and industries to produce targeted resources was seen as the best way to ensure that the causes of discrimination are effectively addressed.⁹²

We also heard similar sentiments through our online survey. For example, one person told us:

It should be engrained from a young age as a form of education. Also, perhaps public advertising similar to how the government educates people about the dangers of cigarettes and alcohol could send a clear and powerful message in society. To educate through various forms of

89 Queensland Law Society submission; Public Advocate (Qld) submission; Assoc Prof Dominique Allen submission; LGBTI Legal Service Inc submission; Maurice Blackburn Lawyers submission; Sisters Inside Inc submission; Vision Australia submission; Women's Legal Service Qld submission; Queensland Mental Health Commission submission; Tenants Queensland submission; Scarlet Alliance submission; Respect Inc and DecrimQLD submission; Aged and Disability Advocacy Australia submission; Queensland Nurses and Midwives Union submission; Australian Discrimination Law Experts Group submission; Community Legal Centres Queensland submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Queensland Council of Unions submission; Equality Australia submission; Queensland Advocacy Incorporated submission; Legal Aid Queensland submission.

90 PeakCare Queensland Inc submission; Queensland Council for Civil Liberties submission.

91 See for example: Queensland Law Society submission; Queensland Catholic Education Commission consultation, 20 August 2021; Clubs Queensland consultation, 24 August 2021; REIQ consultation, 31 August 2021; Australian Industry Group consultation, 9 August 2021; Small Business Commissioner consultation, 28 September 2021; Small business roundtable, 7 March 2022.

92 See for example: Medical Insurance Group Australia submission; Queenslanders with Disability Network submission; Scarlet Alliance, Australian Sex Workers Association submission.

*advertising. Televisions, billboards etc that sexual harassment of any form is unacceptable and cowardly. We have advertising about the dangers of cigarettes and alcohol and drugs. We also need to stamp out this type of insidious abuse through public education campaigns.*⁹³

Legislative change is only the first step. Without awareness raising, education and targeted training, the capacity to address and eliminate discrimination will be limited.

Addressing non-compliance

In addition to the focus on education, there was support for ensuring the entity responsible for enforcement of the positive duty has a range of escalating powers to be used in serious circumstances.⁹⁴ For example, one submission said:

We need a properly resourced regulator with a combination of duties and powers that would enable it to have real impact.⁹⁵

Ensuring accountability for serious or repeated non-compliance, when necessary, would ensure confidence in the regulator and support for its aims.

A role for the Commission or another entity?

The Discussion Paper asked whether the Commission should be given the role of regulator, or if there is a more appropriate entity.

Most submissions that supported creating further mechanisms for regulating compliance,⁹⁶ or provided qualified support,⁹⁷ considered the Commission was the most appropriate entity for this function.⁹⁸

Of the seven stakeholders that did not support a regulatory function for the Commission, all were of the view that no entity should have this role.⁹⁹ In general, those stakeholders considered that the Commission should not be given what they describe as 'quasi-judicial powers', because it is inappropriate to give an unelected or unappointed bureaucratic body the ability to make rules, adjudicate those rules, and then enforce compliance.

93 Benjamin Palmer (Form.005) survey response.

94 See for example: Assoc Prof Dominique Allen submission; Caxton Legal Centre submission; Legal Aid Queensland submission; Queensland Advocacy Incorporated submission; Sisters Inside Inc submission.

95 Caxton Legal Centre submission, 19.

96 Queensland Law Society submission; Public Advocate (Qld) submission; Dominique Allen submission; LGBTI Legal Service Inc submission; Maurice Blackburn Lawyers submission; Sisters Inside Inc submission; Vision Australia submission; Women's Legal Service Qld submission; Queensland Mental Health Commission submission; Tenants Queensland submission; Scarlet Alliance submission; Respect Inc and DecrimQLD submission; Aged and Disability Advocacy Australia submission; Queensland Nurses and Midwives Union submission, Australian Discrimination Law Experts Group submission, Community Legal Centres Queensland submission, Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Queensland Council of Unions submission; Equality Australia submission; Queensland Advocacy Incorporated submission; Legal Aid Queensland submission.

97 PeakCare Queensland Inc submission; Queensland Council for Civil Liberties submission.

98 Queensland Public Advocate submission; Rainbow Families Queensland submission; Assoc Prof Dominique Allen submission; LGBTI Legal Service Inc submission; Maurice Blackburn Lawyers submission; Sisters Inside Inc submission; Vision Australia submission; Queensland Mental Health Commission submission; some survey participants of Queensland Rugby League submission; Tenants Queensland submission; Respect Inc and DecrimQLD submission; Aged and Disability Advocacy Australia submission; Australian Discrimination Law Experts Group submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission.

99 Independent Schools Queensland submission; Human Rights Law Alliance submission; Australian Christian Lobby submission; Christian Schools Australia submission; Australian Association of Christian Schools submission; James Cook University submission; Australian Industry Group submission.

Alignment and efficiency

Most stakeholders strongly supported a redesign of the Commission's role and functions to include a regulatory function to enforce the positive duty to and prevent discrimination and sexual harassment.

Stakeholders thought the Commission should have this function because:

- The Commission is best placed to respond appropriately to unlawful discrimination and sexual harassment.¹⁰⁰
- The function would complement the Commission's existing functions of providing education and training about the Act, which is an integral component of supporting compliance.¹⁰¹

Responsibility for preventing discrimination and sexual harassment would then be shared between duty holders under the Act, people who may experience discrimination, and the Commission as guiding and enforcing compliance.

Tension between roles

While most submissions supported the Commission being given additional legislative tools to support and enforce compliance, some thought this might create a perceived or actual conflict of interest between:

- the Commission's impartial role in conciliating disputes; and
- a statutory function to proactively address systemic discrimination and enforce compliance with a positive duty.

There were mixed views about this issue.

A small number of submissions held an absolute position that undertaking both roles would interfere with the Commission's ability to deal with complaints in an objective and neutral way.¹⁰²

These stakeholders – a sub-set of the seven submissions referred to above – considered that no entity should be given the role of supporting compliance with a positive duty.

The Australian Industry Group, who was of this view, explained their position as follows:

Transforming the QHRC into a regulatory enforcement body in respect of a positive duty and other measures would threaten the perception about the QHRC's independence and impartiality in receiving and conciliating complaints. Perceptions of impartiality, independence and fairness are very important when issues arise between employers and employees.¹⁰³

However, while submissions addressed these concerns as something to consider, most did not form the position that the issue of a perceived or actual conflict meant that the Commission should not have the role.¹⁰⁴

Is the role substantially different to the current position?

Some submissions queried whether a more proactive role for the Commission would be substantially different to its current statutory responsibilities. On this point, Legal Aid Queensland

¹⁰⁰ Public Advocate (Qld) submission, 5.

¹⁰¹ Assoc Prof Dominique Allen submission, 6.

¹⁰² Human Rights Law Alliance submission; Australian Christian Lobby submission; Australian Association of Christian Schools submission; Australian Industry Group submission.

¹⁰³ Australian Industry Group submission, 6.

¹⁰⁴ See for example: Queensland Council of Unions submission; Legal Aid Queensland submission; Equality Australia submission; Queensland Advocacy Incorporated submission.

said they did not consider the new role as contemplated by the Discussion Paper would be a significant departure from the current work of the Commission, which often involves expressing views about discrimination or human rights issues.¹⁰⁵ This view was not shared by Caxton Legal Centre, who said that:

Currently the QHRC maintains a somewhat awkward position of neutrality which makes it hard to see it as a potentially effective regulator.¹⁰⁶

Is the statutory separation of roles effective?

The tension between these roles has been examined in academic literature. Initially, some research considered that complete separation of the complaint handling and enforcement functions may be preferable. For example, in her 2016 article, Assoc Prof Dominique Allen identified justifications for this position:

- to ensure that resources allocated for the express purpose of enforcement are not consumed by the complaints handling responsibilities
- to avoid conflict of interest that would arise if the one agency handles both complaints handling and law enforcement
- to ensure the existing agency can be re-cast as an enforcement agency.¹⁰⁷

However, during our consultation with the Australian Discrimination Law Experts Group,¹⁰⁸ we observed that for some academics, this view has since altered, particularly after taking into account the challenges experienced in international jurisdictions in which these functions have been split between two separate entities – one with a dispute resolution function and another with a regulatory role.

One discrimination law academic, Assoc Prof Alysia Blackham, provided insights from her current and ongoing research into a comparative approach between Australia and the United Kingdom. Following a structural change in 1999, the Equality Commission for Northern Ireland now has the sole function of encouraging and enforcing compliance with Northern Ireland's discrimination and human rights law.¹⁰⁹ The complaint function is now handled by a separated body. This is similar to the Equality and Human Rights Commission in Great Britain where functions have also been split.

In practice, the Northern Ireland statutory enforcement body has limited capacity to evaluate its effectiveness as it does not have oversight of the number and nature of complaints received. It also has limited capacity to monitor and act on trends in systemic issues identified through complaints. This has led to a sense that the regulatory body is 'essentially working with two hands behind their back'¹¹⁰ and has been subjected to criticism that the entity has been ineffectual. Assoc Prof Blackham's view is that splitting these roles is not advisable.

This view is repeated in Assoc Prof Blackham's recent publication addressing age discrimination law:

As both enforcers and (objective) conciliators, Australian equality agencies straddle two potentially competing roles; this may limit the extent to which agencies use their assistance functions to support individual claimants. More likely, though, these dual roles

105 Legal Aid Queensland submission, 62.

106 Caxton Legal Centre submission, 19-20.

107 Queensland Advocacy Incorporated submission, 24; Dominique Allen, Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency (2016) 44 *Federal Law Review* 311.

108 Australian Discrimination Law Experts Group consultation, 14 September 2022.

109 Dominique Allen, *Addressing Discrimination Through Individual Enforcement: A Case Study of Victoria* (2019) Monash Business School, Monash University, Victoria.

110 Australian Discrimination Law Experts Group (Assoc Prof Alysia Blackham) consultation, 14 September 2021.

are mutually supportive, enhancing agency operations... At a systemic level, equality agencies use their gatekeeping role to inform their compliance activities, through collection and analysis of claim data to inform strategic decision-making.¹¹¹

How frequently would this tension arise?

Only in limited circumstances does the tension between roles give rise to a perceived or actual conflict of interest. These circumstances would include when the Commission receives complaints about a duty holder/s at the same time as it is undertaking an independent review or investigation into the same entity or person. In this case, the respondents to the dispute may consider that the Commission could not resolve the dispute without a perceived or actual conflict of interest.

This type of scenario would occur infrequently because the focus of any additional functions to promote compliance would be on support and guidance, rather than enforcement actions. Given the resources required in this type of proactive work, only a small number of reviews and investigations could be conducted each year and would therefore need to be focused on target or priority issues.

This must also be considered against the Commission's approach to resolving disputes. As we discuss in chapter 5, the Commission attempts to resolve complaints through conciliation, a form of alternative dispute resolution. It does not have a role in making a decision about whether or not unlawful discrimination or sexual harassment occurred.

A more common scenario, which the Commission currently manages within its existing functions, is when the Commission is requested to undertake education or training with a duty holder about an issue or topic which may form the basis of a current complaint.

Managing the dual roles

There are three options to manage both roles:

- give both roles to the Commission, but create structural separation within the organisation to ensure the roles are managed by different staff
- constrain the Commission's role to dispute resolution and give the role of supporting and enforcing compliance to an existing regulator, such as Work Health and Safety
- constrain the Commission's role to dispute resolution and establish a new entity to take on the role of supporting and enforcing compliance.

Structural separation

The first option is to introduce structural changes to minimise and manage any potential or actual conflicts that may arise in the Commission if complaints are made about an entity or organisation that is subject to action undertaken using enforcement powers.

This may include:

- organisational re-structure to ensure staff who are involved in dispute resolution are not involved in the Commission's proactive systemic work
- allocate separate budgets for dispute resolution and proactive systemic work to ensure that one focus does not overtake the other
- explore options for dispute resolution using external conciliators, if requested by a respondent.

¹¹¹ Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (2022, Oxford Monographs on Labour Law, Oxford University Press) 290-291.

The potential benefits of creating structural separation within the Commission include:

- **Access to information:** The unit responsible for taking a proactive role would have access to the Commission's complaint data and other information that would allow it to identify systemic themes and trends.¹¹²
- **Complement existing functions:** An expanded role would complement the Commission's existing role of providing education and training about the Act,¹¹³ which is essential to promote compliance.
- **Reducing complexity:** Creating a separate entity may create complexity and overlap in the roles of each entity within the enforcement system.
- **Leveraging existing awareness:** Creating an additional entity may compromise community knowledge of the system. One of the issues identified by the Review was that greater awareness of the Anti-Discrimination Act is necessary to ensure the law is effective.
- **Enhancing efficiency:** Establishing a new statutory entity to develop relevant expertise and undertake enforcement of the Act has significant resource implications. While it is beyond the scope of this Review to consider the extent of the costs of any new entity, it is reasonable to assume they would be considerable.

In providing their support for the Commission to undertake both roles but also creating structural separation, the Aged and Disability Advocacy Australia submission commented that:

The Commission is the entity best placed to undertake a regulatory compliance role. Procedurally, there should be separation of investigation and enforcement responsibilities to ensure that the same officer is not tasked with both functions in relation to investigation of a person or entity. Existing provisions with respect to similar mechanisms under [Work Health and Safety] laws may be a useful model.¹¹⁴

In the structural separation model, governance structures, including administrative arrangements for the Act, would need to be in place to ensure an appropriate level of independence from the government.

Give role to an existing entity

The Queensland Law Society suggested that the Commission could have a role in promoting compliance with discrimination laws, but only where there is not existing coverage by another body.¹¹⁵

They considered that other regulators, including Work Health and Safety, SafeWork Australia, and other industry-specific bodies should be considered as options, but noted that a clear delineation of roles and functions of different bodies would have to be put in place.

We have already discussed the limited overlap with WHS laws. The Commission could work constructively with Work Health and Safety and other work-related regulators to ensure minimal duplication of effort and resources. However, any exclusion of the Commission from the work context may create fragmentation and reduce the effectiveness of a positive duty and other objectives of the Act.

¹¹² Australian Discrimination Law Experts Group consultation, 14 September 2021.

¹¹³ Assoc Prof Dominique Allen submission, 6; Australian Discrimination Law Experts Group consultation (Assoc Prof Alysia Blackham), 14 September 2021.

¹¹⁴ Aged and Disability Advocacy Australia submission, 9.

¹¹⁵ Queensland Law Society submission, 13.

The Queensland Law Society submission also raised the option of the Commission holding a role, but deferring or delegating enforcement to another entity to the extent of any overlap in functions.

This option would effectively separate sections of enforcement to existing entities that may have a limited role in enforcement of the Anti-Discrimination Act.

Create a new entity

A small number of submissions suggested the establishment of a new entity so that the role of dispute resolution and a proactive role in eliminating discrimination could be completely split.

The Queensland Nurses and Midwives submitted that, in their view, any compliance enforcement function should be separated from the Commission and tribunals that perform the roles of conciliation and deciding individual complaints. They considered that any new body should have all the powers to ensure compliance with the National Compliance and Enforcement Policy, which includes education, infringement notices, compliance notices, enforceable undertakings, prosecution, and civil penalties.¹¹⁶

Other submissions provided more equivocal perspectives. Suggestions were made to create a new independent entity such as an Equality Ombudsman,¹¹⁷ a new entity similar to the Fair Work Commission/Fair Work Ombudsman model,¹¹⁸ or a separate entity to handle the functions of complaints and dispute resolution,¹¹⁹ but without coming to a definitive position.

The Queensland Council of Unions raised three options that involve the Commission adopting the education and regulatory functions, along with either the creation of a new entity or transfer of all dispute resolution functions to the tribunals.¹²⁰

The Review's position

The Review considers that:

- The statutory framework needs to include functions and powers of proactively promoting compliance with the Anti-Discrimination Act.
- The advantages of the Commission having a role in enforcing the Act, including the objectives of the Act recommended by this report, outweigh any limitations of this approach.
- Any tension between the roles of proactive education and enforcement and impartial dispute resolution can be moderated through structural separation within the Commission. This would require the Commission to restructure.
- A clear delineation between the funding provided for the Commission's dispute resolution function and its functions to proactively support compliance with the Act is required to achieve structural separation as well as to ensure the new functions of the Commission would have certainty of resourcing. To achieve transparency, this should be publicly reported.

Recommendation 16

16.1 The Act should create a function for the Commission to promote and advance the objectives of the Act, and to be an advocate for the Act. This should include taking a proactive role in eliminating discrimination, including systemic discrimination.

¹¹⁶ Queensland Nurses and Midwives Union submission, 31.

¹¹⁷ Equity Australia submission, 39.

¹¹⁸ Legal Aid Queensland submission, 62.

¹¹⁹ Queensland Advocacy Incorporation submission, 25.

¹²⁰ Queensland Council of Unions submission, 39-40.

- 16.2** The Commission should ensure structural separation between its dispute resolution function and its role in proactively eliminating discrimination, and this should include reviewing information management and governance structures.
- 16.3** If a complaint is made to the Commission that gives rise to an actual or perceived conflict of interest that arises from the Commission's exercise of its functions, the views of the parties about the appropriateness of the Commission to resolve the dispute should inform the decision about whether dispute resolution can be offered.
- 16.4** The Commission's funding to undertake proactive work to eliminate discrimination, including systemic discrimination, should be separate from its funding for dispute resolution functions, and both should be subject to annual public reporting.
-

Tools to support compliance

The existing functions and powers of the Commission under the Anti-Discrimination Act are almost entirely reliant on education and awareness raising, research, and, when complaints are made, resolving disputes. These functions and powers have remained unchanged since introduction of the Act in 1991.

A mix of complex factors contribute to the occurrence of discrimination and sexual harassment. While persuasion and voluntary compliance can be an effective way to address the cause of discrimination and sexual harassment, we were told that persuasion alone is not always sufficient to ensure compliance in serious or complex cases.¹²¹

In the Discussion Paper, we asked stakeholders what the core components of a regulatory model should be, and what mechanisms and powers it should include. We outlined the components of the responsive regulation enforcement pyramid.¹²²

In the discussion below, we examine the mechanisms required to promote compliance. These are grouped in levels, with tools to encourage and support compliance, through to requiring compliance.¹²³

Level one: Building an understanding of obligations

Education and awareness

The Commission's functions currently include undertaking educational programs to promote the purposes of the Anti-Discrimination Act¹²⁴ and promoting an understanding and acceptance, and the public discussion of, human rights in Queensland.¹²⁵

There was strong support for ensuring that education plays a key role in supporting compliance. The Real Estate Institute of Queensland (REIQ) told the Review that:

¹²¹ See for example: Queensland Advocacy Incorporated submission; Caxton Legal Centre submission; Legal practitioners' roundtable, 10 February 2022.

¹²² Professors Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford University Press, 1992).

¹²³ This grouping is loosely based on the levels of regulatory compliance which have been the subject of substantial academic discourse and consideration by equity commissions in Australia and overseas. See for example: Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021).

¹²⁴ *Anti-Discrimination Act 1991* (Qld) s 235(d).

¹²⁵ *Anti-Discrimination Act 1991* (Qld) s 235(i).

I'm very much a believer [that] prevention is always better than cure, so it's about educating real estate agents to stop them from getting in trouble in the first place or stop their clients getting in trouble. ... I feel like that's beneficial to everyone, because none of us have limitless resources.¹²⁶

Education and awareness-building activities might include campaigns aimed at business, government, and non-government agencies to encourage compliance with the Act and best practice.

We identified that having industry-specific education campaigns that include ongoing collaboration with peak bodies would allow for two-way exchange about emerging and systemic issues.

Research

The Commission's existing functions include undertaking research and educational programs to promote the purposes of the Anti-Discrimination Act, and to consult with various organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions of the Act.¹²⁷

The Commission has used this function to prepare reports, including in relation to women in prison, health equity for First Nations people, and building inclusive communities.¹²⁸

However, the Act does not contain powers to support this function, such as requiring or compelling the provision of information to the Commission. This can mean the ability to conduct thorough research and monitor progress is limited to publicly available information.

Stakeholders were supportive of a role for the Commission to conduct research that monitors and reports on systemic discrimination, including through identifying the social, economic, and other conditions that create high risk environments for unlawful discrimination or sexual harassment.¹²⁹

The Gardner Report recommended that the Victorian Commission be given the power to compel public and private sectors to provide data that they can analyse, and to access information on tribunal decisions. The Victorian Equal Opportunity Act provides the Commission with the power to compel a person to produce information or documents.

The capacity to obtain data would support the identification of systemic issues and trends, including to inform the allocation of resources for these research functions. This was specifically supported by some submissions.¹³⁰

Should organisations be required to publish data?

One submission recommended that a positive duty should require public disclosure of standardised, comparable, and disaggregated information by duty holders on how well they are meeting their obligation to eliminate discrimination and sexual harassment.¹³¹ This could include requiring organisations to report on their employment diversity statistics.

While data transparency and publication may enhance transparency and provide statistics from which to measure trends or themes, many organisations may find such a requirement onerous.

Allowing the Commission to issue notices to produce data in connection with own motion investigations would allow the Commission to obtain data relevant to its inquiries.

126 REIQ (Antonia Mercorella) consultation, 31 August 2021.

127 *Anti-Discrimination Act 1991* (Qld) s 235(d) and s 235(e).

128 See for example: *Women in prison 2019: a human rights consultation report*; *Women in prison report* (2016); *Addressing institutional barriers to health equity for Aboriginal and Torres Strait Islander people in Queensland's public hospital and health services* (2017); and *Building inclusive communities: regional conversations about belonging* (2018).

129 Queensland Mental Health Commission submission, 10.

130 See for example: Legal Aid Queensland submission, 61, Assoc Prof Dominique Allen submission, 6.

131 Australian Discrimination Law Experts Group, 41.

Publishing guidelines

The Commission currently develops resources, including web pages, factsheets, and guides to help duty holders understand their obligations under the Act, and for individuals to know their rights. However, the Commission does not have a legislative function to produce formal guidelines to assist organisations to comply with their obligations under the Act.

These guidelines are non-binding, practical tools that assist with decision-making and compliance. They have educative value and can demonstrate best practice approaches, which is useful where the law is complex, difficult to apply in practice, and when case law is limited. Guidelines can be updated as the law changes and as new issues or approaches to best practice emerge.

Publishing guidelines recognises that people and organisations are more able to comply with the law when they have clear guidance on what their obligations are and how to meet them.

There was strong support for the Commission to have legislative authority to develop and produce guidelines that provide clear guidance on the practical steps an organisation should take to meet their obligations under the Act.¹³² One stakeholder said:

I'm a big fan of guidelines, so long as they're practical.¹³³

Consultation is essential

There was a strong message to the Review that guidelines must be co-designed with relevant sectors, and not be unreasonably onerous.¹³⁴

Guidelines should be developed through community and industry stakeholder engagement to ensure they are fit for purpose in different contexts and settings. This would ensure that the development of guidelines is informed by practical realities and resources available to the relevant industry or entity.

Consultation with affected communities is a critical part of the process. It ensures the specific needs of people at risk of experiencing discrimination and sexual harassment are closely considered, particularly where the discrimination may be linked to stigma, myths, and social attitudes.¹³⁵

The importance of consultation was emphasised by groups such as Respect Inc, a non-profit, peer-based organisation that protects and promotes the rights, health, and wellbeing of Queensland sex workers, and Queensland Positive People, a peer-based advocacy organisation that promotes self-determination and empowerment for all people living with HIV throughout Queensland.

A consultation process for developing guidelines would provide an opportunity for meaningful engagement with educative components. In discussing the importance of meaningful consultation, Assoc Prof Alysia Blackham told the Commission:

So I think meaningful consultation, but also meaningful consultation with the right people, giving people the voice to have impact in those processes is really critical to the success of positive duties... consultation is a really important complement to the powers of the

¹³² See for example: Equality Australia submission; Queensland Council for LGBTI Health submission; Queensland Mental Health Commission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission.

¹³³ REIQ (Antonia Mercorella) consultation, 31 August 2021.

¹³⁴ See for example: Aged and Disability Advocacy Australia submission; Small Business roundtable, 7 March 2022.

¹³⁵ See for example: Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Respect Inc and DecrimQLD submission; Scarlet Alliance, Queenslanders with Disability Network.

commission... it's about bringing people along and having unions and employees, and community groups really engaged in that process.¹³⁶

Comparative approaches

The Victorian Equal Opportunity Act provides that the Victorian Commission may issue practice guidelines on any matter relating to the Act. In preparing practice guidelines, the Victorian Commission must consult with people and organisations that it considers represent the areas or persons to whom the practice guidelines will relate.¹³⁷

Practice guidelines are not legally binding, but a court or tribunal may take into account evidence of compliance with a guideline, if relevant to a matter before it.¹³⁸

This process requires that notice of the publication of a guideline (or its withdrawal) must be published in the *Victorian Government Gazette*, as well as in relevant media and industry publications.

Although there is currently no positive duty in federal discrimination laws, the Australian Human Rights Commission has a statutory function to prepare and produce guidelines for employers, and resources to support duty holders to avoid acts or practices that are inconsistent with human rights.¹³⁹ The power to do so is set out in the Australian Human Rights Commission Act and in the four federal discrimination laws.¹⁴⁰

The Review's position

The Review considers that:

- The functions and powers of the Commission should be updated to ensure that the Commission's educative and research functions are retained and augmented to include the new objectives of the Act.
- Ensuring the Commission has the power to compel the production of information, including data, for the purposes of undertaking its research functions has value.
- The Commission should have a legislative basis for developing and publishing guidelines, which should be developed in consultation with duty holders and people who experience, or are at risk of experiencing, discrimination, and sexual harassment.

Level two: Cooperating to address systemic issues

The Commission's functions do not extend to a responsibility to support proactive compliance with the Act. Currently, the relevant function is restricted to undertaking research and educational programs to promote the purposes of the Act and public discussion of human rights.¹⁴¹

While the Act contains an existing provision that provides that the Commission can 'consult with various organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions under the Act', the narrow scope of this function is confined to 'consulting'.¹⁴²

¹³⁶ Australian Discrimination Law Experts Group (Assoc Prof Alysia Blackman) consultation, 14 September 2022.

¹³⁷ *Equal Opportunity Act 2010* (Vic) s148.

¹³⁸ *Equal Opportunity Act 2010* (Vic) s149.

¹³⁹ *Australian Human Rights Commission Act 1986* (Cth) s11(n).

¹⁴⁰ *Racial Discrimination Act 1975* (Cth) s 20(d); *Sex Discrimination Act 1984* (Cth) s 48(1)(ga); *Disability Discrimination Act 1992* (Cth) s 67(1)(k); *Age Discrimination Act 2004* (Cth) s 53(1)(f). In relation to human rights and ILO 111 matters: *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(n); s 31(h).

¹⁴¹ *Anti-Discrimination Act 1991* (Qld) s 235(d) and s 235(i).

¹⁴² *Anti-Discrimination Act 1991* (Qld) s 235(e)



Hypothetical case example one

The following hypothetical scenario is an example of how tools to promote compliance and awareness could be applied. This example does not relate to any situation or organisation and is provided to assist an understanding of how mechanisms to promote compliance might be used in practice.

After a positive duty is introduced into the Anti-Discrimination Act, the Commission completes a consultation process to identify sectors and organisations that require priority support to comply with the Act, including areas where there is limited knowledge of discrimination and sexual harassment laws.

This process, which includes consideration of data from enquiries and complaints, consultation with key stakeholders, and research, identifies that the residential tenancy sector is a priority area for support, which would assist the sector to take reasonable and proportionate steps to eliminate discrimination and sexual harassment.

To develop the guidance, the Commission conducts research to gauge the prevalence and impact of discrimination and sexual harassment in the sector. The next stage is to work closely with peak entities to prepare the guideline. The guideline undergoes various revisions and is trialled in an organisation to test its practicality and identify opportunities for improvements.

Once the process is complete, the Commission puts a notice in the *Queensland Government Gazette*, publishes the guideline on its website, and promotes it through industry channels. A public awareness campaign targeted at real estate agents is developed in partnership with the peak body for real estate agencies. Follow-up research over the next two years finds that complaints from tenants have declined.



Level two compliance powers include tools for working with duty holders to increase awareness of, and willingness to comply with, discrimination laws. This would allow the Commission to conduct voluntary, independent reviews and have a role in monitoring and providing input to an organisation's action plans.

While previously regarded as 'soft' regulation, this approach has increasingly been considered an effective tool for motivating duty holders to take measurable steps towards eliminating systemic discrimination by supporting and promoting transparency, and through it to make progress towards substantive equality.¹⁴³

Independent reviews

What is an independent review?

Independent reviews are a mechanism by which the Commission, on request of a duty holder, can review the duty holder's programs and practices to assist them to comply with the Anti-Discrimination Act, including the positive duty to take reasonable and proportionate steps to eliminate discrimination.

The objective of such a review function is to encourage duty holders to identify systemic issues within their organisation, understand the underlying causes, and develop meaningful steps to eliminate the systemic causes of discrimination and sexual harassment.

An independent review process would allow for close and in-depth consideration of an issue by working cooperatively with the duty holder towards 'transformational change'.¹⁴⁴

Comparative approaches

The Victorian Equal Opportunity Act allows the Commission, upon request by a duty holder, to enter an agreement to review an organisation's programs and practices to determine their compliance with the law.¹⁴⁵

The organisation requesting the review may enter an agreement with the Commission to establish the terms of reference for the review and its methodology. This includes whether and when a public report will be published by the Commission.

The agreement also provides for the payment of the Commission's reasonable costs of undertaking the review.¹⁴⁶

Using this review function, the Victorian Commission has completed small and large-scale independent reviews. The larger, public reviews have involved Ambulance Victoria¹⁴⁷ and Victoria Police,¹⁴⁸ and the Commission is currently engaged as a research partner on an independent review into sexual harassment in Victorian Courts.

Our consultations with the Victorian Commission and consideration of relevant literature reveal an emerging and compelling body of evidence that demonstrates that reviews conducted under this provision are a powerful tool for achieving organisational change and promoting equality.

143 Simone Cusack, 'The Equal Opportunity Act 2010 (Vic) Review function: 'Soft' Regulation or an Effective Tool to Promote Transparency and Equality?' (2021) *Law in Context* 37(2) 132-144.

144 Simone Cusack, 'The Equal Opportunity Act 2010 (Vic) Review function: 'Soft' Regulation or an Effective Tool to Promote Transparency and Equality?' (2021) *Law in Context* 37(2) 132-144., 135.

145 *Equal Opportunity Act 2010* (Vic) s 151.

146 *Equal Opportunity Act 2010* (Vic) s 151(1A).

147 Victorian Equal Opportunity & Human Rights Commission, 'Independent review of Ambulance Victoria', *Research, reviews and investigations* (web page).

148 Victorian Equal Opportunity & Human Rights Commission, 'Independent review of Victoria Police', *Research, reviews and investigations* (web page).

Functions under the Human Rights Act

Under the Queensland Human Rights Act, the Commission has the function of reviewing public entities' policies, programs, procedures, practices, and services in relation to their compatibility with human rights.¹⁴⁹

Using this provision, the Commission has recently worked with a social housing provider to conduct a collaborative organisational review to improve the compatibility of the organisation's policies, programs, procedures, practices, and services with human rights.¹⁵⁰

The provision in the Human Rights Act differs in scope and nature from the independent review function created in the Victorian Equal Opportunity Act,¹⁵¹ because it:

- only applies to public entities
- focuses on assessment of human rights compatibility, and not the ways in which the duty holder is meeting its positive duty to eliminate discrimination and sexual harassment
- does not provide for the Commission to enter a voluntary agreement with the duty holder
- does not contain an express provision that allows an agreement to include payment of the Commission's reasonable costs.

However, the provisions of the Human Rights Act and the Anti-Discrimination Act could complement each other and ensure that any independent review under the Anti-Discrimination Act could also consider the compatibility of the public entity's policies etc with human rights, including the right to non-discrimination.

Action plans

What is an action plan?

Action plans are voluntarily developed by organisations and outline how they will work to achieve particular goals.

Action plans may include: a requirement to develop policies and programs to achieve the objectives of the Act; how those policies will be communicated; policy reviews to identify discriminatory practices; setting goals and targets and measuring success; and appointing people within the organisation to be responsible for implementing the plan.

A discussion paper on the consolidation of discrimination laws published by the federal Attorney-General Department, observed that:

Action plans are voluntary, nonbinding and have limited effect on the action planner's legal obligations. Action plans provide a collaborative mechanism for addressing the needs of people with a particular protected attribute. They are developed through consultation between the employer or service provider and the Commission and the community. This educative process can help businesses to avoid behaviour and practices which are likely to give rise to complaints of unlawful discrimination.¹⁵²

¹⁴⁹ *Human Rights Act* (Qld) s 61(c).

¹⁵⁰ See the Queensland Human Rights Commission's annual reports on the operation of the Human Rights Act 2019 for the periods 2019-20 and 2020-21.

¹⁵¹ *Equal Opportunity Act 2010* (Vic) s 151.

¹⁵² Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011) 44 [175].

There is no function or power under the current Anti-Discrimination Act that provides for action plans.

In a submission to the Review, Associate Professor Dominique Allen, a specialist in anti-discrimination law, supported legislative provisions that allow the Commission to assist organisations to develop action plans¹⁵³ as this can assist them to meet their obligations under the Act.

Comparative approaches

Some discrimination laws, such as the federal Disability Discrimination Act and the Victorian Equality Opportunity Act, include provisions that inform the development of action plans and allow them to be lodged with the relevant agency. The relevant human rights agency may set minimum requirements for action plans, provide advice on the development and implementation of the plans, and register or publish the plans.

Federal disability legislation

To help employers and other organisations eliminate discrimination against people with disability and to increase awareness of the rights of people with disability, the Disability Discrimination Act allows organisations to develop action plans or what is usually called a ‘Disability Action Plan’.

The Disability Discrimination Act provides that a duty holder:¹⁵⁴

- may prepare and implement an action plan,¹⁵⁵
- must include certain provisions, such as developing and communicating policies and procedures to achieve the objectives of that legislation, reviewing internal practices to identify any discriminatory practices, and setting goals and targets to evaluate the success of the action plan in achieving its objectives, and
- identify who will implement the provisions and how evaluations will take place.¹⁵⁶

The purpose of a Disability Action Plan is to encourage, recognise, and promote an active commitment to eliminating disability discrimination and to promote the recognition of the rights of people with disability.¹⁵⁷ Having an action plan assists organisations to plan ways of improving the delivery of goods or services over time.¹⁵⁸

In commenting on the use of these provisions under the Disability Discrimination Act, the Australian Human Rights Commission’s Free and Equal Position paper noted that action plans have primarily been adopted by employers and service providers, including banks, public transport services and government departments.¹⁵⁹

Victorian legislation

The Victorian Equal Opportunity Act provides that the Commission may provide advice about preparing and implementing action plans and set minimum standards for action plans.¹⁶⁰

153 Assoc Prof Dominique Allen submission; Australian Discrimination Law Experts Group submission.

154 In the *Disability Discrimination Act 1992* (Cth), this person is referred to as the ‘action planner’, however they are also in effect a duty holder under that Act.

155 *Disability Discrimination Act 1992* (Cth) s 60.

156 *Disability Discrimination Act 1992* (Cth) s 61.

157 Australian Human Rights Commission, ‘Action plans and action plan guides’, *Disability Rights* (Web page) <<https://humanrights.gov.au/our-work/disability-rights/action-plans-and-action-plan-guides>>.

158 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [4.6.1], [4.6.5].

159 Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021), 121.

160 *Equal Opportunity Act 2010* (Vic) s 152.

If a person or organisation prepares an action plan, they may give a copy to the Commission who may include it in a register of action plans. This register must be made available on the Commission's website and may be published in any other way the Commission considers appropriate.¹⁶¹

Creating an action plan is a voluntary process. It is a planning document that outlines the things an organisation will do to prevent discrimination and sexual harassment and can help improve diversity and inclusion.¹⁶²

The Gender Equality Act, which commenced in March 2021, places obligations on public sector agencies to plan, measure, and track progress to improve gender equality, which includes an express requirement to prepare a gender equality action plan,¹⁶³ many of which have been made public by agencies.

As one example, the Victorian Department of Justice and Community Safety published an action plan that sets out four focus areas directed toward improving data on gender and intersectionality; building capacity and capacity related to equality; creating equitable pathways to career development and leadership; and creating a safer, empowering and inclusive culture. It also outlines how progress towards these goals will be measured over time.¹⁶⁴

The Review's position

The Review considers that:

- There is significant value in giving the Commission the ability to conduct proactive work through voluntary agreements with the duty holder.
- The Commission should be provided with the express statutory ability to conduct independent reviews, and to have a role in advising on and maintaining a register of action plans.

Level three: Addressing non-compliance

While the submissions we received generally supported introducing investigation, public reporting, and other functions necessary to make the law effective, they provided limited details of how they anticipated those powers could be used in practice.

For this section, we have therefore relied on research we conducted on similar approaches in other jurisdictions, as well as targeted consultation we conducted with Commissioners and senior staff in federal and Victorian human rights agencies.

Conducting investigations

What is a systemic investigation?

A systemic investigation, instigated at the discretion of the Commission, would allow the Commission to investigate serious and systemic issues.

Currently, the Commission can investigate a complaint after it has been received. Investigation under the current Act is confined to obtaining documents and information, or for a small groups of complaints, obtaining actuarial, statistical and other data.¹⁶⁵ As we discuss in chapter 5, the

¹⁶¹ *Equal Opportunity Act 2010* (Vic) s 153.

¹⁶² Victorian Equal Opportunity Commission, 'Tools to help you meet your obligations', For organisations (Web page) <<https://www.humanrights.vic.gov.au/for-organisations/tools-to-help-you-meet-your-obligations/>>.

¹⁶³ *Gender Equality Act 2020* (Vic) s 10.

¹⁶⁴ Department of Justice and Community Safety (Vic), *Gender Equality Action Plan* (2022).

¹⁶⁵ *Anti-Discrimination Act 1991* (Qld) s 156, 157.

Commission's investigative powers are only used in limited circumstances during the complaints process in which the focus is on resolving disputes. The Commission does not have a role in determining whether the Act has been contravened.

Systemic investigations are often referred to as 'own-motion investigations' because they do not require a complaint to be made to the Commission.

Own motion investigations are different from general research functions or reviews, as they provide the Commission with powers to conduct a coercive – rather than voluntary – investigation and allow specific enforcement outcomes that may include a public report.

Another difference between the review and own-motion investigation functions is whether the inquiry is conducted voluntarily or using coercive powers. The objectives and outcomes of a voluntary review may be different to those of an investigation conducted at the Commission's own initiative.

What is the purpose of systemic investigations?

The Australian Human Rights Commission's *Free and Equal* Position Paper report identified two mutually reinforcing, elements to an inquiry power:

- the capacity to undertake systemic inquiries – such as in circumstances where there is a pattern of discrimination or suspected compliance issues becomes known to the Commission
- compliance monitoring – to ensure that industries, organisations, sectors, or others are complying with the provisions of a positive duty.¹⁶⁶

What powers are required?

To conduct own motion investigations effectively, the Commission would need the ability to compel the production of information, documents and data, and the power to compel attendance to answer questions at interview. This may include allowing the Commission to prohibit or limit the publication of evidence or the identity of witnesses.

The Gardner Review recommended a public inquiry function for the Victorian Commission. This included functions and powers similar to those provided to oversight agencies such as the Ombudsman, or to a Commission of Inquiry. These powers were initially enacted into the Victorian Equal Opportunity Act and later repealed following a change in government.

Findings and recommendations

Following the completion of an investigation, the Commission should have the legislative basis to find that, on the balance of probabilities, the act or practice to which the investigation relates was inconsistent with or contrary to the Anti-Discrimination Act or the Human Rights Act, and to make recommendations. Any report relating to the outcome of an investigation should include particulars of the findings and any recommendations that it has made.

Procedural fairness provisions that impose requirements at common law should also be codified in the Act. If the Commission believes there are grounds for making adverse findings about a person in the report of an investigation, the Commission must give the person reasonable opportunity to comment on the subject matter of the investigation and respond to the grounds for making the adverse findings before finalising the report.

¹⁶⁶ Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021), 151.



Hypothetical case example two

The following hypothetical scenario provides an example of how tools to promote compliance that focus on cooperating to address systemic issues could be used. This example does not relate to any situation or organisation and is provided to assist an understanding of how mechanisms to promote compliance might be used in practice.

A large state government health agency receives an increase in reports by staff of widespread discrimination, including a number of internal complaints. Staff from culturally and linguistically diverse backgrounds and First Nations people raise concerns that they have not received the same promotional opportunities.

After raising concerns, staff feel that senior managers minimise their issues or consider them individual problems requiring an isolated response, rather than reflecting on broader issues. Those who raise concerns feel they are treated as ‘trouble-makers’.

Staff who have recently resigned make their allegations public during a current affairs television show. In response, senior executives commit to addressing the workplace issues through an independent review. A request is made to the Commission to undertake a review using powers under the Anti-Discrimination Act.

The Commission works collaboratively with the organisation to identify underlying structural issues that are contributing to the issues. An extensive interview process is conducted with staff, and the information gathered is analysed to identify systemic themes. The Commission produces a report setting out its key findings and making recommendations for change.

The review then enters a second phase to create an action plan and implement its recommendations. They later evaluate the extent to which the changes have addressed the original issues. Additional recommendations are made to consolidate changes. A final staff survey finds an improvement in equity measures, including staff diversity rates in management and senior executive positions and cultural competency of all staff, staff retention rates and in client feedback on service delivery.



Comparative approaches

The Victorian Equal Opportunity Act allows the Commission to conduct systemic investigations at the Commission's own initiative when the following threshold criteria have been met:

- the matter raises an issue that is serious in nature; and
- relates to a class or group of persons; and
- cannot reasonably be expected to be resolved by dispute resolution or by making an application to the Tribunal; and
- there are reasonable grounds to suspect that one or more contraventions of this Act have occurred; and
- the investigation would advance the objectives of this Act.¹⁶⁷

The legislation includes the following example:

An organisation has a policy that indirectly discriminates against persons with a particular attribute. The Commission has received several calls complaining about this policy and the policy has received media attention. Although some claims that the policy is discriminatory have been settled on an individual basis, the policy has not been changed. The Commission may decide that, in these circumstances, an investigation could help identify and eliminate a systemic cause of discrimination.¹⁶⁸

The Victorian Commission has described this power to initiate investigations into serious and systemic issues as critical to relieve the burden from individual complainants and allow the Commission to use its enforcement powers to eliminate discrimination to the greatest extent possible.¹⁶⁹

In 2017 the Victorian Commission conducted an own-initiative investigation into the travel insurance industry. The investigation found that, over an eight-month period, three major insurers sold more than 365,000 policies containing terms that discriminated against people with mental health conditions.¹⁷⁰

During the investigation, all three insurers committed to changing their practice of issuing travel insurance policies with a blanket mental health exclusion. The outcome was that some of the largest travel insurers in the Australian market now provide some cover for mental health conditions. The report also considered important steps insurers can take to comply with the law in future.¹⁷¹

Since the mid-2000s, a number of reports have recommended that federal discrimination laws be amended to give the Australian Human Rights Commission the power to conduct own motion inquiries into systemic discrimination.¹⁷²

167 *Equal Opportunity Act 2010* s 127.

168 *Equal Opportunity Act 2010* (Vic) s 127 'Example'.

169 Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019) 29.

170 Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019) 11.

171 Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019) 128.

172 Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021); Australian Government Attorney-General's Department, Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper (September 2011) 53, refers to: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality (Final Report, December 2008) rec 37; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Access All Areas' report of the inquiry into Draft Disability (Access to Premises – Building) Standards, recommendation 17; House of Representatives Standing Committee on Employment and Workplace Relations, Making it Fair: Pay equity and associated issues

These recommendations are supported by stakeholders who consider that reform is necessary to enable the Australian Human Rights Commission to identify systemic causes of discrimination, to suggest solutions, and to relieve the burden of enforcement from people who experience discrimination and sexual harassment.¹⁷³

Does the Commission already have these powers?

The current Anti-Discrimination Act provides that the Queensland Human Rights Commissioner must initiate an investigation if requested to do so by the Minister, or if the tribunal becomes aware of circumstances that may constitute a contravention of the Act and refers the matter.¹⁷⁴

In addition, the Commissioner may initiate an investigation any time after a complaint is received if:

- a possible contravention against a group or class of people is discovered, the matter is of public concern, and the Minister agrees
- an allegation is made that an offence against the Act has been committed
- a possible offence against the Act is discovered.¹⁷⁵

The second and third options apply in limited circumstances when an offence against the Act is alleged to have been committed. For example, improper communication of official information, providing false or misleading information, obstruction, or contempt of the Commission.¹⁷⁶ These provisions have rarely, if ever, been used.

The Commission may conduct an investigation if the first option applies, or if the second option applies and the Minister agrees. However, the outcomes of the investigation are limited to those available through the usual complaint process. This means that the outcome of an investigation conducted under these provisions can, at best, result in a conciliation conference and, if it cannot be resolved, referral to the tribunal for determination. It does not allow for recommendations or a public report, or another outcome.

In practice, the limitations of the current law do not provide a sufficient basis for the Commission to conduct investigations into systemic issues.¹⁷⁷ The deficiencies in these provisions may explain why they have rarely, if ever, been used.

A power to conduct preliminary enquiries is included in the Human Rights Act when a human rights complaint has been made or referred to the Commission.¹⁷⁸

During our consultations, we identified that some stakeholders held a perception that the Commission already had the powers to take a more interventionist approach, including through conducting own-motion investigation powers. In some circumstances, this misinterpretation seems to undermine the credibility of the Commission to effectively achieve the objectives of the Act.

related to increasing female participation in the workforce (Report, November 2009) recommendation 19; Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) recommendation 19.

173 Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021), 147.

174 *Anti-Discrimination Act 1991* (Qld) s 155(1).

175 *Anti-Discrimination Act 1991* (Qld) s 155(2).

176 *Anti-Discrimination Act 1991* (Qld) ss 220-223.

177 While the Commission has conducted a small number of systemic reviews, these have relied on the Commission's functions under s 235(e) of the Act which allows the Commission to consult with organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions of the Act, rather than on an investigation using compulsive powers.

178 *Anti-Discrimination Act 1991* s 68.

What are the possible outcomes?

The outcomes of an own motion inquiry should include:¹⁷⁹

- taking no further action
- preparing a report that may, at the discretion of the Commission, be provided to the Attorney-General or to the Parliament for tabling.

Recent inquiries and reviews have recommended that the outcome of own motion investigations should also include measures to require and enforce compliance, which include:

- entering into an agreement with a duty holder about action required to comply with the Act
- entering into an enforceable undertaking with the duty holder
- issuing a compliance notice to the duty holder.

While there has been considerable support for the inclusion of these powers in discrimination laws, and despite being a common feature of other regulatory frameworks familiar to many duty holders, there is no current example of the operation of these powers in a human rights agency. While the Victorian Act introduced in 2010 contained these powers, and is therefore instructive, it was later repealed before commencement, following a change in government.

In 2010, Victoria passed legislation that included provisions – now repealed – conferring the power on the Victorian Commission to conduct investigations which could result in enforceable undertakings, compliance notices, and the capacity to apply to a tribunal for enforcement.¹⁸⁰ It also provided the Commission with the power to hold public inquiries that could result in a public report.

The Regulatory Powers Act 2014 (Cth) provides for a standardised suite of provisions in relation to monitoring and investigation powers, as well as enforcement provisions through the use of civil penalties, infringement notices, enforceable undertakings, and injunctions. While not directly applicable to Queensland's discrimination laws, this Act provides a helpful set of standard provisions for effective monitoring, investigation, and enforcement, while ensuring adequate safeguards and protecting procedural fairness.

This legislation and the commentary on its application to discrimination law¹⁸¹ has informed our assessment of how the tools discussed below might operate if introduced in Queensland.

Public report

A public report of the outcomes of an investigation could be provided either to the state Attorney-General or the Queensland Parliament. If a report were to be made to Parliament, it should be tabled on the day on which it is received or on the next sitting day.

If the Commission were to make adverse findings against a person in a public report, procedural fairness processes must apply, and could be embedded in the Act. This would be similar to provisions in the Human Rights Act which requires that if the Commissioner proposes to make an adverse comment about a person, they are required to give the person a fair opportunity to make submissions about the comment and ensure that any response is fairly stated in the report.¹⁸²

¹⁷⁹ Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 128-127.

¹⁸⁰ *Equal Opportunity Act 2010* (Vic) No. 16 of 2010, as at 28 April 2010.

¹⁸¹ Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021).

¹⁸² *Human Rights Act 2019* (Qld) s 93.



Hypothetical case example three

The following hypothetical scenario provides a practical example of how tools to promote compliance that focus on addressing non-compliance could be used. This example does not relate to any situation or organisation and is provided to assist an understanding of how mechanisms to promote compliance might be used in practice.

The Commission receives a complaint from a young woman, on a working visa to Australia, that she experienced sexual harassment from her manager while working in a packing shed at a farm in Queensland. The allegations are serious and could amount to criminal conduct. However, before the matter can be assessed by the Commission and dispute resolution conducted, the woman returns to her country of origin, having cut short her visit.

Later, the Commission receives more enquiries from staff at the same farm, including reports that pornographic images are placed on toilet doors alongside graffiti including the names of female workers. Reports about some staff being asked to provide sexual favours in exchange for having their immigration papers signed emerge from information provided to the Commission and from media reports.

The Commission determines that a threshold of a serious, systemic matter has been met, and an investigation is commenced. It emerges that issues of serious sexual harassment are long standing in the organisation and the industry in that region, and that most complaints made by the women in the workplace were never followed up.

During the process, women who allege sexual harassment are referred to legal practitioners for advice about whether they want to report their experience to police or make a complaint to the Commission or another entity.

At the completion of the investigation the organisation enters into an enforceable undertaking with the Commission to create and display a sexual harassment policy. Using the Commission's published guidelines on sexual harassment, they create an action plan to eliminate sexual harassment. All staff including senior management are required to undertake training within a set time, and the effectiveness of the training is evaluated through onsite interviews with staff.



Enforceable undertakings

In the situation where an investigation has identified a contravention of the Act, enforceable undertakings could allow the Commission to obtain agreement from the organisation involved to take steps to address discrimination, without a complaint being made. If the terms of the undertaking are not complied with, the Commission could then apply to a tribunal or court for enforcement.

If enforceable undertakings were introduced, a person authorised by the Commissioner could accept an undertaking to take specified action, refrain from taking specified action, or take specified action directed toward ensuring that a person does not contravene the Act.¹⁸³

As Associate Professor Dominique Allen noted in her submission, the power to conduct an investigation would be strengthened if the Commission could reach enforceable undertakings with an organisation in the absence of voluntary compliance, or issue a compliance notice or seek the imposition of sanctions, such as a fine, from a tribunal.¹⁸⁴

Compliance notices

If, following an investigation, an agreement with the duty holder could not be reached in the form of an enforceable undertaking, a compliance notice could be issued by the Commission, if certain threshold tests were met.

The notice would set out the details of the conduct or behaviour, decision, policy or practice, that gave rise to the contravention, and the steps to be taken to comply with the Act within a specified timeframe, and in some cases an action plan may also be required.

The compliance notice should contain the name of the duty holder; the details of the non-compliance; the action to be taken to address the non-compliance; a reasonable period within which the duty holder must take the specified action; and a reasonable period within which the duty holder must provide the Commission with evidence that the action has been taken.

If the Commission were to be satisfied that the duty holder has failed to comply with the notice, it may apply to a court or tribunal for an order for compliance or an injunction. Requiring the Commission to apply to a court or tribunal to enforce compliance notice means that the Commission would retain its standing as an administrative body without determinative power, as this role should be left exclusively to tribunals and courts.¹⁸⁵

The option of issuing compliance notices is available to the Fair Work Ombudsman. Under the Fair Work Act, failure to comply with a compliance notice means that the Fair Work Ombudsman can initiate legal proceedings which may result in a fine. However, we understand that in practice these powers are not often used, and then only as a last resort after education and cooperative measures have failed.

Civil penalties

In extremely rare circumstances, following the outcome of an investigation, it may be appropriate for the Commission to have the power to apply to a tribunal or court for an order that a person or entity alleged to have contravened the Act pay a civil penalty.

This would only be used where all other options have been exhausted, and where an enforceable undertaking has been entered into, but the terms of the undertaking have been breached.

¹⁸³ This is outlined in the *Regulatory Powers Act 2014* (Cth) Part 6.

¹⁸⁴ Assoc Prof Dominique Allen submission, 5.

¹⁸⁵ Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 131, [6.149].

Other human rights agencies with regulatory functions have similar powers. The Office of the Australian Information Commissioner receives individual complaints about privacy breaches, and is required to act in accordance with model litigant obligations, and the outcomes may be publicly communicated.

While the Anti-Discrimination Act currently creates offences that attract penalty units,¹⁸⁶ civil penalties could be attached to any additional powers to ensure enforcement of serious or repeated contraventions can be undertaken. It is anticipated civil penalties would only be sought in very rare circumstances and may not ever need to be used.

Some submissions emphasised that, in their view, the capacity of the Commission to apply to a tribunal or court for an order compelling a person or entity to pay a civil penalty for a contravention of the Act is critical to ensure serious and sustained contravention of the Act has consequences.¹⁸⁷

Individual enforcement of a positive duty?

A small number of submissions considered whether a person should be able to make a complaint to the Commission on the basis that a duty holder has breached their obligation to take reasonable and proportionate steps to eliminate discrimination and sexual harassment.¹⁸⁸ They suggested this could allow individuals to obtain compensation for loss they have suffered, either concurrent with or independent of any regulatory action.¹⁸⁹

However, a right of action for breach of the positive duty may place a greater onus on the complainant than for complaints about other contraventions. For example, in alleging that an employer has not complied with their positive duty, the person would have to show that the discrimination or sexual harassment occurred, and that the employer did not take reasonable and proportionate measures to eliminate that conduct. This would be a higher threshold than in other complaints under the Act, where the onus would be on the employer to demonstrate that it took reasonable and proportionate measures.

As a complainant cannot be doubly compensated for the same contravention, there may be limited utility from the complainant's perspective. Conciliation agreements reached with individual complaints often contain provisions to implement training or policy reform within the organisation.

It would be a poor use of Commission resources to undertake an investigation for matters that could be properly dealt with through the complaints process. Instead, the use of investigation powers should be confined to matters in which complaints are unlikely to be made. This could be for reasons such as: a group is particularly marginalised; significant risks of reprisal exist; or the affected group are children who in practical terms are unable to bring a complaint.

A recent decision of the Victorian Civil and Administrative Tribunal considered whether, under current provisions in the Victorian Equal Opportunity Act, a person can apply to the tribunal for failure to comply with the positive duty. The Tribunal concluded that a person cannot apply to the tribunal to lodge a complaint about breach of the positive duty but noted that, had the Victorian Equal Opportunity Act provided the jurisdiction to hear the dispute, it would have found the allegation proven.¹⁹⁰

¹⁸⁶ For example, the *Anti-Discrimination Act 1991* (Qld) s 220 makes it an offence for a person in a specified capacity, for example a staff member of the Commission, to community information obtained during their work to another person. The maximum penalty for a person is 85 penalty units.

¹⁸⁷ See for example: Sisters Inside Inc submission; Caxton Legal Centre submission; Australian Discrimination Law Experts Group submission.

¹⁸⁸ See for example: Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Equality Australia submission.

¹⁸⁹ Equality Australia submission, 24.

¹⁹⁰ *Oliver v Bassari (Human Rights)* [2022] VCAT 329 (28 March 2022).

Some submissions considered whether, instead of making a complaint, a person could make a report to the Commission about an alleged failure to comply with the positive duty, without taking further action. This could provide the Commission with information about serious or systemic issues.

The Review's position

The Review considers that:

- Providing the Commission with mechanisms to address non-compliance with the Act is critical to ensuring that its function to act proactively is effective.
- The Commission should be given functions and powers to investigate serious and systemic issues on its own initiative, whether a complaint has been brought or not.
- The outcomes of Commission investigations should include the capacity to make a public report to the Attorney-General or Parliament, to seek enforceable undertakings, to issue compliance notices, and to apply to a tribunal or court to seek civil penalties for non-compliance.
- To support proactive compliance, there should be a staged introduction of provisions to allow duty holders time to seek and receive guidance on implementing a program to comply with the positive duty. More punitive enforcement powers such as enforceable undertakings, compliance notices, and civil penalties should commence after the new Act has been in operation for two years.

Recommendation 17

17.1 The Commission's educative and research functions should be retained, and their scope should be expanded to ensure they can meet the new objectives of the Act.

17.2 The Commission should have a legislative basis for:

- Developing and publishing guidelines in consultation with relevant duty holders and people affected by discrimination and sexual harassment to whom the practice guidelines will affect or relate.
 - Conducting independent reviews that allow the Commission to, on request by a duty holder, enter an agreement to review an organisation's programs and practices to promote compliance with the Act. An agreement may provide for the payment of the Commission's reasonable costs of undertaking the review.
 - Providing advice about action plans. An action plan should not be legally binding but may be considered by a tribunal or court if relevant to a matter before the court or tribunal under this Act.
 - Conducting investigations on its own initiative if certain criteria apply. The criteria should be based on section 127 of the *Equal Opportunity Act 2010* (Vic), and include whether the matter raises a serious issue, relates to a class or group of people, cannot reasonably be expected to be resolved through dispute resolution, there are reasonable grounds to suspect one or more contraventions of the Act have occurred and the investigation would advance the objectives of the Act.
-

Recommendation 18

18.1 At the conclusion of an investigation, the Commission should have the legislative basis to make findings and recommendations.

18.2 The Act should ensure that the outcome of an investigation conducted under these provisions can include:

- taking no further action by the Commission
- providing a public report that contains recommendations to the Attorney-General or Parliament
- entering into an enforceable undertaking with the duty holder
- issuing a compliance notice and, if breached, applying to a tribunal or court to seek civil penalties.

Recommendation 19

19.1 The Commission should retain its investigation powers to compel the production of information and documents, including data. These powers should be for the following purposes:

- undertaking research
- conducting inquiries into complaints received by the Commission
- conducting own-initiative investigations.

19.2 The Act should allow the Commission to require a person to attend before the Commission at a reasonable place and time for the purposes of giving information or answering questions relevant to an investigation.

19.3 The Act should update the penalty provisions that apply to a person for failure to comply with a requirement to produce, provide or attend.

Recommendation 20

20.1 All of the above provisions should be introduced into the new Act. However, to allow time for duty holders to take reasonable and proportionate steps to comply with any new obligations, provisions relating to enforceable undertakings, compliance notices, and civil penalties should come into effect after a period of two years.



Chapter 7:

Updating protected attributes

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Grounds of discrimination

The Terms of Reference for this Review ask us to consider:

- whether the current definitions of protected attributes in the Anti-Discrimination Act best promote the rights to equality and non-discrimination, and
- whether additional attributes should be introduced.¹

The Anti-Discrimination Act prohibits discrimination on the basis of 16 grounds or ‘attributes,’ most of which have been protected since the Act was introduced. Nine attributes have a definition in the Act.

The current attributes are:

- sex
- relationship status
- pregnancy
- parental status
- breastfeeding
- age
- race
- impairment
- religious belief or religious activity
- political belief or activity
- trade union activity
- lawful sexual activity
- gender identity
- sexuality
- family responsibilities
- association with, or relation to, a person identified on the basis of any of these attributes.

The Discussion Paper included questions about whether the current attributes and their definitions should be updated, and whether new attributes should be added. Throughout the Review, we were told that additional attributes should be included and that the existing definitions needed to be updated, both in terms of the language used and the definition in the Act.

We recommend updating the terminology and definitions for several existing attributes, and that additional attributes be included in the Anti-Discrimination Act. These are: sex characteristics, irrelevant criminal record, physical features, subjection to domestic or family violence, and homelessness.

¹ Review of the Anti-Discrimination Act 1991 (Qld), Terms of Reference 3(c).

Updating current attributes

Nine of the 16 protected attributes are defined in the Anti-Discrimination Act. This section considers whether those definitions remain appropriate, or whether new definitions are needed.

In some instances, we have decided that an attribute does not need a statutory definition and can take its ordinary meaning.

The Commission, courts, and tribunals are required to interpret the Act in a way that is consistent with human rights protected under the Human Rights Act.

In the Discussion Paper we ask about the current definitions for a number of attributes. Submissions and consultations that considered these topics suggested we also examine the current definitions for two attributes not included in the Discussion Paper – religious belief or religious activity, and family responsibilities.

Criteria for updates

In deciding whether attribute names and definitions best promote the rights to equality and non-discrimination, we have had regard to:

- **Contemporary approaches** – whether the attributes and their definitions are consistent with contemporary approaches, including in Australian state and federal anti-discrimination laws.
- **Updating terminology** – whether the names of attributes and their definitions are outdated by contemporary standards and may deter people from engaging with the complaint system.
- **Addressing a gap in protection** – whether the current definitions mean that the law is not protecting some people who experience discrimination, where it cannot be objectively justified.

Disability

The review received 37 responses to the Discussion Paper in relation to the language and scope of the impairment attribute.² We also heard from people with disability and organisations that advocate for or support people with disability through a roundtable,³ and through consultations.⁴

2 Queensland Council of Social Service submission; Name withheld (Sub.026) submission; Public Advocate (Queensland) submission; Fibromyalgia ME/CFS Gold Coast Support Group Inc submission; Dr Grazia Catalano submission; Independent Education Union - Queensland and Northern Territory Branch submission; Christian Schools Australia submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Queensland Alliance for Mental Health submission; Dr Claire E Brolan submission; Australian Lawyers Alliance submission; Vision Australia submission; Australian Discrimination Law Experts Group submission; Queensland Family and Child Commission submission; TASC National Limited submission; Tenants Queensland submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Queensland Council for Civil Liberties submission; Queensland Catholic Education Commission submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Name withheld (Sub.135) submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission; Queensland Mental Health Commission submission; Department of Transport and Main Roads (Qld) submission; Department of Education (Qld) submission; Name withheld (Sub.154) submission; Queenslanders with Disability Network submission; Royal Australian & New Zealand College of Psychiatrists submission; Queensland Civil and Administrative Tribunal submission.

3 People with disability roundtable, 4 February 2022.

4 See for example: AMPARO Advocacy Inc consultation, 8 September 2021; Kevin Cocks consultation, 28 February 2022.

Consistently over many years, the most common category of complaint that is made to the Commission is on the basis of impairment.⁵

Impairment or disability?

In the Discussion Paper we asked for submissions on whether the name of the current impairment attribute should be replaced with the name ‘disability’.

Fifteen submissions supported a change of the attribute to ‘disability’,⁶ including for the following reasons:

- The social model of disability recognises disability as the result of a physical, social and attitudinal barriers placed in the way of people with disability, whereas ‘impairment’ is grounded in the biomedical model of health and disability, focusing on the limitations or deficits of a person.⁷
- Negative and stigmatising connotations associated with the term ‘impairment’.⁸
- ‘Disability’ is the term now more commonly used in a variety of sectors, such as education and health.⁹
- It is consistent with terminology used in *the United Nations Convention on the Rights of People with Disability*, and in federal, and other anti-discrimination legislation.¹⁰

There were three submissions in support of retaining the term ‘impairment’.¹¹ Australian Discrimination Law Experts Group thought that ‘impairment’ in discrimination law is more consistent with the social model of disability as it refers to personal characteristics, while discrimination is the ‘disabling’ process experienced by people with impairments.¹² The Queensland Nurses and Midwives Union also cautioned against the change as it could lead to a narrowing of the scope of people covered by the attribute.¹³ The submissions in relation to retaining the term ‘impairment’ were not from disability-focused organisations.

In contrast, Queenslanders with Disability Network (QDN) considered that:

Disability is generally considered a more appropriate term than impairment as there have been many negative connotations associated with the term impairment as it is usually used to describe a person’s lack of function and is linked to arduous assessments an individual must go through to ‘prove’ their disability.¹⁴

5 In 2020-21, 46.2% of discrimination complaints were about impairment discrimination. Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 2021) 36 ‘QHRC Annual Report 2020-2021’.

6 Public Advocate (Queensland) submission; Christian Schools Australia submission; Dr Claire E Brolan submission; Australian Lawyers Alliance submission; Vision Australia submission; TASC National Limited submission; Queensland Catholic Education Commission submission; Aged and Disability Advocacy Australia, Name withheld (Sub.135) submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Department of Transport and Main Roads (Qld) submission; Department of Education (Qld) submission; Queenslanders with Disability Network submission.

7 Australian Lawyers Alliance submission; Dr Claire E Brolan submission; Vision Australia submission; Queensland Advocacy Incorporated submission; Queenslanders with Disability Network submission; Public Advocate (Qld) submission.

8 Queenslanders with Disability Network submission; Queensland Law Society submission.

9 Queensland Catholic Education Commission submission; TASC National Limited submission.

10 Public Advocate (Queensland) submission; Christian Schools Australia submission; Dr Claire E Brolan submission; Australian Lawyers Alliance submission; Vision Australia submission; Department of Transport and Main Roads (Qld) submission; Queensland Law Society submission.

11 Name withheld (Sub.026) submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission.

12 Australian Discrimination Law Experts Group submission, 46.

13 Queensland Nurses and Midwives Union submission, 22.

14 Queenslanders with Disability Network submission, 4.

This submission was consistent with the polling we did with people with disability at a roundtable hosted with QDN, where 69% of attendees preferred 'disability,' 12% preferred 'impairment' and 19% had no preference.¹⁵

Kevin Cocks, a former Anti-Discrimination Commissioner, noted that compared with the term 'disability':

Impairment is still about functionality, and how that may or may not have an impact upon you, but this does not cover enough, including neurodivergence. And, it needs a quite simple definition, basically referring to someone with a differently wired brain. So that covers off, autism, people with learning disability, people with intellectual disabilities, people with ADHD, people with audio receptive language disorder. It's really quite diverse and people often have different ways of coping.¹⁶

Some submissions suggested retention of 'impairment' and the addition of 'disability'.¹⁷

Submissions indicated that there needs to be public guidance and education regarding the scope of disability discrimination, to ensure community awareness and understanding of the protections.¹⁸

We have recommended below that the attribute should be retitled as 'disability,' and will continue to refer to the term disability in this section and all other sections of the report. For accuracy, we will refer to 'impairment' when referring to the current sections of the Act.

The Review's position

The Review's position is that:

- The attribute 'impairment' be replaced with 'disability' as a term which is more consistent with contemporary understandings of the attribute, and for consistency with federal and most other state and territory anti-discrimination laws.

Comparative approaches

Scope of the attribute

Most Australian jurisdictions, except for Queensland, Northern Territory, and South Australia, use the term 'disability.' Most definitions of disability or impairment are exhaustive definitions, with the exception of Northern Territory.¹⁹

Apart from Western Australia, in all the state and federal definitions of this attribute there are references in varying terms to:

- total or partial loss of the person's bodily functions. In some cases, there is also reference to a loss of a person's mental functions
- total or partial loss of a part of the body
- the presence in the body of organisms causing or capable of causing disease or illness

¹⁵ Queenslanders with Disability Network, people with disability roundtable, 4 February 2022.

¹⁶ Kevin Cocks consultation, 28 February 2022.

¹⁷ Queensland Council of Unions submission; Fibromyalgia ME/CFS Gold Coast Support Group Inc submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission.

¹⁸ Queensland Council of Unions submission; Independent Education Union - Queensland and Northern Territory Branch submission.

¹⁹ *Disability Discrimination Act 1992* (Cth) s 4(1) (definition of 'disability'); *Anti-Discrimination Act 1991* (Qld) Sch 1 (definition of 'impairment'); *Anti-Discrimination Act 1977* (NSW) s 4(1) (definition of 'disability'); *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'disability'); *Equal Opportunity Act 1984* (SA) s 5(1) (definition of 'disability'); *Equal Opportunity Act 1984* (WA) s 4(1) (definition of 'impairment'); *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of 'disability'); *Anti-Discrimination Act 1992* (NT) s 4(1) (definition of 'impairment'); *Discrimination Act 1991* (ACT) s 5AA.

- the malfunction, malformation, or disfigurement of a part of a person's body
- a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction.

All Australian jurisdictions have a provision within the definition of disability regarding mental health. Most jurisdictions use terms similar to: 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.'²⁰ The Northern Territory instead refers to 'a psychiatric or psychological disease or disorder, whether permanent or temporary.'²¹ Victoria takes a different approach by providing 'mental or psychological disease or disorder' as an illustrative example of 'a malfunction of a part of the body.'²²

The Northern Territory is the only jurisdiction to explicitly refer to a 'physical or intellectual disability.'²³

No jurisdictions refer to addiction, although under NSW laws, there is an express exception to disability discrimination if the disability relates to a person's addiction to a prohibited drug.²⁴

No jurisdictions expressly refer to HIV as a protected attribute, although NSW and ACT both protect against vilification on the basis that a person has, or is thought to have, HIV/AIDS.²⁵

We note that the Queensland Parliament Legal Affairs and Safety Committee has recently recommended that the government ensures anti-vilification protections extend to 'medical status including HIV/AIDS status.'²⁶ This has been supported by the government in principle, pending the outcome of this Review.²⁷ The Committee considered that disability/impairment and HIV/AIDS status were 'very obvious omissions' from protection.²⁸

Future disability

Definitions of disability in federal legislation, NSW, Tasmania, Victoria and the ACT include conditions that may exist in the future, in some cases including, but not limited to, where the person has a genetic predisposition to that disability.²⁹ The ACT also separately protects the attribute of genetic information.³⁰

Is there a gap in protection?

The Review heard about the following gaps in protection that will be covered by this section:

- The current definition includes language that makes it unclear whether people who are neurodiverse are covered.
- People living with HIV or other health conditions do not identify themselves as having a 'disability'.

20 *Disability Discrimination Act 1992* (Cth) s 4(1) (definition of 'disability' para (g)). See also: *Anti-Discrimination Act 1991* (Qld) Sch 1 (definition of 'impairment' para (d)); *Anti-Discrimination Act 1977* (NSW) s 4(1) (definition of 'disability' para (e)); *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'disability' para (f)); *Equal Opportunity Act 1984* (SA) s 5(1) (definition of 'disability' para (g)); *Equal Opportunity Act 1984* (WA) s 4(1) (definition of 'impairment' para (c)); *Discrimination Act 1991* (ACT) s 5AA(1)(g).

21 *Anti-Discrimination Act 1992* (NT) s 4(1) (definition of 'impairment' para (j)).

22 *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of 'disability' para (d)(i)).

23 *Anti-Discrimination Act 1992* (NT) s 4(1) (definition of 'impairment' para (h)).

24 *Anti-Discrimination Act 1977* (NSW) s 49PA.

25 *Anti-Discrimination Act 1977* (NSW) Part 4F; *Discrimination Act 1991* (ACT) s 67A.

26 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022).

27 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022).

28 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022), 43.

29 *Disability Discrimination Act 1992* (Cth) s 4(1) (definition of 'disability' para (j)); *Anti-Discrimination Act 1977* (NSW) s 49A(d); *Anti-Discrimination Act 1998* (Tas) s 3 (definition of 'disability'); *Equal Opportunity Act 2010* (Vic) s 4(1) (definition of 'disability'); *Discrimination Act 1991* (ACT) s 5AA(2)(b) and (c).

30 *Discrimination Act 1991* (ACT) s 7(1)(h).

- Future disability and pre-disposition to illness is not covered.
- People experiencing mental health conditions do not identify with the language of disability.
- Reliance on assistance animals other than dogs is not covered.
- The extent of coverage for people who experience addiction is unclear.

The definition of disability

Current approach

The current definition of ‘impairment’ under the Act is expansive, including physical disability, learning difference, mental health conditions, illness and disease, and reliance on an assistance dog, wheelchair or other remedial device.³¹ However, as we explore in the following sections, there may be an opportunity to update the scope of protection and the language used in the definition.

Updating language in the definition

During the roundtable we held with people with disability, 69% of participants thought that the definition in the Act should change and 31% were unsure. Some of the concerns included that the terminology was confusing, and particularly it was unclear about whether it included people with ADHD or people on the autism spectrum. One participant told us that with respect to the current definition which refers to ‘learning more slowly:’

*Oh, I don't know what that means. Whereas intellectual disability, autism, though, you know, I know what those terms mean. So yeah, I definitely think it doesn't sort of resonate or even have much meaning. So I think that does need to change.*³²

Another participant told us that:

*It doesn't necessarily mean that person with autism or a neurodiverse difference has trouble learning compared with everyone else. It's just that they learn at a different rate and through a different route.*³³

We also received the following submissions regarding the language that should be used in defining disability:

- use language that is not inherently deficit based³⁴
- have consistency with federal law³⁵
- remove references to outdated language such as ‘malfunction,’ ‘malformation’ and ‘disfigurement’³⁶
- care needs to be taken to use language inclusive of people with neurodiversity such as being on the autism spectrum, which is often considered a difference rather than a ‘disorder or malfunction’³⁷

31 *Anti-Discrimination Act 1991* (Qld) Sch 1 (definition of ‘impairment’).

32 People with disability roundtable, 4 February 2022.

33 People with disability roundtable, 4 February 2022.

34 Queensland Network of Alcohol and Other Drug Agencies Ltd submission, 3.

35 Queensland Council of Unions submission, 25; Australian Discrimination Law Experts Group, 46.

36 Department of Transport and Main Roads submission, 2.

37 Caxton Legal Centre submission, 22; People with disability roundtable, 4 February 2022.

- ‘bodily’ functions should be changed to ‘body’ functions because ‘bodily’ is often subconsciously inferred to only mean incontinence-related issues.³⁸

People living with HIV and other health conditions

Current approach

The Act currently covers people who have organisms causing disease or illness under the definition of impairment,³⁹ which can include conditions as minor as a common cold, or as serious as a major, chronic illness.

Is disability an appropriate term for a condition or illness?

Submissions on behalf of people living with HIV indicated that the term ‘disability’ was not appropriate, as their status has very little impact on their ability to live day to day life. They recommended express protection be given to people living with HIV or a chronic health condition, either separate to disability, or incorporated into the definition of impairment.⁴⁰

Professor Claire Brolan noted United Nations guidance that people with HIV/AIDS experience discrimination on the grounds of their health status and that health status is an attribute of discrimination in its own right. She points to her knowledge of cases of discriminatory treatment on account of their COVID-19 diagnosis. It is in her view inadequate that protection of health status be ‘tacked on’ or under an impairment provision that uses deficit-based and outdated bio-medical framings of disease and ill health.⁴¹

For similar reasons, submissions were also made for the inclusion of ‘irrelevant medical record’ as a protected attribute.⁴²

Future disability and predisposition to genetic conditions

Current approach

The current definition includes illness, disease or injury that presently exists or no longer exists,⁴³ but unlike the federal Disability Discrimination Act,⁴⁴ does not cover people based on conditions that may exist in the future including because of a genetic predisposition.⁴⁵

Should the Act include predisposition to genetic conditions?

Three submissions recommended, consistent with federal laws, that the definition of disability should include disability that may exist in the future (including because of a genetic predisposition to that disability).⁴⁶ Similar issues were also raised in relation to irrelevant medical record, in this chapter, and in relation to superannuation and insurance exceptions in chapter 8.

38 Fibromyalgia ME/CFS Gold Coast Support Group Inc submission, 11.

39 *Anti-Discrimination Act 1991* (Qld), Dictionary – impairment (e).

40 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 12; Scarlet Alliance, Australian Sex Workers Association submission, 12; Respect Inc and DecrimQLD submission, 32-33.

41 Dr Claire E Brolan submission, 7. Submissions from Queensland Network of Alcohol and Other Drug Agencies Ltd and Fibromyalgia ME/CFS Gold Coast Support Group, Inc also supported protection of ‘health status’.

42 Dr Grazia Catalano submission; Australian Discrimination Law Experts Group submission; Queensland Advocacy Incorporated submission; Community Legal Centres Queensland submission; Royal Australian & New Zealand College of Psychiatrists submission.

43 *Anti-Discrimination Act 1991* (Qld) Sch 1 (definition of ‘impairment paras (g) and (h)).

44 *Disability Discrimination Act 1992* (Cth).

45 *Disability Discrimination Act 1992* (Cth), s 4(1) (definition of ‘disability’ para (j)).

46 Queensland Council of Unions submission; Independent Education Union - Queensland and Northern Territory Branch submission; Australian Discrimination Law Experts Group submission.

Mental health conditions

In the Discussion Paper we asked for submissions on whether a separate attribute should be created, or the definition amended, to refer specifically to mental health or psychosocial disability.

Fifteen submissions supported specific reference to mental health or psychosocial disability under the Act.⁴⁷ Many people experiencing mental health issues do not identify with the language of disability.⁴⁸ Queensland Alliance for Mental Health explains:

Psychosocial disability, with its fluctuating/episodic nature and ongoing attempts to achieve personal recovery is distinct from physical and intellectual disability. People living with psychosocial disability also encounter different types of discrimination, based on the enduring stigma attached to mental illness and its propensity to be invisible and not easily quantified. This can be a barrier to seeking help and affect housing and employment opportunities in a way different to people living with physical or intellectual disability.

Moreover, this focus on impairment or disability that underpins the AD Act is diametrically opposed to a wellness and recovery framework. It exacerbates the stigma and does not align with how our sector sees mental illness and the recovery journey.⁴⁹

*Curran v Yourtown & Anor*⁵⁰ was given as an example of the need for a clearer definition of impairment or disability in relation to mental health.⁵¹ In that case, the Queensland Industrial Relations Commission accepted that the complainant had anxiety, but did not consider there was evidence of impairment for the purpose of the Act, stating that she was 'required to produce expert opinion evidence from a person duly qualified to do so.'⁵²

This is consistent with concerns raised by the Queensland Mental Health Commission (QMHC) that people who are experiencing mental health issues but do not meet diagnostic criteria, or which are only episodic in nature, might not be protected by the current wording of the Act. The QMHC noted that the disability sector is increasingly using the term 'psychosocial disability' to describe impacts on daily functioning and recognise the broader social disadvantage and effects of mental illness on people.⁵³

We heard from a person who had experienced workplace discrimination on the basis of mental health, who told us:

*I often see mental illness described as a disability. While I understand the purpose of this, many people with mental illness may not consider themselves as having a disability. Also, those with mental illnesses are more likely to experience different issues and different types of discrimination in comparison to the broader disability community. As such, it may be beneficial to separate these groups out.*⁵⁴

47 Independent Education Union - Queensland and Northern Territory Branch submission; Queensland Alliance for Mental Health submission; Youth Advocacy Centre Inc submission; Queensland Mental Health Commission submission; Name withheld (sub.154) submission; Dr Claire E Brolan submission; Australian Lawyers Alliance submission; TASC National Limited submission; Queensland Catholic Education Commission submission; Aged and Disability Advocacy Australia submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Australian Discrimination Law Experts Group submission; Queensland Family and Child Commission submission; Caxton Legal Centre submission.

48 Queenslanders with Disability Network submission.

49 Queensland Alliance for Mental Health submission, 5.

50 *Curran v Yourtown & Anor* [2019] QIRC 59.

51 Queensland Advocacy Incorporated submission.

52 *Curran v Yourtown & Anor* [2019] QIRC 59 [29].

53 Queensland Mental Health Commission submission, 7.

54 Name withheld (Form.724) survey response.

On the other hand, there were submissions that were supportive of consistent wording with the Disability Discrimination Act, which does not refer to mental health and psychosocial disability, or that a separate attribute could lead to the unintended exclusion of other groups, or was unnecessary.⁵⁵ Concerns regarding unclear coverage could be addressed by a legislative note in the Act and community education.⁵⁶

Assistance animals

In the Discussion Paper we asked whether reliance on a guide, hearing or assistance dog be broadened to assistance animals and whether it should only apply to animals accredited under law such as under the Guide, Hearing and Assistance Dogs Act.⁵⁷ We received 15 submissions on the issue of assistance animals. 14 submissions supported express protection in relation to assistance animals,⁵⁸ and one submission provided potential support.⁵⁹

Current approach

The current definition of ‘impairment’ under the Act includes ‘reliance on a guide, hearing or assistance dog, wheelchair or other remedial device.’⁶⁰

The Act also makes it unlawful to discriminate by:

- refusing to rent accommodation because the person relies on a guide, hearing or assistance dog;
- requiring the person to keep the dog elsewhere; or
- charging extra because the dog lives at the accommodation.⁶¹

A guide, hearing or assistance dog is a dog trained to be used as an aid by a person with vision or hearing impairment or trained to assist a person with a disability to reduce their need for support.⁶²

We note that indirect discrimination already provides protection for people with disability where there is a condition in place that disadvantages people because of reliance on an assistance animal – for example a ‘no animals’ rule at an apartment complex. If a person is told to leave a premises because they have an assistance dog, this would amount to direct discrimination because of the definition of ‘impairment.’

Comparative approaches

The Disability Discrimination Act provides a distinct category of protection for a person who requires adjustments because they have a carer, assistant, assistance animal or disability aid.⁶³

55 Australian Discrimination Law Experts Group submission; Queensland Council of Unions submission; Legal Aid Queensland submission; Department of Education (Qld) submission.

56 Australian Discrimination Law Experts Group submission; Department of Education (Qld) submission; Queensland Council of Unions submission.

57 *Guide, Hearing and Assistance Dogs Act 2009* (Qld).

58 Fibromyalgia ME/CFS Gold Coast Support Group Inc submission; Tenants Queensland submission; Queensland Council for Civil Liberties submission; Department of Education (Qld) submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Queensland Catholic Education Commission submission; Aged and Disability Advocacy Australia submission; Australian Lawyers Alliance submission; TASC National Limited submission; Australian Discrimination Law Experts Group submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Vision Australia submission.

59 Christian Schools Australia submission.

60 *Anti-Discrimination Act 1991* (Qld) Sch 1 (definition of ‘impairment’ para (f)).

61 *Anti-Discrimination Act 1991* (Qld) s 85.

62 See *Anti-Discrimination Act 1991* (Qld) Sch 1 (definitions of ‘guide dog’, ‘hearing dog’ and ‘assistance dog’) and *Guide, Hearing and Assistance Dogs Act 2009* (Qld) Sch 4 (definitions of ‘guide dog’, ‘hearing dog’ and ‘assistance dog’).

63 *Disability Discrimination Act 1992* (Cth) s 8.

The protection is subject to exceptions including in relation to the protection of public health, and the health of other animals.⁶⁴

An assistance animal is defined as a dog or other animal:

- accredited under a State or Territory law; or
- accredited by an animal training organisation prescribed by regulation; or
- trained to assist a person with disability to alleviate the effect of the disability and meets standards of hygiene and behaviour that are appropriate for an animal in a public place.⁶⁵

In the ACT, the definition of disability includes reliance on a support person, a disability aid, or an assistance animal.⁶⁶

An assistance animal means one trained to assist a person with disability to alleviate the effect of the disability (including by guiding a person who is blind or vision impaired or alerting a person who is deaf or hearing impaired to sounds).

The assistance animal must satisfy any requirements prescribed by regulation which currently requires that the animal is:

- accredited under a State or Territory law; or
- accredited by an organisation that trains animals to assist a person with disability to alleviate the effect of the disability; or
- trained to assist a person with disability to alleviate the effect of the disability and meets the standards of hygiene and behaviour that are appropriate for an animal in a public place.⁶⁷

South Australia makes a distinction between ‘assistance animals’ and ‘therapeutic animals.’ While assistance animals only refers to dogs,⁶⁸ therapeutic animals are animals certified by a medical practitioner as being required to assist a person as a consequence of the persons disability or otherwise prescribed by regulation.

It is unlawful to treat a person unfavourably because the person possesses or is accompanied by an assistance animal, or to separate a person from their assistance animal.⁶⁹ For therapeutic animals, it is unlawful to refuse or defer an application for accommodation, or give the application late order of precedence, on the ground that the person intends to keep a therapeutic animal, unless such refusal is reasonable.⁷⁰

Is there a gap in protection?

Most submissions supported adopting the Disability Discrimination Act approach which creates a distinct category of discrimination on the basis of adjustments needed for their care, assistance animal or disability aid.⁷¹ Some submissions indicated that because of the federal laws in place, this would create no additional burden on duty-holders, and consistency is beneficial.⁷²

64 *Disability Discrimination Act 1992* (Cth) ss 48, 54A.

65 *Disability Discrimination Act 1992* (Cth) s 9.

66 *Discrimination Act 1991* (ACT) s 5AA(2).

67 *Discrimination Act 1991* (ACT) s 5AA(3); *Discrimination Regulation 2016* (ACT) s 2.

68 That is, dogs accredited under the *Dog and Cat Management Act 1995* (SA), or a class of animal prescribed under regulation, for which there are currently none: *Equal Opportunity Act 1984* (SA) s 5(1) (definition of ‘assistance animal’).

69 *Equal Opportunity Act 1984* (SA) ss 66(e), 88.

70 *Equal Opportunity Act 1984* (SA) s 88A.

71 Vision Australia submission; Australian Discrimination Law Experts Group submission; TASC National Limited submission; Queensland Advocacy Incorporated submission; Tenants Queensland submission; Legal Aid Queensland submission; Caxton Legal Centre submission.

72 Vision Australia submission; Australian Discrimination Law Experts Group submission; Legal Aid Queensland submission; Caxton Legal Centre submission.

Tenants Queensland recommended that the approach to ‘trained’ should be that taken in *Jackson v Ocean Blue Queensland*⁷³ where training by an approved trainer or approved training institution was not required, but rather required that the animal perform identifiable physical tasks and behaviour to reduce a person’s need for supports.⁷⁴

Christian Schools Australia, while potentially supportive of change, voiced concerns about whether broadening the range of animals would pose a risk to safety of students and the efficacy of the learning environment in a school setting.⁷⁵

Particular issues were raised in relation to discrimination in the area of accommodation:

- Assistance animals ‘in training’ should be protected, to recognise that part of the training of an assistance animals may be to stay with the person, both inside and outside of their home.⁷⁶
- There should be protections for ‘companion animals’ (excluding holiday accommodation), which can alleviate some functional challenges of some disabilities for vulnerable people who would otherwise live alone. Dealing with this matter separately might reduce the burden on users of assistance animals who find their needs are taken less seriously when pets are inappropriately asserted to be assistance animals.⁷⁷

Addiction

We asked for submissions on whether the law should be clarified in relation to people who experience addiction.

We received 13 submissions on this issue.⁷⁸ Of these, 11 supported more clarity that the protection extends to people experiencing addiction (two of these said that it should be dealt with as a separate attribute),⁷⁹ one supported more clarity one way or the other,⁸⁰ and one expressed the view that addiction was already covered by current protections.⁸¹ Notably, none of the submissions received indicated that addiction should not be protected under the Act.

Queensland Network of Alcohol and Other Drug Agencies Ltd (QNADA) is the peak organisation representing the views of the non-government alcohol and drug sector in Queensland. Their position is that the current definition of ‘impairment’ is inaccurate and stigmatising in its application to people with addiction, and that discrimination is not limited to people who experience problematic use. QNADA’s recommendation is to protect ‘health status’ as an attribute, with specific guidance that this extends to people who use alcohol and other drugs, irrespective of their level of use.⁸²

73 *Jackson v Ocean Blue Queensland Pty Ltd* [2020] QCAT 23.

74 Tenants Queensland submission, 5.

75 Christian Schools Australia submission, 16.

76 Tenants Queensland submission, 4-5.

77 Caxton Legal Centre submission, 22-23. See also Fibromyalgia ME/CFS Gold Coast Support Group, Inc submission, 11.

78 Queensland Council of Unions submission; Queensland Catholic Education Commission submission; Aged and Disability Advocacy Australia submission; Name withheld (Sub.026) submission; Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission; Independent Education Union submission; Queensland Mental Health Commission submission; Australian Lawyers Alliance submission; TASC National Limited submission; Australian Discrimination Law Experts Group submission; Legal Aid Queensland submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Caxton Legal Centre submission.

79 Aged and Disability Advocacy Australia submission; Name withheld (Sub.026) submission; Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission; Independent Education Union submission; Queensland Mental Health Commission submission; Australian Lawyers Alliance submission; TASC National Limited submission; Australian Discrimination Law Experts Group submission; Legal Aid Queensland submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Caxton Legal Centre submission.

80 Queensland Catholic Education Commission submission.

81 Queensland Council of Unions submission.

82 Queensland Network of Alcohol and Other Drug Agencies Ltd submission, 4-5.

Three submissions indicated that express protection would remove any residual doubt, and legitimise the legal position of substance abuse as a mental health disorder.⁸³

The Australian Discrimination Law Experts Group suggested that the definition of disability remain consistent with federal law, but the Act include a note to indicate coverage of addictions.⁸⁴

Queensland Positive People and others noted that the tables used to assess work-related impairment for the disability support pension under the Social Security Act⁸⁵ recognise functional impairment as a result of substance use.⁸⁶

The Review's position

The Review's position is that:

- As duty holders must already comply with the broader definition in the Disability Discrimination Act, it will reduce complexity and make it easier to comply to align the definitions to the greatest extent possible. Adopting this definition will expand coverage to disability that may exist in the future (including because of a genetic predisposition to that disability), and update the language to 'learning differently' rather than 'learning more slowly.'
- Without creating inconsistency between the scope of the protection between the state and federal jurisdictions, there are terms such as 'malfunction,' 'malformation' and 'disfigurement' that could be modernised to bring the definition more into alignment with modern terminology.
- The current definition already encompasses disease and illness, including people living with HIV/AIDS. While it is not language that is used by the community to reflect their status, we could not identify a gap in protection that adding 'health status' would resolve, and providing an additional 'health status' attribute could create duplication and confusion as to which conditions fall into each category.
- Similarly, referring specifically, and only, to 'mental or psychological disease or disorder' may have unintended consequences, including narrowing protections for people who do not meet diagnostic criteria.
- Expanding the Act to include assistance animals, rather than just dogs, using a model that aligns with the Disability Discrimination Act, is justified.
- Assistance animals 'in training' will meet threshold requirements for protection under the Act once they have had some training to assist a person with disability to alleviate the effect of the disability and meet the standards of hygiene and behaviour that are appropriate for an animal in a public place.
- Both companion animals and assistance animals in training that are genuinely necessary as an accommodation for a person with disability will continue to be protected under indirect discrimination, as they are under the current Act.
- More clarity that the attribute can extend to protection of people experiencing addiction would be beneficial, and can be achieved by a legislative note.
- While the Review acknowledges concerns regarding clarity and understanding of the attribute as it applies to people with mental illness and psychosocial disability, and

83 Legal Aid Queensland submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 12; Australian Discrimination Law Experts Group submission, 46.

84 Australian Discrimination Law Experts Group submission, 46.

85 *Social Security Act 2011* (Cth).

86 *Social Security (Tables for the Assessment of Work-related Impairment for Disability Support Pension) Determination 2011* (Cth), Part 3 Table 6.

people who are living with HIV or other health conditions, this can be addressed by guidance material.

Recommendation 21

- 21.1 The term 'impairment' should be replaced with 'disability'.
 - 21.2 The definition of disability should be aligned with the federal *Disability Discrimination Act 1992* (Cth) but should remove references to outdated or inappropriate language such as 'disfigurement', 'malformation' or 'malfunction'.
 - 21.3 The Act should provide express protection for assistance animals, not limited to dogs, using a model that is consistent with the Disability Discrimination Act.
 - 21.4 To remove any doubt, the Act should confirm that people with addiction are covered by the attribute of disability.
 - 21.5 The Commission should continue to undertake engagement with stakeholders to promote a greater understanding about the scope of the disability attribute and who it protects.
-

Gender identity and gender

In recent decades, community awareness and knowledge about gender and gender identity has increased, scientific research has been made available, legal cases have received attention, and terminology used has generally shifted.

In the Discussion Paper, we asked whether the definition of gender identity should be updated, and whether gender should be made an additional attribute. If gender were to be made an attribute, we asked whether it should be defined, and if so, how.

Soon after the Discussion Paper was published, the Queensland Parliament's Legal Affairs and Safety Committee recommended that anti-vilification protections include gender and/or sex, and gender identity and/or gender expression.⁸⁷ The Queensland Government has given in-principle support to this recommendation pending the outcome of this Review.⁸⁸ The Review's recommendations on this issue may therefore influence which attributes will be covered by future anti-vilification protections provided by the Anti-Discrimination Act.

We recommend redefining gender identity consistently with the *Yogyakarta Principles plus 10*⁸⁹ but have decided that an additional attribute of gender should not be incorporated in the Act.

87 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022) 45, Recommendation 4c and 4e.

88 Queensland Government, Response to Legal Affairs and Safety Committee Inquiry into serious vilification and hate crimes Report No 22 (2022) 2, Recommendation 4.

89 *Yogyakarta Principles: principles on the application of international human rights law in relation to sexual orientation and gender identity* (March 2007) 17

Gender identity

Current approach

‘Gender identity’ is defined in the Schedule to the Act as:

gender identity, in relation to a person, means that the person—

- (a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or
- (b) is of indeterminate sex and seeks to live as a member of a particular sex.

The current definition of gender identity takes a binary gender position (that is, only two genders – male and female) which excludes people who identify outside of the gender binary and does not explicitly refer to a person’s gender expression.

The second part of the definition erroneously refers to people of ‘indeterminate sex.’⁹⁰ We discuss a possible ‘sex characteristics’ attribute under protecting additional attributes – sex characteristics, below.

We received 35 submissions⁹¹ about the definition of gender identity and heard from trans and gender diverse people through the Have Your Say survey and our initial consultations.⁹² We also received feedback from a community survey that the Review co-designed with Queensland Council for LGBTI Health, the peak health organisation for the LGBTIQ+ community in Queensland (referred to in this section as ‘QC community survey’).⁹³

Of the submissions received, most supported change⁹⁴ because of limitations and shortcomings of the current definition, which:

- conflates gender identity and sex characteristics, even though intersex is not an identity⁹⁵

90 *Anti-Discrimination Act 1991* (Qld) Dictionary - gender identity (b).

91 Name withheld (Sub.026) submission; PeakCare Queensland Inc submission; LGBTI Legal Service Inc submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Law Society submission; Name withheld (Sub.008) submission; Queensland Council of Social Service submission; Intersex Human Rights Australia submission; IWD Brisbane Meanjin submission; Fair Go for Queensland Women submission; Sisters Inside submission; Diversity Queensland Incorporated submission; Independent Education Union - Queensland and Northern Territory Branch submission; Australian Christian Higher Education Alliance submission; Christian Schools Australia submission; Queensland Alliance for Mental Health submission; Pride in Law submission; Australian Lawyers Alliance submission; Human Rights Law Alliance submission; R Harrison submission; Dr Catherine Carroll submission; Name withheld (Sub.118) submission; Queensland Positive People (QPP), HIV/AIDS Legal Centre (HALC), The National Association of People with HIV Australia (NAPWA) submission; Aged and Disability Advocacy Australia submission; FamilyVoice Australia submission; Just.Equal Australia submission; Queensland Council for LGBTI Health submission; Australian Lawyers for Human Rights submission; Queensland Advocacy Incorporated submission; Australian Association of Christian Schools submission; Department of Education (Qld) submission.

92 Australian Transgender Support Association consultation, 19 August 2021; Trans Health Australia consultation, 1 September 2021; Open Doors consultation, 13 September 2021; Just.Equal Australia consultation, 17 September 2021.

93 Queensland Council for LGBTI Health submission.

94 Queensland Council for LGBTI Health submission; Pride in Law submission; Name withheld (sub.026) submission; Rainbow Families Queensland submission; Legal Aid Queensland submission; Intersex Human Rights Australia submission; Equality Australia submission; Just.Equal Australia submission; Australian Lawyers for Human Rights submission; Caxton Legal Centre submission; PeakCare Queensland Inc submission; Respect Inc and DecrimQLD submission; LGBTI Legal Service Inc submission; Aged and Disability Advocacy submission; Sisters Inside submission; Queensland Alliance for Mental Health submission; Diversity Queensland Incorporated submission; Name withheld (Sub.008) submission; Australian Discrimination Law Experts Group submission; Queensland Positive People (QPP), HIV/AIDS Legal Centre (HALC), The National Association of People with HIV Australia (NAPWA) submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission.

95 Intersex Human Rights Australia submission, 20.

- does not reflect the full spectrum of ways in which people identify, or the terminology that the trans and gender diverse community uses⁹⁶
- uses the term ‘opposite sex’, which excludes people who identify outside the binary gender who should have protection under the Act,⁹⁷ particularly considering the growing numbers of people who identify as non-binary or gender diverse including younger people⁹⁸
- does not incorporate elements of gender-related expression,⁹⁹ such as the way people dress or their mannerisms
- has been problematic – particularly the words ‘seeking to live’ – when interpreted by tribunals, as in the case of *Tafao*.¹⁰⁰

In the QC community survey of 74 community members, 90% of survey participants thought the definition of gender identity should change.¹⁰¹

One person, who identified as non-binary, told us about their experience through our Have Your Say survey. They said they had experienced:

...deliberate misgendering, intrusive questions about “biological sex” and sexual orientation, invalidating “non-traditional” relationships, non-binary erasure (i.e. being forced to choose male or female and gendered titles on forms etc). Like most trans and gender diverse people, these constant microaggressions and inability to have our gender validated is exhausting and contributes to poor mental health outcomes...

*Legislative change is required to clarify that non-binary people are protected from discrimination. While QHRC have informed me that non-binary people are protected from discrimination on the grounds of gender identity when I have made a phone enquiry, the current definition of gender identity in the Act technically excludes non-binary people.*¹⁰²

When we spoke with Open Doors Youth Service, an organisation that supports young people with diverse genders and sexualities, we also heard about the need to protect gender expression more clearly under the Act:

*What we’re seeing is young people who are gender nonconforming, who may identify as a boy but likes to wear dresses and makeup and stuff, they experience a lot of harassment in different places especially navigating public transport or public spaces, accessing public restrooms. They don’t necessarily identify as gender diverse but are absolutely experiencing gender-based violence, and quite regularly, so I think sometimes like having gender expression covered as well will be super helpful.*¹⁰³

96 Name withheld (Sub.026) submission; Diversity Queensland Incorporated submission, 1; Pride in Law submission, 1.

97 Queensland Alliance for Mental Health submission, 3-4.

98 Australian Discrimination Law Experts Group submission; 48; Australian Lawyers for Human Rights submission, 5-6; Legal Aid Queensland submission, 68; Open Doors, consultation, 10 September 2021.

99 Equality Australia submission, 6.

100 Caxton Legal Centre submission, 23. In the original decision, the Tribunal found that a transgender woman was not a woman but was a person of the ‘male gender’ who identifies and seeks to live as a female and is a male because of her biological sex. See *Tafao v State of Queensland & Ors* [2018] QCAT 409 at [175]. This was affirmed on appeal to QCATA.

101 Queensland Council for LGBTI Health submission, 21. Of the 74 survey participants, 22 were from people who identified with a gender different from that assigned at birth.

102 Name withheld (Form.003) survey response.

103 Open Doors Youth Service consultation, 13 September 2021.

Twelve submissions did not agree with changing the definition of gender identity, or expressed reservations¹⁰⁴ for reasons that included:

- A perception that sex-based rights for women and girls would be compromised.¹⁰⁵
- Religious educational institutions may have difficulty operationalising the law if the attribute is broadened in scope, because of the belief systems underpinning some schools or universities.¹⁰⁶

Comparative approaches

The current definition of gender identity reflects the approach of several jurisdictions when the attribute was introduced into state anti-discrimination laws around 20 years ago. Queensland, Western Australia, and New South Wales have retained the original definitions. However, in the intervening years, most equality jurisdictions have adopted a more inclusive gender identity definition.¹⁰⁷

Definition based on Yogyakarta Principles

The *Yogyakarta Principles* are a guide to human rights relating to sexual orientation and gender identity and were produced as the outcome of an international meeting of human rights experts in Yogyakarta, Indonesia in November 2006. The Principles address a broad range of international human rights standards and their application to sexuality and gender identity issues.

In 2017, additional principles were added to the original Principles to reflect developments in international human rights law and practice, and named the *Yogyakarta Principles plus 10*.¹⁰⁸ As well as outlining international best practice on defining concepts relating to sexuality, gender identity, and sex characteristics, these Principles assist with the interpretation of key rights under the *International Covenant on Civil and Political Rights* (ICCPR) including the right to recognition as a person before the law,¹⁰⁹ the right to equality,¹¹⁰ and the right to privacy.¹¹¹

These principles provide authoritative exposition of international human rights law, as required by the Terms of Reference.¹¹²

The Discussion Paper canvassed views about a definition based on the language and definitions in the *Yogyakarta Principles*.

The *Yogyakarta Principles* define gender identity in the following way:¹¹³

104 Queensland Council for Civil Liberties submission; James Cook University submission; R. Harrison submission; Dr Catherine Carol submission; Human Rights Law Alliance submission; Fair Go for Queensland Women submission; IWD Brisbane Meanjin submission; Christian Schools Australia submission; Australian Association of Christian Schools submission; Australian Christian Higher Education Alliance submission; FamilyVoice Australia submission; Name withheld (Sub.118) submission.

105 Fair Go for Queensland Women submission, 2; IWD Brisbane Meanjin submission, 1-2; Dr Catherine Carol submission, 1-2; Name withheld (Sub.118) submission, 18.

106 Christian Schools Australia submission, 16-17; Australian Association of Christian Schools submission, 13; Australian Christian Higher Education Alliance submission, 6.

107 The 'gender identity' definition has been updated and separated from intersex status/sex characteristics in Victoria, Tasmania, Australian Capital Territory, and South Australia; the Commonwealth introduced a broader definition and separate intersex status protections in 2013; Northern Territory has announced that it will protect 'gender identity' rather than transsexuality, and review of legislation in Western Australia anticipates reform.

108 *Yogyakarta Principles plus 10: additional principles and State obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (10 November 2017) 14.

109 *International Covenant on Civil and Political Rights* Article 16, reflected in s 15(1) *Human Rights Act 2019* (Qld).

110 *International Covenant on Civil and Political Rights* Article 2, reflected in s 15(2)-(5) *Human Rights Act 2019* (Qld).

111 *International Covenant on Civil and Political Rights* Article 17, reflected in s 25 *Human Rights Act 2019* (Qld).

112 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 2.

113 *Yogyakarta Principles plus 10: additional principles and State obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (10 November 2017) 14.

Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Most of the submissions that favoured a change to the definition supported this approach.¹¹⁴ The *Yogyakarta* approach was also canvassed in the QC community survey, with 67% of survey participants supporting *Yogyakarta* definitions.

Stakeholders who expressed reservations about this approach were primarily concerned about whether the language was explicit enough to make it clear that non-binary identities were included.¹¹⁵ However, these reservations were positioned as something to consider, not a withholding of support for the approach.

Alignment with other laws

The definition proposed in the Discussion Paper has recently been incorporated into the Public Health Act¹¹⁶ which prohibits conversion therapy.¹¹⁷ Conversion therapy is a practice that attempts to change or suppress a person's sexual orientation or gender identity.

Adopting this definition of gender identity would align the Queensland Act with discrimination law in Victoria, Tasmania, and the ACT, as well as other Queensland Acts.

Since 2013, the federal Sex Discrimination Act has included gender identity¹¹⁸ which is defined as:

The gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

While stakeholders considered this definition preferable to the current approach in the Anti-Discrimination Act, only two submissions identified this approach as something to consider.¹¹⁹

Other suggestions

Other suggestions for the definition of gender identity included: retaining the status quo,¹²⁰ removing the attribute altogether,¹²¹ defining gender identity to be synonymous with 'biological sex',¹²² or re-naming it 'gender identity beliefs and activities'.¹²³ Each of these options would downplay the significance of discrimination based on gender identity and narrow, rather than broaden, protection for a marginalised group of people.

The Review's position

114 PeakCare Queensland Inc submission, 12; Australian Lawyers Alliance submission, 12; Intersex Human Rights Australia submission, 23; Sisters Inside Inc submission, 10; Australian Discrimination Law Experts Group submission, 48; Diversity Queensland Incorporated submission, 2; Queensland Alliance for Mental Health submission, 4; Pride in Law submission, 2; LGBTI Legal Service Inc Qld submission, 3; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 12; Australian Lawyers for Human Rights submission, 6-7; Just.Equal Australia submission, 2; Respect Inc and DecrimQLD submission, 33; Aged and Disability Advocacy Australia submission, 10; Rainbow Families Queensland submission, 5; Queensland Council for LGBTI Health submission, 9; Equality Australia submission, 5.

115 Queensland Council for LGBTI Health submission 9.

116 *Public Health Act 2005* (Qld).

117 *Public Health Act 2005* (Qld) s 213G.

118 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

119 Pride in Law submission, 2; Queensland Law Society submission, 16.

120 Queensland Council for Civil Liberties submission, 13-15; Human Rights Law Alliance submission, 15.

121 FamilyVoice Australia submission, 8; Name withheld (Sub.118) submission, 18.

122 Australian Association of Christian Schools submission, 13; Dr Catherine Carol submission, 1-2.

123 James Cook University submission, 3; R. Harrison submission, 1-2.

The Review's position is that:

- Transgender, non-binary, and gender diverse people in Queensland experience discrimination and require protection under the Act.
- Providing people with protection from discrimination based on their gender identity does not dilute or erode the rights of other people. The attributes of sex and gender identity have coexisted in the Act for 20 years.
- The definition of gender identity requires updating so that it:
 - retains the current definitional aspect of self-identification of gender
 - removes the language of 'opposite sex' to ensure coverage of people with non-binary and gender diverse identities
 - no longer conflates intersex with gender identity
 - incorporates gender expression (including dress, speech etc).¹²⁴
- The definition of gender identity should not be restricted to specific identities (e.g. transgender, non-binary) because terminology is constantly evolving.
- The Act should include a definition that is consistent with the *Public Health Act 2005* (Qld) and the *Births, Deaths and Marriages Registration Act 2003* (Qld) to avoid inconsistent interpretations.
- While the *Yogyakarta* definition is expansive, it does not include words used by the community, such as 'transgender' or 'genderqueer'. However, the Explanatory Notes could assist interpretation by providing this context. Guidance material developed by the Commission would also assist anyone who needs recourse to the Act.

Gender

Current approach

The Act currently protects people from sex discrimination but does not refer to gender.¹²⁵ The attribute of sex is protected but not defined in the Act, and the word 'sex' is included in existing exemption provisions and examples.¹²⁶

In the Discussion Paper we asked whether gender should be included as an attribute in the Act. Of the 24 submissions on this topic,¹²⁷ some indicated support for including gender as an attribute, but most had concerns or reservations, including:

¹²⁴ Consistent with Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022), recommendation, gender expression should be incorporated as a ground for vilification, but we see no need for it to be separated from gender identity.

¹²⁵ Only *Anti-Discrimination Act 1998* (Tas) refers to 'gender' rather than 'sex'.

¹²⁶ See for example – single sex schools (s 41), restricting access to places of religious/cultural significance (s 48), reasonable sex discrimination in relation to clubs and their benefits (s 98).

¹²⁷ Name withheld (Sub.026) submission; Rainbow Families Queensland submission; PeakCare Queensland Inc submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission; Queensland Council for Civil Liberties submission; Equality Australia submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Name withheld (Sub.008) submission; Queensland Council of Social Service submission; Fair Go for Queensland Women submission; Diversity Qld Incorporated submission; Christian Schools Australia submission; Australian Lawyers Alliance submission; Human Rights Law Alliance submission; R. Harrison submission; Maternity Choices Australia submission; Name withheld (Sub.118) submission; Queensland Catholic Education Commission submission; Aged and Disability Advocacy Australia submission; Queensland Council for LGBTI Health submission; Australian Association of Christian Schools submission; Department of Education (Qld) submission.

- How gender would interact with the existing attributes of gender identity and sex is unclear.¹²⁸
- Separating gender from sex may create confusion and uncertainty.¹²⁹
- Different points of view about how gender should be defined abound and if the Act contained both sex and gender as attributes, gender may overtake or subsume sex as an attribute.¹³⁰
- Determining what falls under gender as opposed to sex discrimination may reduce protection for trans and intersex people.¹³¹

Does the attribute of sex already include gender?

As we have noted, sex is not defined in the Act or in the Acts Interpretation Act.¹³² The *Macquarie Dictionary*, often used to interpret words in the absence of a statutory definition, makes a distinction between sex as anatomical and physiological, and gender as ‘socially constructed sexual identity such as male, female, gender queer etc.’¹³³

However, as expressed by the World Health Organisation, sex and gender are hard to separate because they are concepts that ‘interact’ with each other.¹³⁴

On one view, experiences of gender-based discrimination may be covered by the current Act. Section 8 states that discrimination on the basis of an attribute includes discrimination on the basis of a characteristic that a person with the attribute generally has or is often imputed to a person with the attribute, or can include where a person is presumed to have an attribute but does not.

For sex discrimination this might include gendered expectations or stereotypes – such as not giving an employee reception work because they do not conform to stereotypical gender roles, or presumptions about a person’s sex, based on gendered appearance – such as discrimination against a masculine-presenting woman because it is presumed they are a man.¹³⁵

Equality Australia suggests that, rather than creating a ‘gender’ attribute, there may be benefit in clarifying:

that the ground of ‘sex’ includes all forms of discrimination based on gender roles, expectations and stereotypes, or making clear that the definition of ‘sex’ is not limited to or defined by any particular physical sex characteristics but extends to social roles, expectations and stereotypes related to gender.¹³⁶

What have courts and tribunals decided?

The High Court has recognised transgender people and non-binary people in two landmark decisions that challenged traditional male/female gender binary notions based on biological characteristics.

¹²⁸ Queensland Catholic Education Commission submission, 8.

¹²⁹ Christian Schools Australia submission, 20.

¹³⁰ IWD Brisbane Meanjin submission, 1; James Cook University submission, 3; Christian Schools Australia submission, 20; Maternity Choices Australia submission, 9; Name withheld (Sub.118) submission, 4.

¹³¹ Equality Australia submission, 6.

¹³² *Acts Interpretation Act 1954* (Qld) - this Act is used to interpret laws in Queensland.

¹³³ *Macquarie Dictionary* (online at 21 June 2022) ‘sex’ (def 1), ‘gender’ (def 2).

¹³⁴ World Health Organization, *Gender and health* (Web page, 2022) <<https://www.who.int/health-topics/gender>>.

¹³⁵ Equality Australia submission, 6.

¹³⁶ Equality Australia submission, 6.

In *AB v Western Australia*¹³⁷ the High Court decided that two trans men who had undergone double mastectomies and hormone treatment were of the male sex, because they were perceived as men in their day-to-day lives. The Court said there was no need for detailed knowledge of a person's bodily state (including genitalia) to make this determination.

In *Norrie's case*¹³⁸ the High Court determined that the NSW Registrar of Births, Deaths and Marriages had the power to record a person as 'non-specific' rather than male or female and accepted that a person's sex may fall outside the binary.

Prior to the introduction of gender identity as an attribute, a transgender woman who experienced transphobic treatment in a grocery store successfully argued that she had been discriminated against based on her female sex because sex includes characteristics imputed from the person's sex or a person's presumed sex.¹³⁹ However, in a more recent Queensland case about a transgender prisoner, the tribunal at first instance and on appeal did not accept that a trans person became the gender with which they identify in the absence of sex reassignment surgery.¹⁴⁰ This has created doubt as to how tribunals and courts may determine the meaning of sex and gender.

However, this interpretation is likely to be limited to the factual circumstances of the case. In the *Tafao* case, the tribunal member was attempting to identify the appropriate comparator for a woman in a prison where only males were present.

Human rights considerations

The Human Rights Act requires courts to interpret the Anti-Discrimination Act in a way that is compatible with human rights,¹⁴¹ including the right to equality before the law,¹⁴² and the right to privacy.¹⁴³

As the Anti-Discrimination Act is beneficial legislation, statutory interpretation principles require that, if there is ambiguity, it should be resolved in a way most favourable to people for whose benefit the Act is intended – that is, people with protected attributes.¹⁴⁴ A narrow interpretation of 'sex' as meaning only 'biological sex' (such as hormones, chromosomes, and anatomical characteristics) is inconsistent with this principle, and is unlikely to be compatible with human rights.

Interpreting sex in a narrow way also means that:

- Trans and gender diverse people would not be protected from sexist conduct under sex discrimination provisions.
- Refusing a trans woman assistance in crisis accommodation for women operated by a charity would not be unlawful.¹⁴⁵
- Refusing to admit a trans boy into an all-boys school would not be unlawful.¹⁴⁶

¹³⁷ *AB v Western Australia* (2011) 244 CLR 390; [2011] HCA 42.

¹³⁸ *New South Wales Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, [2014] HCA 11.

¹³⁹ *M v A and U* [2007] QADT 8; *M v A and U* [2007] QADT 23.

¹⁴⁰ See *Tafao v State of Queensland* [2020] QCATA 76 at [43]. The QCAT appeal tribunal found there was indirect discrimination based on misgendering her, but did not identify any error with the initial finding that Ms Tafao's biological sex was male and she identified as female. The Court of Appeal later overturned the Appeal Tribunal's decision that there was indirect discrimination.

¹⁴¹ *Human Rights Act 2019* (Qld) s 48.

¹⁴² *Human Rights Act 2019* (Qld) s 15.

¹⁴³ *Human Rights Act 2019* (Qld) s 25.

¹⁴⁴ The principle that anti-discrimination legislation should be interpreted as beneficial to a person who has a protected attribute is a well-established principle of common law, and has been settled by the High Court – See: *IW v City of Perth* [1997] HCA 30; 191 CLR 1, 11 (Brennan CJ and McHugh J), and see 27 (Toohey J); *Waters v Public Transport Corporation* (1991) 173 CLR 349, 394 (Dawson and Toohey JJ) and 407 (McHugh J).

¹⁴⁵ *Anti-Discrimination Act 1991* s 91.

¹⁴⁶ *Anti-Discrimination Act 1991* s 41.

Applying the reasoning from *AB v Western Australia* and *Norrie's case*, and interpreting the Act consistently with the Human Rights Act we consider the current meaning of 'sex' would encompass:

- the sex that a person was assigned at birth, where the person's gender identity aligns (cisgender people)
- the sex with which a person identifies, where a person's gender identity does not align with their sex assigned at birth (trans and gender diverse people).

This interpretation means that there would be no need for an additional gender attribute, which may create unnecessary duplication.

References to males and females in the Act

Equality Australia suggested that we remove existing binary references to sex by changing references from 'males and females' to 'people of a different sex', or people with a particular sex.¹⁴⁷

This would align with changes to the definition of gender identity that we have recommended, and would recognise non-binary people.

Sex/gender recognition and registration reforms

At the time of writing, the Department of Justice and Attorney-General is reviewing sex/gender registration under the Births, Deaths and Marriages Act.¹⁴⁸ The outcomes of that review may directly impact the meaning of the word 'sex' in the Act.

The recommendations of this Review should be considered by the government in light of the outcomes of that review.

The Review's position

The Review's position is that:

- Creating a separate attribute of gender is unnecessary, if our recommendation to expand the gender identity attribute is accepted.
- Adopting a flexible and beneficial understanding of 'sex,' consistent with the Human Rights Act and interpretation by the High Court in *AB* and *Norrie*, would include people assigned a sex at birth as well as people who identify as that sex. Explanatory Notes should clarify this point.
- Adding an additional attribute of gender may create uncertainty and confusion in interpreting the Act by trying to separate intrinsically related concepts (that is, sex and gender).
- Defining attributes of sex or gender is inherently limiting as they are evolving concepts on which there are different views. Allowing these terms to be interpreted by courts or tribunals ensures they can be context-dependent.
- Removing references to male and female in the Act, and replacing them with more neutral language such as 'in relation to sex' or 'a particular sex' would make the Act more consistent overall with the inclusion of non-binary people in the definition of gender identity.
- Depending on the outcome of the Births, Deaths, and Marriages Act reforms, a provision in the Anti-Discrimination Act should provide that all references to 'sex' in the Act means both people who were assigned a sex at birth, and people who have changed their gender/sex marker at a later time.

¹⁴⁷ Gender binary references are currently included in the Act at ss 30 (1)(b), 98, and 111(1)(a).

¹⁴⁸ *Births, Deaths and Marriages Act 2003* (Qld) - Department of Justice and Attorney-General, Review of the Births, Deaths and Marriages (Discussion Paper, March 2018).

Recommendation 22

- 22.1** The definition of gender identity should be based on the definition in the Yogyakarta Principles.
- 22.2** The Act should make reference to sex and/or gender in a way that is complementary with Queensland's birth registration laws.
- 22.3** The Act and its Explanatory Notes should clarify that all references to 'sex', or a 'particular sex' include both people of a sex that was assigned to them at birth, and people whose gender identity aligns with that sex.
-

Sexual orientation

Current approach

The attribute of 'sexuality' is defined under the current Act as:

sexuality means heterosexuality, homosexuality or bisexuality.¹⁴⁹

The definition of sexuality is narrow and does not reflect the ways that people describe various sexualities. In the Discussion Paper we asked whether there should be a new definition of sexuality, and if so, what that definition should be.

Of the 33 submissions we received about the definition of sexuality,¹⁵⁰ most supported updating the definition. Since publication of the Discussion Paper in November 2021, a parliamentary committee inquiring into vilification laws in Queensland has published its final report, which recommended that the Act cover the attribute of 'sexual orientation'.¹⁵¹

Is there a gap in protection?

During the Review, we heard that some aspects of sexuality are not covered by the definition, including for people who experience a lack of romantic or sexual attraction.¹⁵² Asexuality is an emerging way in which people are expressing their identity, but there remains limited social awareness.¹⁵³ Studies have indicated there are strong negative attitudes towards people who are

149 *Anti-Discrimination Act 1991* (Qld) Dictionary - sexuality.

150 Name withheld Sub.026 submission; Rainbow Families Queensland submission; PeakCare Queensland Inc submission; LGBTI Legal Service Inc submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Name withheld (Sub.008) submission; Queensland Council of Social Service submission; IWD Meanjin Brisbane submission; Fair Go for Qld Women submission; Diversity Queensland Incorporated submission; Independent Education Union - Queensland and Northern Territory Branch submission; Australian Christian Higher Education Alliance submission; Christian Schools Australia submission; Pride in Law submission; Australian Lawyers Alliance submission; Human Rights Law Alliance submission; R. Harrison submission; Name withheld (Sub.118) submission; Queensland Positive People (QPP), HIV/AIDS Legal Centre (HALC), The National Association of People with HIV Australia (NAPWAHA) submission; Aged and Disability Advocacy Australia submission; Just.Equal Australia submission; Queensland Council for LGBTI Health submission; Australian Lawyers for Human Rights submission; Freedom for Faith submission; Australian Association of Christian Schools submission; Department of Education (Qld) submission; Eros Association submission.

151 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022) 45, Recommendation 4.

152 See for example: Open Doors consultation, 13 September 2021; Just.Equal consultation, 17 September 2021; Townsville Community Law consultation, 17 August 2021; Queensland Council for Social Service consultation, 12 October 2021.

153 Amy Antonsen et al 'Ace and aro: Understanding differences in romantic attractions among persons identifying as asexual.' (2020) *Archives of Sexual Behavior*, 1615-1630.

asexual which are worse relative to attitudes towards gay and bisexual people.¹⁵⁴ People may also experience prejudice when presumed to be asexual, such as people with disability.¹⁵⁵

Some stakeholders were concerned that the terminology is outdated, and as a result, people who identify with sexualities outside those presented in the Act as an exhaustive list (heterosexuality, homosexuality or bisexuality) do not feel that the legislation includes or protects them.¹⁵⁶ This may include people who are pansexual, and attracted to people on the basis of personal qualities unrelated to their gender.¹⁵⁷

We heard that marginalised groups who experience discrimination because of stigma, social norms and attitudes, are discouraged from making complaints, even if they may be covered by the current definition.¹⁵⁸

Demonstrating the demand for change, around 75% of the 74 survey respondents to the QC community survey thought that the definition needs to be updated.¹⁵⁹

Sexuality or sexual orientation?

The Australian Discrimination Law Experts Group recommended a change of terminology to 'sexual orientation.'¹⁶⁰ Most submissions referred to 'sexual orientation' rather than 'sexuality,' and this is now the language used by most Australian anti-discrimination jurisdictions, including the federal Sex Discrimination Act, as well as the Australian Bureau of Statistics.¹⁶¹

Renaming the attribute to sexual orientation would also be consistent with the recommendations of the Legal Affairs and Safety Committee regarding the groups who should be afforded anti-vilification protections¹⁶² and would create consistency with the Queensland Public Health Act conversion therapy provisions.¹⁶³

Comparative approaches

Yogyakarta Principles approach

As noted above in the discussion on gender identity, the international *Yogyakarta Principles* provide best practice guidance on terminology contributed by international human rights experts.

A definition of 'sexual orientation' based on these principles has recently been added into the Queensland Public Health Act.¹⁶⁴ The definition provides that:

Sexual orientation, of a person, means the person's capacity for emotional, affectional and sexual attraction to, and intimate and sexual relations with, persons of a different gender, the same gender or more than 1 gender.¹⁶⁵

154 Cara MacInnes and Gordon Hodgson, 'Intergroup bias toward "Group X": Evidence of prejudice, dehumanisation, avoidance and discrimination against asexuals.' (2012) *Group Processes & Intergroup Relations*, Issue 6, 725-743.

155 Karen O'Connell, 'Can Law Address Intersectional Sexual Harassment? The Case of Claimants with Personality Disorders,' (2019) *Laws*, 3.

156 See for example: Queensland Council for LGBTI Health submission, 9; Rainbow Families Queensland submission, 5.

157 Survey participant (19), Queensland Council for LGBTI Health submission, 35.

158 Legal Aid Queensland submission, 69.

159 Queensland Council for LGBTI Health submission, 32.

160 Australian Discrimination Law Experts Group submission, 13.

161 Australian Bureau of Statistics, *Standard for Sex, Gender, Variations of Sex Characteristics and Sexual Orientation Variables* (Web page, 14 January 2021) <<https://www.abs.gov.au/statistics/standards/standard-sex-gender-variations-sex-characteristics-and-sexual-orientation-variables/latest-release>>.

162 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022), 4.

163 *Public Health Act 2005* s 213E.

164 *Public Health Act 2005* (Qld).

165 *Public Health Act 2005* (Qld) s 213E.

This option was canvassed in the Discussion Paper because of the benefits of consistent definitions in Queensland Acts and to align with international best practice. A similar, simplified version of the above has recently been introduced in the Victorian Equal Opportunity Act.¹⁶⁶

Because terminology in this field is evolving, tying the definition to current language would perpetuate the problem.¹⁶⁷

Most stakeholders supported the definition of sexual orientation in the Public Health Act, or a variation of it.¹⁶⁸ Of the survey respondents to the QC community survey, 64% were in favour of this definition, but several survey participants were concerned about potential lack of inclusion of people who are asexual or aromantic.¹⁶⁹ A smaller number of survey participants, and a submission from Diversity Queensland Incorporated¹⁷⁰ suggested that polyamory should be included.¹⁷¹

Suggestions to address any lack of inclusion included:

- adding the words 'or none' to make it clear the definition applies to people who lack attraction¹⁷²
- explaining that sexuality also includes a lack of emotional, affectional, and sexual attraction in a legislative note¹⁷³
- adapting the definition to say that it includes emotional *or* affectional *or* sexual attraction (rather than 'and')¹⁷⁴
- including the words 'any combination thereof' at the beginning of the definition.¹⁷⁵

Two submissions were not in favour of changing the definition to reflect the *Yogyakarta Principles* approach,¹⁷⁶ and four indicated some reservations.¹⁷⁷ These submissions were of the view that:

- The definition in the *Yogyakarta Principles* is 'incomprehensible' and 'vague'.¹⁷⁸
- The word 'sex' is preferred over 'gender' in any definition of sexuality so that it provides recognition for cisgender people who are attracted to other cisgender people.¹⁷⁹
- Sexuality definitions should be tied to adulthood.¹⁸⁰

Submissions from organisations that represent religious education providers said that sexuality should acknowledge traditional beliefs around marriage and sexual morality, and sought

166 *Equal Opportunity Act 2010* (Vic) s 4 - sexual orientation means a person's emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender. We note that this removes the words 'capacity for'.

167 Rainbow Families Queensland submission, 5.

168 Australian Lawyers Alliance submission, 13; Australian Discrimination Law Experts Group, 13; Queensland Council for Civil Liberties submission, 16; Equality Australia submission, 6; Rainbow Families Queensland submission, 5; Diversity Queensland Incorporated submission, 2; PeakCare Queensland Inc submission, 12; Aged and Disability Advocacy Australia submission 10; Just.Equal Australia submission, 3; Queensland Council for LGBTI Health submission; Australian Lawyers for Human Rights submission, 7; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 13.

169 Queensland Council for LGBTI Health submission, 33-35.

170 Diversity Queensland Incorporated submission, 1. The submission suggested inclusion in lawful sexual activity as a broader definition or in relationship status.

171 Queensland Council for LGBTI Health submission, 34.

172 LGBTI Legal Service Inc submission, 33-34; Survey participants, Queensland Council for LGBTI Health submission, 21.

173 Rainbow Families Queensland submission, 5; LGBTI Legal Service Inc submission, 3.

174 Suggestions provided by several survey participants, Queensland Council for LGBTI Health submission, 33-35.

175 LGBTI Legal Service Inc submission, 33-34; Suggestions provided by several survey participants, Queensland Council for LGBTI Health submission, 33-35.

176 Christian Schools Australia submission, 16; Human Rights Law Alliance submission, 13.

177 Fair Go for Queensland Women submission, 3; R Harrison submission, 2-3; James Cook University submission, 4; Freedom for Faith submission, 6.

178 Christian Schools Australia submission, 16.

179 R Harrison submission, 2-3; James Cook University submission, 4; Freedom for Faith submission, 6.

180 Freedom for Faith submission, 6.

assurances that teaching biblical sexual ethics would not be discriminatory.¹⁸¹ See also our discussion on religious exceptions in chapter 8.

Sex Discrimination Act

Sexual orientation is defined in the federal Sex Discrimination Act as a person's sexual orientation towards persons of the same sex, persons of a different sex, or persons of the same sex and persons of a different sex.¹⁸²

While this definition does not refer to 'heterosexuality, homosexuality' or bisexuality, it has the same coverage as the Queensland Anti-Discrimination Act.

Only two submissions approved of this option.¹⁸³

Lawful sexual activity

Prior to 2003, people were protected from discrimination because of any sexual activity that was lawful. This broadly encompassed those who were diverse in their sexual expression, including heterosexual people who were expressing their sexuality in a non-traditional way, such as people who had multiple partners or were polyamorous. However, since 2003 the definition has been confined only to lawful sex workers as described in detail in the following section.¹⁸⁴

An attribute based on 'activity' as opposed to an 'identity' proved to be limited in protecting people from discrimination based on sexual orientation, because the word 'activity' led to interpretation issues when a person was not practicing the activity.¹⁸⁵

One submission on behalf of sex workers suggested that the definition of sexuality should be replaced with a broad definition which includes all of a person's involvement in sexual activity.¹⁸⁶

Others thought that a broad, undefined lawful sexual activity attribute could be reintroduced, in addition to attributes protecting sexual orientation and sex workers.¹⁸⁷ Caxton Legal Centre gave examples of people whose other lawful sexual activity, that is, other than those in the sex/adult industry, has been the basis of discrimination. These examples included women who were asked or forced to leave workplaces after ending consensual sexual relationships with male colleagues, and treatment of people in pre-employment situations where there is sexual content in the public domain.¹⁸⁸

The words 'includes' rather than 'means'

Because the definition in the Anti-Discrimination Act says sexuality *means* heterosexuality, homosexuality and bisexuality it creates an exhaustive list to which nothing else may be added and allows for no other interpretation.

Equality Australia suggested following the approach adopted by the ACT and Tasmania, which have non-exhaustive lists of identities.¹⁸⁹ Because those Acts use the word *includes*, rather than *means*, other analogous (like) identities may be inferred. The list could also be expanded to

181 Australian Association of Christian Schools submission, 13; Australian Christian Higher Education Alliance submission, 16.

182 *Sex Discrimination Act 1984* (Cth) s 4.

183 Pride in Law submission, 3; LGBTI Legal Service Inc submission, 3.

184 Amendments made by the *Discrimination Law Amendment Act 2002* (Qld).

185 *JM v QFG* [1998] QCA 228 – Refusal of fertility treatment to lesbian women was found to be based on their sexual 'inactivity' and therefore not unlawful.

186 Eros Association submission, 3.

187 See for example: Australian Discrimination Law Experts Group submission, 49; Caxton Legal Centre submission, 24.

188 Caxton Legal Centre submission, 24.

189 See: *Discrimination Act 1992* (ACT) and *Anti-Discrimination Act 1998* (Tas), sexuality includes heterosexuality, homosexuality and bisexuality.

more than the three options currently in the Queensland definition and include identities such as pansexuality and asexuality.¹⁹⁰

The Review's position

The Review's position is that:

- The term 'sexual orientation' is more contemporary terminology and would improve consistency with Queensland, federal, and other state and territory legislation.
- A definition that is not tied to specific identities, for example bisexuality, would allow the Act to remain current as terminology changes.
- A broader and more inclusive definition is required to ensure that people who identify outside of heterosexual, homosexual, and bisexual identities are covered by the Act, and to ensure that sexually diverse communities know that they are recognised and protected by the Act.
- While consistency with the federal legislation generally has advantages, adopting the Sex Discrimination Act's definition would not improve protection of people in Queensland.
- Although creating an inclusive rather than non-exhaustive list of identities would allow tribunals and courts to infer analogous identities, it might also leave room for ambiguity and reduce certainty about who is protected by the Act.
- Using the word 'gender', instead of 'sex' in the definition of this attribute would align the Act with the Queensland Public Health Act and not compromise existing protections.
- The *Yogyakarta Principles* provide a best practice approach. To ensure coverage for people who are asexual or aromantic, a legislative note could clarify that sexual orientation includes not having an orientation.
- On the basis of material provided to the Review, we did not identify a gap in protection for people based on their sexual activity which is not already protected by sex, sexuality or relationship status attributes.

Recommendation 23

23.1 The Act should rename the sexuality attribute to sexual orientation, and define it to mean a person's emotional, affectional, or sexual attraction to, or intimate or sexual relations with:

- persons of a different gender; or
- persons of the same gender; or
- persons of more than one gender.

23.2 The section should include a legislative note that explains that sexual orientation includes not having attraction to or intimate or sexual relations with a person.

¹⁹⁰ Name withheld (Sub.008) submission, 1-2.

Sex workers

‘Lawful sexual activity’ is currently defined in the Act as:

a person’s status as a lawfully employed sex worker, whether or not self-employed.¹⁹¹

The law was amended in 2002 to create this narrow definition, which meant that only sex workers were included, not any person engaging in lawful sexual activity.¹⁹²

This definition means that a person’s *activities* as a sex worker, as opposed to *being* a sex worker (their status), are not protected by the Act. For example, refusing to provide accommodation because it is to be used for sex work is not covered by the Act,¹⁹³ but telling a person they cannot volunteer at an organisation because they are a sex worker could be.

Because the word ‘lawful’ is included in the attribute, only sex workers operating within the law are protected. At present, only two forms of sex work are legal – sex work conducted in licensed brothels, and private sex work by a person working alone. However, the majority of sex work occurs outside of these scenarios.¹⁹⁴ The Queensland Government has recently acknowledged that current laws have the effect of criminalising safety strategies used by sex workers, and consider that sex workers should not have to choose between working legally and being safe at work.¹⁹⁵

As a result, the Attorney General has referred to the Queensland Law Reform Commission (QLRC) terms of reference to review and investigate the legislative and regulatory framework necessary to decriminalise the sex work industry. In April 2022 the QLRC released a Consultation Paper outlining issues relevant to this Review, and will deliver its final report to the Attorney-General by 27 November 2022.¹⁹⁶

The types of sex work that are ‘lawful’ are likely to be the subject of recommendations by the QLRC. However, as we explain below, we do not consider that the lawfulness of the sex work should define whether or not sex workers should be protected by the Act.

In the Discussion Paper we asked whether the name of the attribute lawful sexual activity should be changed, and if so, what it should be. We also asked if a new definition should be included in the Act.

We received 35 submissions on the attribute of lawful sexual activity and its definition.¹⁹⁷

191 *Anti-Discrimination Act 1991* (Qld) Dictionary – lawful sexual activity.

192 *Discrimination Law Amendment Act 2002* (Qld) s 12.

193 *Dovedeen Pty Ltd v GK* [2013] QCA 116.

194 See Prostitution Licensing Authority (Qld), Annual Report 2020-21 (Report, 2021) 20; Crime and Misconduct Commission, *Regulating Prostitution: A follow-up review of the Prostitution Act 1999* (Report, 2011) xiii.

195 The Honourable Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, ‘Considering a safe and regulated sex work industry’ (Media statement, 28 August 2021).

196 Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP80, April 2022). Chapter 16 addresses discrimination against sex workers.

197 Abigail Corrin submission; Name withheld (Sub.022) submission; Prof John Scott submission; Queensland Council of Social Service submission; Name withheld (Sub.026) submission, PeakCare Queensland Inc submission; Jesse Jones submission; Magenta submission; Name withheld (Sub.062) submission; Name withheld (Sub.064) submission; Name withheld (Sub.066) submission; Name withheld (Sub.059) submission; Name withheld (Sub.069) submission; Dr Zahra Stardust submission; Touching Base Inc submission; Australian Lawyers Alliance submission; Stonewall Medical Centre submission; Alistair Witt submission; SIN (South Australia) submission; Natasha submission; Jenna Love submission; Name withheld (Sub.089) submission; Australian Discrimination Law Experts Group submission; TASC National Limited submission; Jenny King submission; Queensland Council for Civil Liberties submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Sex Work Law Reform Victoria Inc submission; Caxton Legal Centre submission; Queensland Council for LGBTI Health submission; Eros Association submission.

None were supportive of preserving the status quo and 23 supported the current attribute being replaced with 'sex work' and 'sex worker'.¹⁹⁸

In this section we also explore the sex worker accommodation exception,¹⁹⁹ because it is relevant to how far protections for sex workers should extend.

Ultimately, we recommend that the attribute of 'sex worker' should replace the attribute 'lawful sexual activity,' and that sex worker should mean being a sex worker and engaging in sex work. We recommend that the sex worker accommodation exception be repealed, if the Queensland Government introduces a legislative framework for regulating sex work.

Is there a gap in protection?

Respect Inc and DecrimQLD,²⁰⁰ told us that 'lawful sexual activity' is an ineffective attribute because:

- protection is limited to a person's status as a sex worker, rather than the practice of performing sex work
- many aspects of sex work are not lawful under current Queensland law
- the scope of the attribute is not clear which results in lengthy debates in tribunals and courts about the attribute
- it is hard to understand and for people to identify that they have protections.²⁰¹

The Respect Inc and DecrimQLD submission was drawn from information they obtained through consultations, workshops and online discussions held by Respect Inc, as well as a survey by DecrimQLD of 204 sex workers on experiences of discrimination and barriers to reporting.²⁰² They told us that a significant proportion of sex workers had experienced discrimination in the areas of goods and services (including provision of health care), accommodation, education, and administration of State laws and programs, but most did not make a complaint because they did not think they were included in the definition of the current attribute, or there was another barrier to making a complaint, such as privacy concerns.²⁰³

The Review also heard directly from 33 people who identified as sex workers through submissions and the Have Your Say survey, as well as a number of organisations that represent sex workers.²⁰⁴ People told us stories of discrimination that they had not complained about for various reasons. They also told us about the impact and consequences of discrimination. For example, one person told us that:

198 Respect Inc and DecrimQLD submission; Name withheld (Sub.022) submission; Prof John Scott submission; Jesse Jones submission; Name withheld (Sub.062) submission; Name withheld (Sub.064) submission; Name withheld (Sub.083); Alistair Witt submission; Touching Base Inc submission; Name withheld (Sub.059) submission; Queensland Council for LGBTI Health submission; Legal Aid Queensland submission; Sex Workers Outreach Program (NT) and Sex Workers Reference Group submission; Scarlet Alliance submission; Magenta submission; Name withheld (Sub.084) submission; Name withheld (Sub.069) submission; Stonewall Medical Centre submission; SIN (South Australia) submission; Name withheld (Sub.089) submission; Jenny King submission; Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission; Caxton Legal Centre submission.

199 *Anti-Discrimination Act 1991* (Qld) s 106C.

200 Respect Inc is the state-wide sex worker organisation in Queensland that provides a comprehensive health promotion and peer education program for sex workers and DecrimQLD is a committee of sex workers who have joined with Respect Inc to progress the removal of harmful and discriminatory sex work laws and achieve decriminalisation in Queensland.

201 Respect Inc and DecrimQLD submission, 2 and 35.

202 Respect Inc and DecrimQLD submission, 2.

203 Respect Inc and DecrimQLD submission, 5, 7.

204 For example: Eros Association submission; Magenta submission; Scarlet Alliance, Australian Sex Workers Association submission; Sex Workers Outreach Program and Sex Workers Reference Group (NT) submission; Sex Workers Outreach Project Inc NSW submission; SIN (South Australia) submission.

*...if sex workers can be discriminated against when finding employment it makes it harder for us to find jobs and stability outside of the industry...*²⁰⁵

Lawfulness

As we identify above, only a narrow section of the sex work industry is lawful, leaving many sex workers presently unprotected by the attribute. At the same time, we heard that discrimination is occurring for all sex workers, whether or not they are conducting their work in a way that is lawful, and that this discrimination has harmful impacts. This therefore creates a gap in protection.

For example, one person told us they used safety strategies such as sharing a hotel room with a colleague and sending text messages when bookings arrive and leave. As a result, they were acting unlawfully and would not be covered by the Act.²⁰⁶ Another sex worker told us:

*The attribute 'lawful sexual activity' as a euphemism for sex work in the Act, has always been problematic because not all lawful sexual activity is sex work and not all sex work is lawful.*²⁰⁷

Experiences of discrimination and stigma reported to the Review were common throughout the sex work industry.²⁰⁸ Respect Inc and DecrimQLD told us lawfulness is an unhelpful dividing line because 'more marginalised members of the sex worker community, who are likely to experience discrimination at a higher level of frequency or with more extreme outcomes, are not covered.'²⁰⁹

One participant in the survey DecrimQLD conducted said that:

*I did not believe I had grounds for a discrimination complaint because I was not a 'lawful' sex worker.*²¹⁰

Another person who identified as a sex worker told us:

*Lots of the ways in which I work to stay safe, such as sharing a hotel room with another sex worker, are unlawful. Therefore I am not currently covered by anti-discrimination legislation.*²¹¹

The status of being a sex worker

One of the key issues raised about the current attribute is that a person's *activities* as a sex worker, as opposed to *being* a sex worker (their status), are not protected by the Act.

The case of *Dovedeen*²¹² involved a sex worker being denied accommodation at a motel in Moranbah. It was decided in the Court of Appeal, so is the authoritative source for the meaning of the definition of 'lawful sexual activity.' The court found that the protected attribute is confined to a person's 'status' and does not extend to the 'activity' of engaging in sex work.

This means that there is also a gap in protection where the discrimination is experienced because a person is engaging in sex work.

205 Name withheld (Sub.066) submission, 1.

206 Name withheld (Sub.062) submission, 3.

207 Abigail Corrin submission, 1.

208 Dr Zahra Stardust, Carla Treloar, Elena Cama, Jules Kim, *I wouldn't call the cops if I were being bashed to death: Sex work, whore stigma and the criminal legal system* (2021) International Journal for Crime, Justice and Social Democracy, 10(2).

209 Respect Inc and DecrimQLD submission, 37.

210 Survey participant, Respect Inc and DecrimQLD submission, 5.

211 Name withheld (Sub.022) submission, 1.

212 *Dovedeen Pty Ltd v GK* [2013] QCA 116.

People in the adult industry

Sex Work Law Reform Victoria told us that:

... discrimination against the adult and sex industries is not limited to sex workers. Other workers, including brothel operators, escort agency drivers, adult store managers and adult entertainers experience discrimination.²¹³

Taking into account these experiences, Sex Work Law Reform Victoria advocates that a broader group of people connected to the adult and sex industries should be protected.²¹⁴

Comparative approaches

Tasmania prohibits discrimination on the basis of 'lawful sexual activity'²¹⁵ and provides that 'sexual activity includes not engaging in, or refusing to engage in, sexual activity.'²¹⁶

In 2022 amendments, Victoria retained the attribute of 'lawful sexual activity'²¹⁷ but now also protects the attribute of 'profession, occupation or trade.'²¹⁸ 'Lawful sexual activity' means engaging in, not engaging in or refusing to engage in a lawful sexual activity.²¹⁹ The new attribute is not defined. In the Explanatory Memorandum to the Sex Work Decriminalisation Bill, Parliament states that the new attribute of 'profession, trade or occupation' is intended to address discrimination against sex workers and other persons based on their participation in sex work as a profession, trade or occupation, protect sex workers from discrimination in future, and de-stigmatised the sex work industry.²²⁰

The ACT protects the attribute of 'profession, trade, occupation or calling.'²²¹ The attribute is not defined, but the Parliamentary record when amendments to the Act were debated in 1994 indicates that sex work was contemplated as at least a significant reason for inclusion of this attribute.²²²

The Northern Territory has a proposal for reform in 2022 that would protect 'those who engage and have engaged in sex work.'²²³

In NSW, Western Australia, and federally there are no provisions for protecting sex workers from discrimination.

What are the options?

As outlined above, Respect Inc and DecrimQLD propose that instead of a new definition under the current attribute, new attributes of 'sex work' and 'sex worker' are necessary.²²⁴

In relation to the current attribute, the Australian Discrimination Law Experts Group advocated for retaining 'lawful sexual activity' but abolishing the definition, so that people are protected from discrimination when their sexual activity is lawful.²²⁵ Caxton Legal Centre advocated similarly,

213 Sex Work Law Reform Victoria Inc submission, 7.

214 Sex Work Law Reform Victoria Inc submission, 2.

215 *Anti-Discrimination Act 1998* (Tas) s 16(d).

216 *Anti-Discrimination Act 1998* (Tas) s 3.

217 *Equal Opportunity Act 2010* (Vic) s 6(g).

218 *Equal Opportunity Act 2010* (Vic) s 6(la).

219 *Equal Opportunity Act 2010* (Vic) s 4.

220 Explanatory Memorandum, *Sex Work Decriminalisation Bill 2021* (Vic) 9.

221 *Anti-Discrimination Act 1991* (ACT) s 7(1)(p).

222 Australian Capital Territory, Parliamentary Debates, Legislative Assembly, 2 March 1994, 372-379.

223 *Achieving Equality in the Northern Territory*, Northern Territory Government, February 2022, 8.

224 Respect Inc and DecrimQLD submission, 35.

225 Australian Discrimination Law Experts Group submission, 49.

though recommended also explicitly protecting ‘sex work’.²²⁶ Aged and Disability Advocacy Australia supported a new definition for the current attribute.²²⁷

Sex Work Law Reform Victoria advocate that the broader attribute of ‘profession, trade or occupation’ should be included in the Queensland Act, and Eros Association agrees with this position.²²⁸ The Australian Discrimination Law Expert Group advocated for inclusion of ‘profession, trade or occupation’ if an even broader attribute of ‘social origin and social status’ was not included.²²⁹

Does the attribute need to be defined?

Submissions and consultations have sent a strong message that both the sex work activity and the status of being a sex worker need to be protected. A clear definition would be helpful and would reduce the likelihood of lengthy legal arguments about the attribute itself.

There are no definitions of ‘sex work’ in discrimination legislation in Australia.

Some examples from legislation regulating sex work in other Australian jurisdictions are:

- The Victorian Sex Work Act defines ‘sex work’ as the provision by one person to or for another person of sexual services in return for payment or reward.²³⁰
- The ACT Sex Work Act defines ‘commercial sexual services’ as sexual services provided for monetary consideration or any other form of consideration or material reward (regardless of whether the consideration or reward is, or is to be, paid or given to the person providing the sexual services or another person).²³¹

In their Consultation Paper, the QLRC have used the following definition of sex work and sex worker:

‘Sex work’ refers to an adult providing consensual sexual services to another adult in return for payment or reward, and a ‘sex worker’ is someone who provides sex work within this meaning.²³²

The Review’s position

The Review’s position is that:

- The current ‘lawful sexual activity’ creates a gap in protection because the current attribute only protects lawful sex workers, but people who work outside of the regulated and licenced sector are still experiencing discrimination.
- The attribute and its definition should not be limited to a person’s status as a sex worker, and should also include the activity of engaging in sex work to create certainty in the law, and to avoid an ongoing gap in protection.
- As the attribute of profession, trade or occupation, could cover almost any worker in any industry, of which most are not marginalised or socially disadvantaged groups, this would be a broad attribute and does not meet our criteria for inclusion of new attributes, and is therefore not preferred.

²²⁶ Caxton Legal Centre submission, 24.

²²⁷ Aged and Disability Advocacy Australia submission, 10.

²²⁸ Eros Association submission, 2.

²²⁹ Australian Discrimination Law Experts Group submission, 61. See further discussion on ‘social origin and social status’ later in this chapter.

²³⁰ *Sex Work Act 1994* (Vic) s 3.

²³¹ *Sex Work Act 1992* (ACT) Dictionary.

²³² Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP80, April 2022), 5.

- In developing a definition for the term ‘sex work’, Queensland Parliament should consider the outcomes of the Queensland Law Reform Commission review to ensure consistency.

Are exceptions needed?

In this section we have considered whether exceptions are needed if the sex worker attribute is changed from the current definition of ‘lawful sexual activity.’

Accommodation for use in connection with sex work

In the Discussion Paper we asked for submissions about whether the sex worker accommodation exception should be retained, changed or removed. We received 39 submissions on this topic, with 37²³³ of them supporting removal of this exception.²³⁴ We did not receive submissions from accommodation providers on this topic.

A submission from Freedom for Faith provided the perspective of a religious accommodation provider and considered that use of accommodation for sex work would be a serious interference with religious convictions.²³⁵

Current approach

The Act currently provides that it is not unlawful for an accommodation provider to discriminate against another person by refusing to supply accommodation, evicting them, or treating them unfavourably in any way in connection with accommodation, if the accommodation provider reasonably believes the other person is using, or intends to use, the accommodation in connection with that person’s, or another person’s, work as a sex worker.²³⁶

Accommodation is defined broadly to include business premises, houses, flats, hotels, motels, boarding houses and hostels, caravans, manufactured homes, camping sites, and building or construction sites.²³⁷

A regulatory framework

The terms of reference for the QLRC’s current review of the sex work industry states that the government intends that sex work will be lawful when conducted in accordance with the recommended regulatory framework to ensure better public health and human rights outcomes.

The QLRC’s Consultation Paper on the decriminalisation framework notes that sex work can extend to work at hotels or other commercial premises and to private sex workers working from their own residential premises.²³⁸ These are the circumstances in which the exception is most likely to apply.

233 Name withheld (Sub.008) submission; Abigail Corrin submission; Name withheld (Sub.022) submission; Prof John Scott submission; Public Advocate (Qld) submission; Name withheld (Sub.043) submission; Diversity Queensland Incorporated submission; PeakCare Queensland Inc submission; Magenta submission; Name withheld (Sub.059) submission; Name withheld (Sub.062) submission; Name withheld (Sub.064) submission; Name withheld (Sub.066) submission; Name withheld (Sub.069) submission; Dr Zahra Stardust submission; Touching Base Inc submission; Maurice Blackburn Lawyers submission; Alistair Witt submission; SIN (South Australia) submission; Natasha submission; Jenna Love submission; Name withheld (Sub.089) submission; Australian Discrimination Law Experts Group submission; TASC National Limited submission; Sienna Charles submission; Jenny King submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Sex Workers Outreach Project Inc NSW submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Sex Work Law Reform Victoria Inc submission; Caxton Legal Centre submission; Queensland Council for LGBTI Health submission; Queensland Advocacy Incorporated submission.

234 The two submissions that did not support removal were: Name withheld (Sub.026) submission; Freedom for Faith submission.

235 Freedom for Faith submission, 6.

236 *Anti-Discrimination Act 1991* (Qld) s 106C.

237 *Anti-Discrimination Act 1991* (Qld) Dictionary - ‘accommodation’.

238 Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP 80, April 2022), 50-51.

The QLRC is currently considering a framework for the planning and regulation of commercial sex work and home-based sex work businesses, including whether there should be separation distances from other kind of land use (e.g., schools, childcare centres, places of worship) and limitations on the numbers of sex workers working from a premises.²³⁹ They will consider and balance the following in recommending a regulatory system:

- the recognition of sex work as legitimate work—one of the aims of decriminalising sex work is to bring sex work businesses into the mainstream of business regulation and to reduce unfair discrimination against sex workers
- the rights and interests of sex workers—limiting the places where sex work business premises can operate may impact on sex workers' safety, freedom of movement and enjoyment of property rights
- the interests of local communities—some people may have concerns about the impact of sex work businesses on local amenity, nearby places of worship or schools, community safety and quiet enjoyment of their homes
- the impact on government and industry—the decriminalisation framework should minimise the resource burden on government and the industry.²⁴⁰

Impact of the exception

Researchers Hobbs and Trotter have commented that the exception forms a 'viable pretext' for unfair treatment sex workers in a broad range of circumstances, and can result in poor treatment, overcharging and eviction, and could result in housing instability and homelessness.²⁴¹

The Respect Inc and DecrimQLD submission told us that they had received the following input from survey participants:

- 'I have been denied housing unless I did sexual favours.'²⁴²
- 'My stay at hotels have been cut short unless I paid more.'²⁴³
- 'The manager of the body corporate threatened to tell the neighbours if I didn't provide sex for free.'²⁴⁴

One submission to the Review also told us:

*Even though all my rent and bills were up to date, I was forced to move home rather than be considered to stay. This type of housing insecurity is unfair. When I compare my situation to friends in the exact same bracket of the rental market I can see that I have been put out, required to move, threatened unfairly and generally experienced less housing security simply because I am doing sex work from home.*²⁴⁵

239 Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP 80, April 2022), chapter 12.

240 Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP 80, April 2022), 134.

241 See Harry Hobbs and Andrew Trotter, 'How far have we really come? Civil and political rights in Queensland' (2013) 25(2) Bond Law Review 166, 205–6; Scarlet Alliance, *The Principles for Model Sex Work Legislation* (2014) 75–6, 78.

242 Survey participant (84), Respect Inc and DecrimQLD submission, 47.

243 Survey participant (205), Respect Inc and DecrimQLD submission, 43.

244 Survey participant (205), Respect Inc and DecrimQLD submission, 43.

245 Name withheld (Sub.062) submission, 5.

Purpose of the exception

The provision was introduced in 2012 in response to a finding of the Appeal Tribunal of QCAT that a motel operator had contravened the Act by refusing accommodation to a sex worker. That decision was subsequently overturned by the Court of Appeal.²⁴⁶

Records of parliamentary debate provide an insight into the policy intention at the time to: 'protect businesses from this sort of complaint and give them control over the use that is made of their premises...it will not allow a person to refuse to provide accommodation to someone merely because the other person is a sex worker.'²⁴⁷

Scope and how the exception is being applied

The sex worker accommodation exception may apply if 'the accommodation provider reasonably believes' that the accommodation is being used in connection with sex work.²⁴⁸ This provision is based on the subjective view of the property owner without the need for evidence of an intention to use, or actual use of, the property for sex work. While the belief must be 'reasonable,' in practice the reasonableness or otherwise of the property owner's belief will rarely, if ever, be subjected to scrutiny by the tribunal. Once a person has been evicted, it would be rare for them to make a complaint of discrimination.

Human rights considerations

The Human Rights Act protects and promotes human rights of people in Queensland. Human rights may be subject to reasonable limitations that can be demonstrably justified in a free and democratic society based on human dignity, equality, and freedom. In deciding whether rights can be reasonably and justifiably limited, consideration should be given to the factors outlined in the Human Rights Act.²⁴⁹

Under the Human Rights Act, sex workers have a right to privacy and home²⁵⁰ (which includes the right not to have their privacy, family, or home arbitrarily interfered with) which must be balanced with the accommodation providers' property rights²⁵¹ (which includes the right to own property and not be arbitrarily deprived of their property).

Placing the threshold at a 'reasonable belief' may amount to an arbitrary interference with a sex worker's right to privacy, particularly in residential tenancy situations.

When a similar exception was recently repealed in Victoria, the human rights statement of compatibility addressed these potentially competing rights and determined that repeal of the exception would not mean that accommodation provider's property rights are unfairly limited.²⁵²

246 See *GK v Dovedeen Pty Ltd & Anor* [2012] QCATA 128 for the Appeal Tribunal decision, and *Dovedeen Pty Ltd v GK* [2013] QCA 116 for the Court of Appeal decision.

247 Queensland, Parliamentary Debates, Legislative Assembly, 1 November 2012, 2382 (JP Bleijie, Attorney-General).

248 *Anti-Discrimination Act 1991* (Qld) s 106C.

249 *Human Rights Act 2019* (Qld) s 13.

250 *Human Rights Act 2019* (Qld) s 25.

251 *Human Rights Act 2019* (Qld) s 24.

252 Victoria, Parliamentary Debates, Legislative Assembly, 13 October 2021, 3875.

A number of submissions told us about other ways to protect the rights of property owners, for example:

There are other means by which landlords and businesses can retain control of their premises without prejudicing and stigmatising a particular group. For example, a landlord could insert a clause in a rental contract that says the premises cannot be used to conduct any business. There are also local laws in every jurisdiction which address amenity and noise complaints. These laws apply to everyone, including sex workers.²⁵³

The peace, comfort, and privacy of others, including other residents, guests, and neighbours to accommodation premises must also be considered. It may be that sex work cannot be safely and appropriately undertaken at all kinds of premises, but we have not had submissions directly on this point. However, Legal Aid Queensland told us that:

...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.²⁵⁴

Comparative approaches

Queensland is the only jurisdiction in Australia to have this exception in its discrimination law.

The most recent repeal of a similar provision occurred in February 2022 in Victoria.²⁵⁵

Acts done in compliance with other laws

Our proposed change to the scope of the attribute, which would include where a person is doing work as a sex worker, may create conflicting duties in some instances, such as for accommodation providers, financial institutions, or employers in sex work businesses. For example, a motel owner who does not have the approvals for a sex work business to run from all the rooms in the premises might be committing a development offence and could risk being fined, but to tell a person to stop doing sex work there may be discrimination. We have therefore considered whether a further exception may be required to ensure that duty holders can discharge obligations imposed by other laws and also comply with the Anti-Discrimination Act.

Current approach

Where discrimination is necessary to comply with or specifically authorised by another law, a duty holder can arguably be exempt from obligations under the Anti-Discrimination Act because of an exception in the Act. However, this only applies to laws passed before 1991.²⁵⁶

The Queensland Court of Appeal has considered how the Anti-Discrimination Act operates where there appears to be a conflict between a more recent law passed since 1991 and the Anti-Discrimination Act. In reaching its decision, the Queensland Court of Appeal considered established rules about the way courts interpret laws, and determined that if the provisions of an Act are completely inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication.²⁵⁷ If the laws cannot operate concurrently in a sensible way because the duty-holder would then be acting unlawfully in relation to another law, then the more recent law will prevail to the extent it is inconsistent. If the two laws can be reconciled, the duty-holder must comply with both laws.

253 Sex Work Law Reform Victoria Inc submission, 9.

254 Legal Aid Queensland submission, 94.

255 *Decriminalisation of Sex Work Act 2022* (Vic) s 36.

256 *Anti-Discrimination Act 1991* (Qld) s 106.

257 *State of Queensland v Attrill & Anor* [2012] QCA 299; *Goodwin v Phillips* [1908] HCA 55; (1908) 7 CLR 1; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50; (2006) 228 CLR 566 at 585.

In effect, this case means that the courts consider that a duty holder would not be liable for unlawful discrimination under the Anti-Discrimination Act if they are complying with an obligation imposed by a more recent law in instances that the laws cannot sensibly work in parallel.

If the attribute of 'lawful sexual activity' is amended to 'sex worker' in line with our recommendations, a situation could arise where a person is faced with having to comply with two different and conflicting laws that cannot be reconciled.

Comparative approaches

In other jurisdictions that protect sex workers from discrimination, there are general exceptions that mean a duty holder is not unlawfully discriminating if they act in accordance with other legislation.²⁵⁸

For example, in Victoria, a person may discriminate if the discrimination is 'necessary to comply with, or is authorised by, a provision of an Act...' ²⁵⁹

The Review's position

The Review's position is that:

- The threshold for the sex worker accommodation exception is too low, because it allows discrimination based on 'reasonable belief' of an accommodation provider and this is leading to unfair treatment and housing instability for sex workers.
- The exception may not be compatible with human rights because it unreasonably limits the right to equality and the right to privacy of sex workers, including the right not to have a person's home arbitrarily interfered with, such as through eviction.
- Once home-based, hotel-based or work from commercial premises is regulated by the new decriminalisation framework being formulated by the QLRC, the system of regulation will balance the rights and interests of property owners, sex workers and the public.
- It is not the intention of the amendments to the attribute to create rights for sex work businesses over and above the rights of any other business owners, so an exception may need to be included to cover these situations.
- Acts done in direct compliance with laws regulating the sex work industry should not amount to discrimination under Queensland anti-discrimination legislation.

Recommendation 24

24.1 The Act should include 'sex worker' as an attribute and the attribute should be defined to mean 'being a sex worker or engaging in sex work.'

24.2 The Queensland Government should consider introducing an exception to permit discrimination on the basis of this attribute when an act is in compliance with a law that regulates the sex work industry.

24.3 Following the outcome of the Queensland Law Reform Commission's review of the regulatory framework for the sex work industry, the Queensland Government should:

- include a definition of sex work in the Act to align with any reforms to the sex work industry
- repeal the sex worker accommodation exception in 106C of the Act.

²⁵⁸ *Anti-Discrimination Act 1998* (Tas) s 24(a); *Anti-Discrimination Act 1992* (NT) s 53; *Equal Opportunity Act 2010* (Vic) s 75.
²⁵⁹ *Equal Opportunity Act 2010* (Vic) s 75.

Immigration status

The Terms of Reference ask us whether an additional attribute of immigration status should be introduced into the Act.

In the Discussion Paper we asked whether immigration status should be added as a stand-alone attribute, or whether sufficient protection could be provided by including immigration status in the definition of race. We received 18 submissions²⁶⁰ and all but two²⁶¹ supported including specific protections for people based on their immigration or migration status.

In this section we also explore the existing citizenship and visa status exception provision, because it is relevant to how far protections for people based on their immigration status should extend.

In the Discussion Paper we asked whether an existing general exception – a provision that allows eligibility provisions requiring a particular citizenship or visa status to be included in state government policies²⁶² – should be retained, removed, or changed. Of the nine submissions received,²⁶³ one recommended retaining the exception.²⁶⁴

We consulted with groups that support migrants, refugees, and people from minority cultural groups,²⁶⁵ as well as government agencies.²⁶⁶ Following the roundtable discussion, some government agencies raised concerns with us about the impact on financial resources and operational issues if the general exception for citizenship and visa eligibility provisions were to be removed.

We have concluded that the most appropriate way to ensure people are protected from discrimination on the basis of their immigration status is to extend the current definition of race, and that two general exceptions, specifically about immigration or migration status, should be available.

Is there a gap in protection?

While race is a protected attribute, the Act gives no indication of whether or not ‘race’ includes a person’s immigration status.

Race is defined in a non-exhaustive list to include: colour, descent or ancestry, ethnicity or ethnic origin, and nationality or national origin. As the definition uses the word ‘includes’ rather than ‘means,’ discrimination on the basis of race may include aspects of a person’s race not mentioned in the definition. Immigration status could possibly be inferred to be another aspect of race.²⁶⁷

²⁶⁰ Queensland Council for Civil Liberties submission; Youth Advocacy Centre Inc submission; Queensland Law Society submission; Australian Lawyers Alliance submission; PeakCare Queensland Inc submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Maurice Blackburn Lawyers submission; Multicultural Australia submission; Aged and Disability Advocacy Australia submission; Legal Aid Queensland submission; Queensland Transcultural Mental Health submission; Dr Grazia Catalano submission; Department of Education (Qld) submission; Australian Industry Group submission; Australian Discrimination Law Experts Group submission; Name withheld (sub.069) submission; Life Without Barriers submission.

²⁶¹ Department of Education (Qld) submission; Australian Industry Group submission.

²⁶² *Anti-Discrimination Act 1991* (Qld) s 106B.

²⁶³ PeakCare Queensland Inc submission; Australian Discrimination Law Experts Group submission; Scarlet Alliance, Australian Sex Workers Association submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Department of Education (Qld) submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission.

²⁶⁴ Department of Education (Qld) submission.

²⁶⁵ For example: AMPARO Advocacy Inc consultation, 8 September 2021; Queensland Program of Assistance to Survivors of Torture and Trauma, consultation 23 August 2021; Brisbane Bahá’í community consultation, 12 August 2021; Bangladeshi community consultation, 15 August 2021; Islamic Women’s Association of Australia consultation, 16 September 2021; Immigrant Women’s Support Services consultation, 19 August 2021; Queensland African Community Council consultation, 8 September 2021.

²⁶⁶ Government representatives roundtable, 14 February 2022.

²⁶⁷ The Full Court of the Federal Court in *Macabenta v Minister of Immigration and Multicultural Affairs* (1998) 90 FCR 202 at 211 determined that nationality is equivalent to citizenship but different from national origin.

This interpretation is consistent with the approach taken in *Mabo v Queensland (No 1)* in which Deane J made the point in relation to the federal Racial Discrimination Act that race and the phrase ‘national or ethnic origin’ should not be given a ‘pedantic or unduly narrow meaning.’²⁶⁸

In some circumstances, complaints of discrimination because of a person’s immigration status might also be discrimination because of another aspect of race, such as the person’s ethnicity, nationality, or national origin.

Immigration status and citizenship are closely connected with nationality, which has been recognised as a protected status by the United Nations Human Rights Committee.²⁶⁹ The Committee on Economic, Social and Cultural rights has commented that the ground of ‘nationality’ applies to all non-nationals including refugees, asylum seekers, stateless persons, migrant workers, and victims of international trafficking.²⁷⁰

In the matter of *SUPRA*,²⁷¹ the NSW tribunal considered a similar non-exhaustive definition of race and determined that the practice of denying students on international student visas the same access to transport concessions as Australian students was nationality discrimination.

Depending on the circumstances, immigration status might be a characteristic of nationality. Characteristics that a person with an attribute generally has or are imputed to the person with that attribute are covered under the Act.²⁷²

A person who has immigrated to Australia and experienced discrimination because of that status might be protected under the race discrimination provisions, if the discrimination occurred because people of the person’s nationality are generally migrants, or it is often imputed that they are migrants.

However, nationality is unlikely to encompass immigration status in all circumstances. In the United Kingdom, where nationality but not immigration status is protected, this line of argument failed.²⁷³ Nigerian women on domestic worker visas had their passports taken by their employers and suffered exploitative conditions and abuse. However, the court found that the real reason for the discrimination was vulnerability arising from the women’s immigration status, which was not the same as their Nigerian nationality.

The inference that immigration status is already covered by the Act is supported by the current exception – citizenship or visa requirements imposed under State government policies.²⁷⁴ We discuss this further below.

Federal protections

In a number of sections, the Racial Discrimination Act gives protection from discrimination to a person who ‘is or has been an immigrant.’²⁷⁵

Discrimination because of immigration status was raised in relation to the ranking system for university admission, which may disadvantage overseas applicants compared with local students.

268 *Mabo v Queensland* (1988) 166 CLR 186, 230; [1988] HCA 69.

269 *Gueye v France* (196/85) – regarding the different treatment of retired soldiers depending on their nationality; *Adam v Czech Republic* (586/94) – regarding a law compensating Czech citizens who left the country under Communist pressure, which was not made available to a person with Czech parents who held citizenship of Australia; *Karakurt v Austria* (965/00) – where a Turkish citizen residing in Austria could not be a representative on a work council based on not being an Austrian citizen.

270 Committee on Economic, Social and Cultural Rights, *General Comment No. 20* (n 4) 30.

271 *SUPRA v Minister of Transport Services* [2006] NSWADT 83.

272 *Anti-Discrimination Act 1991* (Qld) s 8 (a) and (b).

273 *Taiwo v Olagbe* (and another) and *Onu v Akwivu* (and another) [1] [2016] UKSC 31.

274 *Anti-Discrimination Act 1991* (Qld) s 106B.

275 *Racial Discrimination Act 1975* (Cth) s 5.

However, the court found that because of the way the federal Act is drafted, immigration status can only be argued as direct, but not indirect, discrimination.²⁷⁶

This means that people in Queensland only have partial cover for discrimination on the grounds of immigration status under federal race discrimination law.

Experiences of discrimination

The Review was consistently told that people who are not Australian citizens, particularly if they are or have been refugees or asylum seekers, and people on short-term work visas (457 visas) are a marginalised group.²⁷⁷ This is significant given that around one in three people living in Queensland were born overseas, and 4.3% of the population has migrated from New Zealand.²⁷⁸

Multicultural Australia, which has extensive experience with clients from migrant and refugee backgrounds, told us that people regularly experience discrimination on the grounds of their visa or immigration status, including being:

- asked about their visa status and denied housing or employment, even where the visa category does not restrict them from obtaining accommodation or work
- subjected to exploitative working conditions, discrimination, or harassment on the assumption they won't take any action because of a 'precarious' visa.²⁷⁹

Queensland Transcultural Mental Health told us that immigration status is a 'large driver' of discrimination including when people try to access and navigate basic services – education, work rights, medical, and mental health care.²⁸⁰ They said that while policies exist for free health care for asylum seekers in Queensland, ongoing gaps and exclusions continue to pervade, creating significant inequality.²⁸¹

Another submission pointed to challenges for refugees who have severe to moderate disability, including psychosocial disability. While a range of programs and services is provided by the Queensland health and education departments to meet essential service needs, this does not extend to providing ongoing specialised disability supports. Special programs provided by the Queensland Government for resettlement support do not include specialised disability supports.²⁸²

Immigration Women's Support Service (IWSS) said that international students are struggling to find work since COVID-19, compared with the situation before the pandemic, and they have heard reports of a noticeable shift to employers hiring more permanent residents in roles in hospitality that they used to fill.²⁸³

Submissions received by the Review included these examples of discrimination related to immigration status:

- paying employees less than others because they are on 457 working visas²⁸⁴
- requiring disclosure of immigration status on rental application forms through real estate agencies²⁸⁵

276 *Jin v The University of Queensland* [2015] FCCA 2982 [38]–[42].

277 See for example: Queensland Program of Assistance to Survivors of Torture and Trauma consultation, 23 August 2021; Immigrant Women's Support Services consultation, 19 August 2021.

278 Australian Bureau of Statistics, *2016 Census QuickStats* (Web page, 26 October 2021) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/3>.

279 Multicultural Australia submission, 10.

280 Queensland Transcultural Mental Health submission, 11.

281 Queensland Transcultural Mental Health submission, 10.

282 Dr Grazia Catalano submission, 2-3.

283 Immigrant Women Support Services consultation, 19 August 2021.

284 Legal Aid Queensland submission, 79; Maurice Blackburn Lawyers submission, 12.

285 Legal Aid Queensland submission, 79; Maurice Blackburn Lawyers submission, 12.

- refusing bank or financial services because of being a migrant.²⁸⁶

Intersectional experiences

We also heard that discrimination is often caused by the interaction between a person's immigration status and another attribute or attributes.

Women from culturally and linguistically diverse communities who are temporary residents are at increased risk of stigma and marginalisation. To illustrate this point, Legal Aid Queensland provided this de-identified example from their legal practice:

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.

Legal Aid Queensland commented that if immigration status were recognised as a protected attribute, coupled with the recognition of intersectional discrimination, their client would have a strong complaint of discrimination on the grounds of immigration status and sex, as well as sexual harassment.

Similarly, IWSS told us about the challenges for women with temporary visa statuses who are trying to secure accommodation in a tight rental market. This has led to cases of sexual abuse from landlords, particularly where the person has taken up an informal tenancy arrangement, usually out of desperation.²⁸⁷

Scarlet Alliance noted that sex workers on temporary visas are a 'marginalised group within a marginalised group.' They report that migrant sex workers experience discrimination in relation to accommodation, financial services, and 'high rates of police and immigration harassment, threats and targeting.'²⁸⁸ Respect Inc and DecrimQLD echoed similar concerns that migrant sex workers feel coerced into providing information or testimony about other workers and were having difficulty reporting crimes and receiving support.²⁸⁹

AMPARO Advocacy Inc also told us about the intersectional experiences of their client group, who are people from refugee or migrant backgrounds and who have a disability. We heard that this group experiences serious challenges in navigating systems that are not designed for them, including access to essential services such as mental health.²⁹⁰

²⁸⁶ Maurice Blackburn Lawyers submission, 79.

²⁸⁷ Immigrant Women's Support Services consultation, 19 August 2021.

²⁸⁸ Scarlet Alliance, Australian Sex Workers Association submission, 11.

²⁸⁹ Respect Inc and DecrimQLD submission, 40.

²⁹⁰ AMPARO Advocacy Inc consultation, 8 September 2021.

Comparative approaches

Tasmania and the Northern Territory

Both the Northern Territory and Tasmanian Acts include a definition of race similar to Queensland's non-exhaustive definition, but with the added words, 'and status of being, or having been, an immigrant' (for Tasmania), and 'that a person is or has been an immigrant' (for the Northern Territory).²⁹¹

ACT Discrimination Act approach

The ACT legislation includes a stand-alone attribute of immigration status rather than including it in the definition of race, following a recommendation from the 2015 review of discrimination law by the Law Reform Advisory Council (LRAC) in that state.²⁹² The LRAC's view was this was appropriate to protect to a vulnerable part of the ACT community, and would give effect to the guarantee in the ACT's Human Rights Act of equal and effective protection against discrimination.²⁹³

Immigration status under the ACT legislation, 'includes being an immigrant, a refugee or an asylum seeker, or holding any kind of visa under the *Migration Act 1958* (Cth)'.²⁹⁴

Which approach is preferred?

Of the submissions in favour of protections for people on the basis of immigration status, most indicated a preference for immigration status being a stand-alone attribute.²⁹⁵ Legal Aid Queensland preferred the stand-alone ACT approach because they thought it best captured the scope of immigration status to be protected.²⁹⁶

However, others thought that because there is already a detailed definition of race, it would be fitting to expand the categories within race.²⁹⁷

The Review's position

The Review's position is that:

- People who are, or have been, immigrants, migrants, refugees, or asylum seekers experience discrimination in many areas of public life and should be protected by the Act.
- On a broad reading of the existing non-exhaustive definition of race, immigration or migration status is generally covered by the Act. But to avoid any doubt, this should be made clear by adding immigration or migration status to the list of things that race includes in the definition.
- Creating a separate, stand-alone attribute of immigration status is unnecessary if it is already included in the definition of race.
- Defining the terms immigration status or migration status would serve to unnecessarily constrain the scope, and this approach would be consistent with other terms such as 'colour' and 'ancestry' being undefined.

291 *Anti-Discrimination Act 1998* (Tas) s 3; *Anti-Discrimination Act 1992* (NT) s 4.

292 ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015) 84, Recommendation 14.5.

293 ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015) 81.

294 *Discrimination Act 1991* (ACT) Dictionary – immigration status.

295 Youth Advocacy Centre Inc submission, 4; Australian Lawyers Alliance submission, 15; Legal Aid Queensland submission, 15; Aged and Disability Advocacy Australia submission, 11; Queensland Law Society submission, 17; Maurice Blackburn Lawyers submission, 11.

296 Legal Aid Queensland submission, 96.

297 Australian Discrimination Law Experts Group submission, 54-55.

- Interpretation of the Act must be consistent with the Human Rights Act, and consideration of international human rights law commentary would lead to a broad and liberal interpretation of ‘immigration status’ or ‘migration status.’

Are exceptions needed?

Two submissions were concerned about the prospect of immigration status being an attribute, because it may cause inconsistency with other laws and obligations, or create an unreasonable compliance burden.²⁹⁸

In a roundtable with representatives of Queensland state government departments, we heard about financial resourcing and operational issues that might flow from including immigration status in the Act.²⁹⁹ Following the roundtable discussion, two government agencies directly raised concerns of this kind.

Employers

Submissions on behalf of employers raised two concerns about protecting immigration status:

- potential inconsistency between an employer’s obligation not to discriminate and the need to comply with various state and federal migration and other laws
- preferences for hiring Australian citizens because of the additional compliance burden required when hiring non-citizens.

The Australian Industry Group described the challenges for employers complying with the Migration Act,³⁰⁰ and noted other areas where there may be complications for employers³⁰¹ including that:

- The Queensland Labour Hire Licensing Authority identifies the presence of temporary migrant workers in a licence holder’s workplace as a risk factor to be considered in decisions to grant a labour hire licence and for general monitoring purposes.
- There are restrictions on hiring overseas workers if Australian workers can perform the work.³⁰²

Australian Industry Group also considered that:

It is inappropriate and unworkable for immigration status to be considered a protected attribute given the Migration Act’s protections and given employer preferences to employ citizens where possible to avoid significant obligations and risk attached to employing migrant workers on particular types of visas.³⁰³

Stakeholders who supported protection from discrimination on the basis of immigration status nevertheless acknowledged that some situations should fall outside the scope of the protection.³⁰⁴ Such a situation could include a complaint being made against an employer who could not employ a person or allow them to work more than a certain number of hours, because it would be unlawful under migration laws.

298 Australian Industry Group submission, 11-13; Department of Education (Qld) submission, 13.

299 Government representatives roundtable, 14 February 2022.

300 *Migration Act 1958* (Cth).

301 Australian Industry Group submission, 12-13.

302 Australian Industry Group submission, referring to the *Building and Construction Industry (Improving Productivity) Act 2016* which requires that the Building Code include a requirement that “no person is employed to undertake building work unless...the employer demonstrates that no Australian citizen or Australian permanent resident is suitable for the job.”

303 Australian Industry Group submission, 12.

304 Youth Advocacy Centre Inc submission, 4; Queensland Council for Civil Liberties submission, 16-17; Maurice Blackburn Lawyers submission, 11-12.

While some submissions suggested adding a reasonableness condition (like the ACT approach),³⁰⁵ Maurice Blackburn Lawyers suggested that statutory exceptions may need to apply.³⁰⁶ Legal Aid Queensland suggested that the ACT option should be implemented, but without the reasonableness aspect, because reasonableness is already encompassed in the definition of indirect discrimination.³⁰⁷

Education providers

The Queensland Department of Education said that inclusion of immigration status or changes to exceptions would have significant implications for service delivery and resourcing because the existing system is:

...predicated on the application of specific criteria to support government strategic objectives and specific visa class holders through the current citizenship or visa status exemption.³⁰⁸

A key concern was the potential for inconsistency with existing federal legislation that mandates charging of fees to international students (student visa (Subclass 500) holders), which is also reflected in the state education laws.³⁰⁹

Government policies

In 2012 a new general exemption³¹⁰ from the operation of the Act was added to the Anti-Discrimination Act.³¹¹ The provision allows eligibility provisions that require a particular citizenship or visa status to be included in state government policies, and is unique to Queensland.

Government policies that are exempt from the Act include where people are provided with financial or other assistance, services, or support – this may be disability supports, housing, or other essential government services.

While the justification for the new exemption was to ensure ‘effective management of limited public resources,’³¹² it was criticised at the time in submissions to the Legal Affairs and Community Safety Committee as being:

- potentially incompatible with human rights instruments including the ICCPR; and
- sought to target particular nationalities, in particular New Zealand citizens, and families of children with disabilities.³¹³

Rather than representing a shift in policy, the Department of Justice and Attorney-General advised the Committee that policies relating to education, training, housing, disability, mental health, seniors and investment services were already limiting access to services based on citizenship and visa requirements, and the government wanted certainty that this would not amount to discrimination.³¹⁴

305 See for example: Queensland Council for Civil Liberties submission, 16-17, Youth Advocacy Centre Inc submission, 4.

306 Maurice Blackburn Lawyers submission, 11.

307 Legal Aid Queensland submission, 95.

308 Department of Education (Qld) submission, 13.

309 Department of Education (Qld) submission, 13. Referring to *Education Services for Overseas Students Act 2000* (Cth) and *Education General Provisions Act 2006* (Qld).

310 *Anti-Discrimination Act 1991* (Qld) s 106B.

311 Inserted by *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Act 2012* (Qld).

312 Queensland, *Parliamentary Debates*, Legislative Assembly, 1 November 2012, 2382 (JP Bleijie, Attorney-General).

313 Legal Affairs and Community Safety Committee, *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012* (Report no. 18, November 2012), 34-44.

314 Legal Affairs and Community Safety Committee, *Youth Justice (Boot Camp Orders) and Other Legislation Amendment Bill 2012* (Report no. 18, November 2012), 44.

Submissions to this Review questioned whether the broad approach of allowing all government policies to contain eligibility provisions based on a particular citizenship or visa status was necessary and compatible with the right to equality protected under the Human Rights Act.³¹⁵

Comparative approaches

Other jurisdictions contain exceptions, but they do not have the same broad scope as the Queensland exception.

The Australian Capital Territory protects people from discrimination on the ground of their immigration status but provides an exception if the discrimination is 'reasonable' having regard to relevant factors.³¹⁶ The only example given of a relevant factor is the 'effect on the person.'³¹⁷

At the federal level, the Age Discrimination Act³¹⁸ provides an exemption for acts done in the administration of the Migration Act, or Immigration (Guardianship of Children) Act,³¹⁹ or associated regulations.³²⁰ The exemption also covers anything done in direct compliance with the Australian Citizenship Act³²¹ or Immigration (Education) Act.³²² The Disability Discrimination Act provides a similar exemption, but it requires that the acts done are permitted or required under the Migration Act (or legislative instruments made under it) for the exemption to apply.³²³

In the Northern Territory and Tasmania, which have broader definitions of race that explicitly cover immigration status, discrimination is permitted where necessary to comply with a law of the state or Commonwealth.³²⁴

Human rights considerations

We have identified potential inconsistency between the obligations of public entities to act compatibly with human rights under the Human Rights Act and the blanket approach of the citizenship or visa requirements exception.

The Human Rights Act protects and promotes human rights of people in Queensland, including that people are equal before the law and have the right to equal and effective protection against discrimination.³²⁵ The Act applies to everyone in Queensland regardless of their immigration or migration status.

Human rights may be subject to reasonable limitations that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. In deciding whether rights can be reasonably and justifiably limited, consideration should be given to the factors outlined in the Human Rights Act.³²⁶

Ensuring that finite state resources are effectively managed is a legitimate purpose to be achieved by government. However, this must be balanced with preserving human rights, including equality rights, for example, of people on temporary visas, who as a group may be vulnerable to marginalisation and exploitation.

315 See for example: PeakCare Queensland Inc submission, 16; Australian Discrimination Law Experts Group submission, 66; Legal Aid Queensland submission, 94; Respect Inc and DecrimQLD submission, 50.

316 *Discrimination Act 1991* (ACT) s 57P.

317 *Discrimination Act 1991* (ACT) s 57P.

318 *Age Discrimination Act 2004* (Cth).

319 *Immigration (Guardianship of Children) Act 1946* (Cth).

320 *Age Discrimination Act 2004* (Cth) s 43.

321 *Australian Citizenship Act 2007* (Cth).

322 *Immigration (Education) Act 1971* (Cth).

323 *Disability Discrimination Act 1992* (Cth) s 52.

324 *Anti-Discrimination Act 1998* (Tas) s 24; *Anti-Discrimination Act 1992* (NT) s 53.

325 *Human Rights Act 2019* (Qld) s 15.

326 *Human Rights Act 2019* (Qld) s 13.

Implementing eligibility provisions in government policies could potentially unreasonably limit people's human rights, particularly where the policies relate to accessing essential government services. Under the Human Rights Act, government service providers must consider whether there are less restrictive and reasonably available ways to achieve the balance between the equality rights of visa holders and non-citizens, and the legitimate purpose of preserving government resources for people most in need of assistance.

The Review's position

The Review's position is that:

- Employers and government departments should not have to deal with competing duties under migration laws and anti-discrimination law.
- Any exceptions that permit discrimination on the basis of immigration status, visa or citizenship status, should not be so broad as to allow unfavorable treatment to merely avoid inconvenience.
- Acts done in direct compliance with federal or state laws regarding immigration or citizenship should not amount to discrimination under Queensland anti-discrimination legislation.
- The current citizenship and visa status exception, if retained, should be consistent with obligations of public entities under the Human Rights Act to act and make decisions compatibly with human rights.

Recommendation 25

- 25.1** The Act should add the further terms 'immigration or migration status' to the non-exhaustive definition of race.
- 25.2** A general exception should be included in the Act to permit discrimination on the basis of immigration or migration status when an act is done in direct compliance with a law of the state or Commonwealth regarding the regulation of immigration to Australia, and related matters.
- 25.3** The existing citizenship or visa requirements exception should be retained in the same terms with an additional sub-section that requires that decisions and actions made under it are to be compatible with the Human Rights Act.
-

Religious belief or activity

In the Discussion Paper we asked about whether reform to the definition of existing attributes is needed. The current definitions for religious activity and religious belief are:

religious activity means engaging in, not engaging in or refusing to engage in a lawful religious activity.

religious belief means holding or not holding a religious belief.³²⁷

Three submissions said that the definitions required changes,³²⁸ and suggested that:

- The words ‘genuine’³²⁹ or ‘sincerely held’³³⁰ should be added to the religious belief definition.
- The definition of activity should be clear that it extends to observances of religious worship outside of personal, private observances.³³¹
- Religious belief or activity should encompass actions motivated by faith.³³²

At the commencement of the Review, we undertook initial consultations to identify priority issues. This included meeting with representatives from religious bodies and organisations representing religious educational institutions.³³³ During our consultations, we did not identify issues with the definition of religious belief or activity in the Act.

Family, carer and kinship responsibilities

In the Discussion Paper we asked whether any reform to the definitions for existing attributes is needed. We heard from five stakeholders that the definition of family responsibilities needs to be reconsidered.³³⁴

Current approach

Family responsibilities is defined in the Act to mean a person’s responsibilities to care for or support:

- a dependent child of the person; or
- any other member of the person’s immediate family who is in need of care or support.³³⁵

Immediate family is defined through an exhaustive list which is —

- the person’s spouse or former spouse; or
- a child of the person or the person’s spouse or former spouse, including an ex nuptial child, stepchild, adopted child, or past or present foster child of the person or the person’s spouse or former spouse; or

327 *Anti-Discrimination Act 1991* (Qld) Dictionary – religious activity, religious belief.

328 Australian Association of Christian Schools submission, 14; Christian Schools Australia submission, 17-19; Human Rights Law Alliance, 6-7.

329 Christian Schools Australia submission, 17-19; Human Rights Law Alliance, 6-7.

330 Australian Association of Christian Schools submission, 14.

331 Human Rights Law Alliance, 6-7.

332 Christian Schools Australia submission, 17-19.

333 Queensland Churches Together consultations (Christian churches and multifaith representatives), 13 and 16 September 2021; Associated Christian Schools consultation, 8 August 2021; Australian Christian Higher Education Alliance consultation, 21 September 2021; Brisbane Bahá’í Community consultation, 12 August 2021; Queensland Catholic Education consultation, 20 August 2021; Islamic College of Brisbane consultation, 8 August 2021; Islamic Women’s Association of Queensland consultation, 16 September 2021; Sikh Nishkam Society of Australia consultation, 9 August 2021.

334 Queensland Advocacy Incorporated submission, 4; Queensland Nurses and Midwives Union submission, 23-24; Equality Australia submission, 8; Australian Discrimination Law Experts Group submission, 50; Jacqueline King, Council of Unions, Consultation with the Review of the Anti-Discrimination Act, 16 September 2021.

335 *Anti-Discrimination Act 1991* (Qld) Dictionary – family responsibilities.

- a parent, grandparent, grandchild or sibling of the person or the person's spouse or former spouse.³³⁶

'Family responsibilities' are therefore confined to 'care or support' and 'immediate family' confined to children (such as stepchildren, grandchildren, and adopted or foster children); spouse or former spouse (and their children); and parents, grandparents, and siblings of the person or their spouse or former spouse. People caring for someone not included in the definition of 'close relative,' such as an aunt, uncle, or cousin would not be covered by this attribute.

Is there a gap in protection?

Stakeholders raised the following concerns with the current definition:

- People who provide critical care or support for a person with a disability who is not a relative would not be considered 'immediate family'.³³⁷
- This definition represents a narrow concept of family that is out of step with the diversity of contemporary families, cultural practices, and family arrangements, particularly when compared with other Australian discrimination and industrial laws.³³⁸
- Current definitions may exclude people without legal recognition of their relationships, co-parenting arrangements, and chosen or kinship family structures.³³⁹

Comparative approaches

Most Australian jurisdictions contain protections for the equivalent of 'family responsibilities' but there is no consistency in the terms used for this attribute. The terms used include: family responsibilities; responsibilities as a carer; parental status or status as a carer; family responsibility or family status; parental status, parent, family, carer or kinship responsibilities; parenthood; and caring responsibilities.

Definitions in state laws

Definitions in Western Australia, the ACT, and Victoria include caring relationships which are not limited to immediate family. The ACT and Victoria define a carer as a person on whom someone is dependent for voluntary care,³⁴⁰ and Western Australia includes having unpaid responsibility for the care of another person who need not be a dependent.³⁴¹

South Australia expressly recognises responsibilities for Aboriginal peoples and Torres Strait Islander peoples, with a definition that includes responsibilities to care for or support any person to whom that person is held to be related according to Aboriginal kinship rules or Torres Strait Islander kinship rules.³⁴²

336 *Anti-Discrimination Act 1991* (Qld) Dictionary – immediate family.

337 Queensland Advocacy Incorporated submission, 4.

338 Queensland Nurses and Midwives Union submission, 23-24; Equality Australia submission, 8 and 43; Queensland Council of Unions consultation, 20 August 2021.

339 Equality Australia submission, 43; Australian Discrimination Law Experts Group submission, 50.

340 *Discrimination Act 1991* (ACT) Dictionary; *Equal Opportunity Act 2010* (Vic) s4(1).

341 *Equal Opportunity Act 1984* (WA) s 4(1).

342 *Equal Opportunity Act 1984* (SA) s 5(3)(b).

Definitions in federal laws

The Sex Discrimination Act narrowly defines family or carer's responsibilities as responsibilities to care for or support dependent children or immediate family members,³⁴³ and is similar to the Queensland definition.

The federal Fair Work Act protects people from adverse action on the basis of family or carer's responsibilities.³⁴⁴ This prohibited ground is potentially open to a broader interpretation because it is undefined, and therefore should take its ordinary meaning.

Human rights considerations

International human rights law has broadly interpreted what family and caring relationships include,³⁴⁵ extending its meaning beyond a traditional family unit based on biological connections or marriage.³⁴⁶ The Human Rights Act provides for the right to protection of families and children.³⁴⁷ The Explanatory Notes to the Human Rights Bill 2018 state that 'family' is understood broadly and would extend to different cultural understandings of family and small family units with or without children.³⁴⁸

The concept of 'family' and the expectations placed on members of First Nations people and some culturally and linguistically diverse communities in relation to caring responsibilities are beyond the scope of the current definition. This is significant because cultural rights are protected under the Human Rights Act, and Aboriginal and Torres Strait Islander cultural rights are expressly recognised.³⁴⁹ The Human Rights Act refers specifically to the right of Aboriginal and Torres Strait Islander peoples to 'enjoy, maintain, control, protect, and develop their kinship ties.'³⁵⁰

Kinship responsibilities might extend to an obligation placed on a particular person because of their family and cultural connections. The term 'parent' may extend to a cultural parent including those extended family or kin involved in child rearing.³⁵¹ Other responsibilities may arise during Sorry Business, which involves obligations during the period of cultural practices and protocols associated with death.³⁵²

To ensure compatibility with the Human Rights Act, the meaning given to family, carer, or kinship carer may be informed by the language of relevant international instruments:

- *Convention on the Elimination of All Forms of Discrimination against Women* (United Nations)³⁵³
- *Workers with Family Responsibilities Convention* (ILO 156)³⁵⁴

343 Sex Discrimination Act 1984 (Cth) s 4A.

344 Fair Work Act 2009 (Cth) s 351.

345 United Nations Human Rights Committee, General Comment No 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation, 32nd sess (8 April 1988). United Nations Human Rights Committee, General comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses, 39th sess (27 July 1990). See also *Hendriks v Netherlands* (201/85), *X v Colombia* (1361/05), *Balaguer Santacana v Spain* (417/90), *Hopu and Bessert v France* (549/93).

346 This was recognised by Queensland Civil and Administrative Tribunal in *NN and IN v Department of Child Safety, Youth and Women* [2020] QCAT 126, 22-28.

347 Human Rights Act 2019 (Qld) s 26(1).

348 Explanatory Notes, Human Rights Bill 2018 (Qld), 22.

349 Human Rights Act 2019 (Qld) s 27 cultural rights – generally, and s 28 – cultural rights – Aboriginal peoples and Torres Strait Islander peoples

350 Human Rights Act 2019 (Qld) s 28(b).

351 Department of Children, Youth Justice and Multicultural Affairs (Qld), *Charter of Rights for parents involved with the child protection system in Queensland*, 11.

352 SNAICC, *Sorry Business*, (Web page, 2022) <<https://www.supportingcarers.snaicc.org.au/connecting-to-culture/sorry-business/>>

353 United Nations General Assembly, International Convention of the Elimination of All Forms of Racial Discrimination, res 2106 (21 December 1965). The Preamble recognises that the traditional caring role of women for children should not be a basis for discrimination and that there should be responsibilities that are shared between men and women.

354 ILO Convention C156 – Workers with Family Responsibilities Convention, 1981 (no 156) – Article 1 refers to members of immediate family who clearly need care or support.

- *Convention on the Rights of the Child* (United Nations)³⁵⁵
- *Convention on the Rights of Persons with Disabilities* (United Nations)³⁵⁶
- *United Nations Declaration on the Rights of Indigenous Peoples*.³⁵⁷

The Review's position

The Review's position is that:

- A narrow definition of family responsibilities that includes only immediate family does not reflect diverse contemporary family structures.
- Aboriginal and Torres Strait Islander communities have the right and cultural responsibility to maintain their kinship ties, and the current definition fails to acknowledge this.
- Situations where a carer is not an immediate family member are not covered by the current definition. This exposes people who care for people with disability and older people to discrimination on that basis.
- Attempting to define family, caring, and kinship relationships is difficult and may unnecessarily constrain the interpretation of those words by tribunals and courts, and may become out of date.
- Most employers in Queensland are required to comply with the Fair Work Act, which contains family or carer's responsibilities as a protected ground.
- The preferred approach is to change the name of the attribute to reflect three distinct but often related responsibilities – family, carer, and kinship.
- The attribute should take its ordinary meaning, but be interpreted compatibly with Human Rights Act.

Recommendation 26

26.1 The current attribute of family responsibilities should be renamed 'family, carer, or kinship responsibilities' and should not be defined.

³⁵⁵ United Nations General Assembly, *Convention on the Rights of the Child*, res 44 (20 November 1989). Article 2(1) recognises that children have rights no matter what kind of family they come from (regardless of their parent or carer's status), and Article 5 confirms that state parties should respect the responsibilities and rights of not only parents, but those extended family or community members provided for by local custom, legal guardians and others responsible for the child.

³⁵⁶ United Nations General Assembly, *Convention on the Rights of Persons with Disabilities*, 61st sess, UN Doc A/RES/61/106 (13 December 2006). The Preamble sets out a key concept that family is the natural and fundamental group unit in society and people with disabilities and their family members should receive protection and assistance to ensure the full and equal enjoyment of rights for the person with disability. Article 23(5) further states that people with disabilities should be supported to be cared for by immediate family, in the alternative wider family, and failing that within the community in a family setting.

³⁵⁷ United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc A/RES/61/295 (13 September 2017), 4. The Preamble recognises the right of Indigenous family and communities to retain shared responsibility for upbringing, training, education and well-being of children.

Protecting additional attributes

Criteria for including new attributes

Since the introduction of the Anti-Discrimination Act over 30 years ago, social structures and community attitudes and expectations have changed.

Discrimination law has the job of protecting all people – and particularly people most at risk of experiencing discrimination – from its harmful effects. In this section we examine whether further attributes should be protected to ensure that the Act remains relevant in today's society.

In 2002 the list of protected attributes in the Act was expanded to include parental status, family responsibilities, sexuality, and gender identity. Parliament's reasons for enacting these amendments were 'to acknowledge the changing nature of social and family relationships in contemporary society.'³⁵⁸

Since then, society's attitudes have continued to change, with a notable example being the introduction of marriage equality.³⁵⁹ However, no additional attributes have been added to the Act since 2002. Through our consultations, submissions, and responses to the Discussion Paper, we heard the community's expectations about additional attributes that should be protected by law, as well as attributes that are currently protected in other jurisdictions and how they are defined.

In recommending new attributes, we have considered what is essentially a threshold question. The Act's effectiveness may be diluted, and it becomes difficult to comply with the law³⁶⁰ if there is a long list of attributes, particularly if they overlap, and lead to complaints on the basis of multiple attributes that cover the same characteristics.

Any lack of clarity about why unfair treatment because of some attributes and not others is prohibited can also undermine the credibility of the law.³⁶¹

Discrimination law in Queensland has aimed to provide a means to protect people from being treated unfairly, denied opportunities, refused access to what was by rights theirs, and from objectionable conduct, as well as providing enforcement provisions. While the Act sought to set a 'new, normative standard of civilised behaviour'³⁶² it does not protect against all negative attitudes and stigma.

In deciding whether an attribute should be protected by the Act, we have asked:

- Is there a gap in protection?
- Is the proposed attribute of a comparable nature to those already covered under the Act?

Is there a gap in protection?

We have considered whether there is sufficient information to show that people with a particular characteristic require the protection of the Anti-Discrimination Act. In doing this, we have taken into account the frequency and type of discrimination people experience, and the impact it has on their lives.

358 Discrimination Law Amendment Bill 2012

359 Which included amendment of the federal *Marriage Act 1961* (Cth) on 9 December 2017 following a compulsory national plebiscite.

360 Australian Industry Group submission, 12.

361 Iyiola Solanke, *Discrimination as Stigma: A Theory of Anti-Discrimination Law*, (Bloomsbury Publishing, 2017) 160.

362 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 1991, 3196-3197 (DM Wells, Attorney-General).

Whether people with the particular characteristic are already protected under an existing attribute, or are covered by other legislation, for example an industrial relations law, is also a factor for consideration.

Is the proposed attribute of a comparable nature to the attributes already in the Act?

The grounds of discrimination (such as age, sex, colour etc) protected under the *International Covenant on Economic Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR) are provided as a non-exhaustive list, which means that further grounds may be incorporated over time.³⁶³

Protected attributes under these international instruments do not extend to any characteristic of a person, but only those that are comparable to the ones listed.³⁶⁴

We consider that attributes protected under the Anti-Discrimination Act fall into three main categories:

- **Immutable characteristics:** Attributes that relate to immutable characteristics, which are traits that a person cannot change – for example age, race etc.³⁶⁵
- **Characteristics of historically marginalised groups:** Attributes that relate to characteristics of historically marginalised groups or people who regularly experience stigma, prejudice, or vulnerability – for example, sex workers (covered by lawful sexual activity), people with mental health conditions, and people who live with HIV (covered by impairment).
- **Established human rights:** Attributes based on human rights protected under international instruments – for example religious belief or activity, political belief or activity.

The criteria we have adopted have been informed by the commentary of the United Nations Committee on Economic, Social and Cultural Rights Committee. In determining if another ground or ‘status’ should be recognised in addition to the express grounds, this Committee has commented that because the nature of discrimination varies according to context and evolves over time, there needs to be a ‘flexible’ approach, incorporating considerations of whether the group is experiencing discrimination which cannot be reasonably and objectively justified, and whether the group is of a comparable nature and is vulnerable, having suffered or continuing to suffer marginalisation.³⁶⁶

In considering additional attributes for inclusion in the Act we have had regard to the following factors in relation to groups or classes of people with a currently unprotected attribute:

- Is the group experiencing discrimination that cannot be reasonably and objectively justified?
- Is the group of a comparable nature to people represented by the attributes already recognised by the Act?
- Is the group vulnerable, having suffered and continuing to suffer marginalisation?

³⁶³ Article 2 of each Covenant states that ‘each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth **or other status**.’ [emphasis added]

³⁶⁴ William A Schabas, *UN International Covenant on Civil and Political Rights: Nowak’s CCPR commentary* (N.P. Engel Publisher, 3rd rev ed, 2019) 774.

³⁶⁵ Another way that this has been framed is whether the person has a characteristic which is ‘either unchangeable or changeable only at unacceptable personal costs.’ – *Egan v Canada* [1995] 2 SCR 513

³⁶⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 20* (n 4) 27. See also *Egan v Canada*, [1995] 2 SCR 513, 554.

Ensuring the Act remains current

The only way to extend the list of protected attributes under the Anti-Discrimination Act is to amend the law.

While this is the case in all jurisdictions in Australia, some international jurisdictions have a different approach. The South African Act includes a list of prohibited grounds, but can also include any other ground where discrimination causes or perpetuates systemic disadvantage, undermines human dignity, or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to the prohibited grounds.³⁶⁷

Queensland's Human Rights Act has a non-exhaustive definition of discrimination that 'includes' the meaning of discrimination under the Anti-Discrimination Act. However, human rights legislation pertains to the relationship between an individual and the State, not between individuals and other individuals or organisations across broad areas of public life covered by the Anti-Discrimination Act, for example work and provision of goods and services in the private sector.³⁶⁸

Non-exhaustive attribute list

Four submissions suggested that a more flexible approach would be to allow tribunals and courts to recognise other attributes if they relate to systemic or historical disadvantage, based on the approach of the ICCPR and ICESCR in allowing grounds of discrimination to be included if comparable to existing grounds (as described above).³⁶⁹ Caxton Legal Centre thought that there would need to be a robust framework for establishing systemic or historical disadvantage before an attribute is included, so that the evolution of the law responds only to the demands of equality, not privilege.³⁷⁰

However, consistent with the ACT Law Reform Commission's decision not to adopt this approach,³⁷¹ we consider that:

- Uncertainty about whether discrimination is lawful or not is a genuine risk if there is a general 'or other status' element to the list of attributes. Ensuring that duty-bearers understand the scope of their responsibilities assists compliance.
- The business community have expressed concerns about the complexity of complying with both federal and state discrimination and industrial laws, each with different coverage.³⁷² If the laws become ambiguous and hard to apply, the level of compliance decreases.
- The Commission and the Act has a role in educating duty-holders and the community about anti-discrimination laws – a degree of certainty about what those rights and responsibilities is needed for the law to be effective.
- Such an open-ended provision could infringe on the fundamental legislative principle which requires that legislation is unambiguous and drafted in a sufficiently clear and precise way.³⁷³
- Tribunals and courts may be reticent to take on what may amount to a law-making function.

While we agree with the premise of needing to 'future-proof' the Act, more appropriate ways to achieve this are available, and are discussed in the following section.

367 *Promotion of Equality and Prevention of Unfair Discrimination Act* [No. 4 of 2000], ch 1 Definitions 1 (xxii).

368 *Human Rights Act 2019* (Qld) Sch 1 Dictionary.

369 Community Legal Centres Queensland submission, 2; Women's Legal Service Qld submission, 3; Queensland Advocacy Incorporated submission, 3; Caxton Legal Centre submission, 28.

370 Caxton Legal Centre submission, 28.

371 ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015), 56.

372 Australian Industry Group submission, 12; Small business roundtable, 7 March 2022.

373 *Legislative Standards Act 1992* (Qld) s 4(3)(k).

Recommending additional grounds

One of the current functions of the Commission is:

When requested by the Minister, to research and develop additional grounds of discrimination and to make recommendations for the inclusion of such grounds into the Act.³⁷⁴

While this function provides the capacity to ensure that the list of protected attributes keeps in step with the needs of contemporary society, to the knowledge of the Review, this function has never been used, either by request from the Attorney-General or at the suggestion of the Commission.

In chapter 6 we recommend the expansion of the functions of the Commission including that the Commission's research function be retained and expanded.

Through its engagement and consultation work, the Commission is well placed to identify if and when additional attributes should be protected. To add to this knowledge, data about enquiries and complaints is routinely reviewed and analysed. To ensure the Commission takes a proactive role in monitoring the list of protected attributes, we consider that there would be value in allowing the Commission to recommend additional attributes to the Attorney-General on its own initiative, rather than only by request.

We anticipate that the Commission would need to establish a set of considerations to identify the threshold at which to recommend a new attribute be protected by the Act. This could be informed by the criteria for including new attributes outlined above.

The Review's position

The Review's position is that:

- The Commission's functions should include the capacity to recommend to the Attorney-General that additional grounds of discrimination be included in the Act. This would place the responsibility for identifying when additional attributes should be protected with the Commission, which is best placed to do so.
- This would allow for the Commission to recommend updates to the law without having to wait until the next comprehensive review of the Act.

Recommendation 27

27.1 The Commission's functions should include the ability to recommend to the Attorney-General that additional grounds of discrimination be included in the Act.

27.2 The Commission should establish an internal process to monitor and evaluate information it obtains, including through its education, engagement, and dispute resolution functions, to identify when the threshold for adding a new attribute is met.

Sex characteristics

In the Discussion Paper we asked whether sex characteristics should be included as an additional attribute, whether it should be defined, and if so, how.

Since the Discussion Paper was published, the Legal Affairs and Safety Committee has recommended that anti-vilification protections should extend to include sex characteristics and/or

³⁷⁴ *Anti-Discrimination Act 1991* (Qld) s 253(f).

intersex status,³⁷⁵ and the government has supported this in-principle, pending the outcome of this Review.³⁷⁶ Our recommendations in this section will therefore influence the terminology that will be used to recognise intersex people in relation to protection from both discrimination and vilification.

Current approach

People born with variations in sex characteristics, sometimes known as intersex, are not clearly covered by the Act. While the Act refers to being 'of indeterminate sex' in the definition of gender identity, this term is not used by people who have variations of sex characteristics.

Twenty submissions indicated support for a new attribute, separate from gender identity.³⁷⁷ No stakeholders suggested that people born with variations in sex characteristics were not in need of specific and separate protection, or that the status quo was appropriate.

Is there a gap in protection?

A detailed submission from Intersex Human Rights Australia (IHRA) provided examples of the discrimination experienced by people who have variations in sex characteristics in many areas of life, including health services, accommodation, education, employment and insurance.³⁷⁸

IHRA refers to a survey of people born with atypical sex characteristics which identified that individuals whose variations are more physically evident to strangers are more likely to bear the brunt of social discrimination³⁷⁹ and where a variation is not evident, an individual may avoid disclosure, or medicalise their intersex trait, to prevent risks of discrimination.³⁸⁰

Australia Lawyers Alliance also comment that:

People born with variations of sex characteristics, also called intersex people, experience stigmatisation, discrimination, bullying, body shaming and other forms of discrimination and harm because of their sex characteristics, and also assumptions about their identities.³⁸¹

In our consultations³⁸² we heard from Intersex Peer Support Australia and Queensland Council for LGBTI Health about the issues faced by this group. A strong and consistent theme was negative and sometimes traumatic experiences when accessing health services.

The current definition of gender identity creates a gap in protection by incorrectly conflating trans and gender diverse people and people born with variations of sex characteristics. The words 'of indeterminate sex' used in the gender identity definition are not used by people with variations in sex characteristics, and in 2002 when the gender identity attribute was created there seems to

375 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022), 45.

376 Queensland Government, Response to Inquiry into serious vilification and hate crimes (Tabled Paper, 2022), Recommendation 4.

377 Intersex Human Rights Australia submission; Rainbow Families Queensland submission; PeakCare Queensland Inc submission; Diversity Queensland submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Australian Lawyers for Human Rights submission; Queensland Council for LGBTI Health submission; Queensland Council for Civil Liberties submission; Queensland Law Society submission; R Harrison submission; Name withheld (sub.008) submission; Respect Inc and Decrim QLD submission; Just.Equal Australia submission; Pride in Law submission; Australian Discrimination Law Experts Group submission; LGBTI Legal Service Inc submission; Aged and Disability Advocacy Australia submission; Equality Australia submission; Legal Aid Queensland submission; Australian Lawyers Alliance submission.

378 Intersex Human Rights Australia submission, 12-16.

379 Intersex Human Rights Australia submission, 13. Referring to Tiffany Jones, Bonnie Hart, Morgan Carpenter, Gavi Ansara, William Leonard, and Jayne Lucke, *Intersex: Stories and Statistics from Australia*, (Open Book Publishers, 2016). Summary of findings available: <<https://ihra.org.au/30313/intersex-stories-statistics-australia/>>.

380 Intersex Human Rights Australia submission, 13.

381 Australian Lawyers for Human Rights submission, 4.

382 Intersex Peer Support Australia consultations, 9 September and 16 September 2021; Queensland Council for LGBTI Health consultation, 26 August 2021.

have been insufficient community consultation on this language.³⁸³ The current definition not only uses inappropriate and stigmatising language, but makes it difficult for people to identify if they are protected by the law.

Is the proposed attribute of a comparative nature to those already covered under the Act?

Sex characteristics are either innate (genetic traits) or acquired (for example, through life-preserving medical treatment).³⁸⁴ People with variations in sex characteristics possess an 'immutable characteristic' and they experience disadvantage and stigma because of it. They are an analogous group to those already protected by the Act.

Comparative approaches

Having a variation in sex characteristics is not a gender identity, and most Australian jurisdictions have separated these attributes. The federal Sex Discrimination Act has included 'intersex status' since 2013.³⁸⁵

Since that time, advocates have sought to include a universal sex characteristics attribute,³⁸⁶ which is a position endorsed in the community consensus Darlington Statement.³⁸⁷ Tasmania includes an attribute called 'intersex variations of sex characteristics',³⁸⁸ Victoria and the ACT include 'sex characteristics',³⁸⁹ and the Northern Territory has announced it will protect 'sex characteristics' as an attribute.³⁹⁰

We note that the Legal Affairs and Community Safety Committee recently identified the need to protect people with variations of sex characteristics from vilification. However, the Committee did not decide which was the better term, 'sex characteristics' or 'intersex status'.³⁹¹

Which terminology and definition are preferred?

We recognise that people with variations in sex characteristics have a range of experiences. One participant in a community survey run by QC LGBTI Health described having a variation in sex characteristics:

*It's not an impairment and it's not a gender identity or a sex. It is various conditions that make someone appear to be a mix of genders naturally. They could be XX, XXY's etc. Or they might be like me, hormones gone haywire and now I have low SHBG and high testosterone leading to hirsutism and me looking like a man but being a woman.*³⁹²

The majority of submissions explicitly endorsed the *Yogyakarta Principles plus 10* terminology and approach (reflected in ACT and Victorian legislation).³⁹³ The alternatives noted were: potential

383 Intersex Human Rights Australia submission, 21-22 referring to Queensland parliament records (Hansard).

384 Intersex Human Rights Australia submission, 26.

385 *Sex Discrimination Act 1984* (Cth) s 5C.

386 Intersex Human Rights Australia, *Discrimination* (Web Page, 24 February 2021) <<https://ihra.org.au/discrimination/>>.

387 Intersex Human Rights Australia, *Darlington Statement* (Web Page, 2022) <<https://ihra.org.au/darlington-statement/>>.

388 *Anti-Discrimination Act 1998* (Tas) s 16(eb).

389 *Equal Opportunity Act 2010* (Vic) s 6(oa).

390 Northern Territory Government, *Territory Stories – Achieving Equality in the Northern Territory* (Tabled Paper, February 2022).

391 Legal Affairs and Safety Committee, Report No. 22, 57th Parliament, *Inquiry into serious vilification and hate crimes* (2022).

392 Survey participant (2), Queensland Council for LGBTI Health submission, 21.

393 Name withheld (sub.008) submission, 2; Intersex Human Rights Australia submission, 26; Rainbow Families Queensland submission, 6; PeakCare Queensland Inc submission, 15; Australian Lawyers Alliance submission, 16; Australian Lawyers for Human Rights submission, 4; Queensland Positive People, HIV/AIDS Legal Centre,

inclusion in the attribute of sex,³⁹⁴ or physical features,³⁹⁵ or emulating the federal approach of intersex status.³⁹⁶

The Preamble to the *Yogyakarta Principles plus 10*³⁹⁷ defines sex characteristics as ‘each person’s physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.’

Intersex Human Rights Australia recommended the inclusion of ‘sex characteristics’ based on the *Yogyakarta Principles plus 10* terminology and definition, rather than an ‘intersex status’ attribute, for reasons including that sex characteristics:

- operates ‘at a different, finer degree of granularity to the coarser, broader concept of intersex status’
- are not an identity, and this would be made clearer
- are universal.³⁹⁸

The Review’s position

The Review’s position is that:

- Having determined that there is a gap in protection, and that the attribute is comparable to existing grounds, adding an additional and separate ‘sex characteristics’ attribute meets our criteria for including a new attribute.
- The *Yogyakarta Principles plus 10* provides a best practice approach to defining this attribute.

Recommendation 28

28.1 The Act should include a new attribute of sex characteristics, defined consistently with the *Yogyakarta Principles plus 10*.

Criminal record attributes

The Terms of Reference ask us to consider three potential new attributes based on a person’s criminal history:

- spent criminal conviction
- irrelevant criminal record
- expunged homosexual conviction.

and National Association of People with HIV Australia submission, 14; Equality Australia submission, 7; Just.Equal Australia submission, 4; Respect Inc and DecrimQLD submission, 42; Australian Discrimination Law Experts Group submission, 55.

394 Australian Association of Christian Schools submission, 14.

395 Legal Aid Queensland submission, 84.

396 Pride in Law submission, 3; LGBTI Legal Service Inc submission, 9.

397 *Yogyakarta Principles plus 10: additional principles and State obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (10 November 2017) 14.

398 Intersex Human Rights Australia submission, 26-28.

The Review received 45 submissions³⁹⁹ on this topic. Overall, there was strong support for adding spent criminal record, irrelevant criminal record, and expunged homosexual conviction as further potential grounds protected by the Act. Two submissions expressed reservations, but did not oppose the inclusion of the attribute if a balanced approach is taken, and reasonable exceptions are available to employers.⁴⁰⁰

In summary, we have determined that the Act should include an attribute of ‘irrelevant criminal record,’ which includes charges, convictions (including spent and expunged homosexual convictions) and infringement notices.

Current approach

People are not protected from discrimination on the grounds of criminal record in Queensland.

A person in Queensland may complain to the Australian Human Rights Commission (AHRC) about discrimination on the ground of irrelevant criminal record, but AHRC only has the power to investigate and make non-enforceable recommendations.⁴⁰¹ A complainant cannot refer the matter to a court for determination or seek any financial or other redress.⁴⁰²

Is there a gap in protection?

The submissions highlight that discrimination based on criminal record has adverse impacts on foundational aspects of an individual’s life, and across broad areas of activity including access to goods and services, employment, and accommodation.

One submission told us that:

*I have been refused memberships with private associations and non-profit organisations, private clubs, employment positions and volunteer roles. I have also been discriminated against based on a non-existent criminal history which has considerably disadvantaged me in my public life and of which there are currently no protections in Australia. I have also been reconsidered as a volunteer for this organisation due to my criminal history and specifically, the ‘spent’ public nuisance offence.*⁴⁰³

399 Youth Advocacy Centre Inc submission; Queensland Law Society submission; Queensland Advocacy Incorporated submission; Caxton Legal Centre submission; Australian Industry Group submission; Just.Equal Australia submission; Aged and Disability Advocacy Australia submission; Legal Aid Queensland submission; Equality Australia submission; Queensland Positive People, HIV/AIDS Legal Centre, The National Association of People with HIV Australia submission; Community Legal Centres Queensland submission; Queensland Council for Civil Liberties submission; Queensland Council of Unions submission; Queensland Nurses and Midwives Union submission; Tenants Queensland submission; TASC National Limited submission; Australian Discrimination Law Experts Group submission; Sisters Inside Inc submission; Clubs Queensland submission; Australian Lawyers Alliance submission; Maurice Blackburn Lawyers submission; Touching Base Inc submission; Shane Cuthbert submission; Pride in Law submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; PeakCare Queensland Inc submission; Hub Community Legal submission; United Nations Association of Australia, Queensland Chapter, submission; Eros Association submission; Sex Work Law Reform Victoria submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Jenny King submission; Name withheld (sub.089) submission; Jenna Love submission; Natasha submission; SIN (South Australia) submission; Alistair Witt submission; Stonewall Medical Clinic submission; Dr Zahra Stardust submission; Name withheld (sub.064) submission; Magenta submission; Prof John Scott submission; Remi submission; Abigail Corrin submission.

400 Australian Industry Group submission; Clubs Queensland submission.

401 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.

402 Australian Human Rights Commission, *The Australian Human Rights Commission’s Complaint Process: for complaints about discrimination in employment (ILO)* (Web page, 2022) <<https://humanrights.gov.au/our-work/complaint-information-service/australian-human-rights-commissions-complaint-process-1>>.

403 Name withheld (sub.065) submission.

Not only does having a criminal record create social and economic disadvantage, but it can lead to reoffending either because the person is unable to gain employment, or they feel hopeless about their future.⁴⁰⁴

Submissions highlighted the impacts of criminal record discrimination on employment opportunities, and in particular the disadvantage to women, young people, Aboriginal and Torres Strait Islander communities, and sex workers, including people who experience discrimination on the basis of combined attributes.⁴⁰⁵

Queensland Positive People and others stated that:

...one-off minor drug possession charges can hinder people's ability to enter the workforce, particularly young people. It can also impact future employment prospects when attempting to seek a higher position with a different organisation.

Employment is important to a lot of people and can provide a better standard of living due to financial and mental health advantages. With access to better financial and social circumstances, young people in particular are less likely to be involved in risk-taking behaviours and engage with support services to resolve issues that may emerge.⁴⁰⁶

We also heard that this form of discrimination impacts a person's wellbeing, and their ability to rehabilitate and reintegrate into society and move forward with their lives.⁴⁰⁷ Some submissions also highlighted that discrimination on the basis of an irrelevant criminal record may mean a person is not able to access safe housing.⁴⁰⁸ Tenants Queensland stated that people are denied tenancies because of a criminal record, despite the particular offence having no bearing on their ability to pay rent or maintain the tenancy.⁴⁰⁹

We received a number of submissions from the perspective of sex workers and the impact of discrimination based on criminal history causing barriers to housing, financial security, qualifications, and employment.⁴¹⁰ This group experiences particular impacts because of the narrow framework for legal sex work in Queensland.⁴¹¹ Scarlet Alliance described the impact of criminal record discrimination as follows:

*Allowing discrimination to continue against people with criminal records is a form of double jeopardy, where people face barriers both whilst incarcerated and then subsequently in areas of public life.*⁴¹²

404 Australian Human Rights Commission, *Discrimination in Employment on Basis of Criminal Record* (Web page, 2022) <<https://humanrights.gov.au/our-work/rights-and-freedoms/human-rights-discrimination-employment-basis-criminal-record#e9>>.

405 See for example: Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission, 13-14; Sisters Inside Inc submission, 8-9; SIN (South Australia) submission, 4; Jenny King submission, 4.

406 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 13-14.

407 Queensland Network of Alcohol and Other Drug Agencies Ltd submission, 5-6; TASC National Limited submission, 6; Caxton Legal Centre submission, 25-26; Youth Advocacy Centre Inc submission, 3; Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission, 13-14.

408 Sisters Inside Inc submission, 8-9; Queensland Advocacy Incorporated submission, 10; Scarlet Alliance submission, Australian Sex Workers Association submission, 10; TASC National Limited submission, 6.

409 Tenants Queensland submission, 5.

410 See for example: Respect Inc and DecrimQLD submission; Scarlet Alliance, Australian Sex Workers Association submission, 10; Abigail Corrin submission; Dr Zahra Stardust submission; Jenny King submission.

411 Queensland Law Reform Commission, *A framework for a decriminalised sex work industry in Queensland* (Consultation Paper WP80, April 2022). See also Updating current attributes - Sex workers, in this chapter.

412 Scarlet Alliance, Australian Sex Workers Association submission, 11.

Is the proposed attribute of a comparable nature to those already covered by the Act?

As described above, submissions indicated that some people who have a criminal record experience persistent disadvantage and marginalisation in many areas of public life.

The Australian Human Rights Commission (AHRC) have commented that people with a criminal record face significant barriers to participation in the community and that consistent with the right to equality, people should be treated based on their merits rather than stereotypes. The AHRC acknowledges, however, that there must be a careful balancing of rights:

On the one hand former offenders have ‘served their time’ and paid their debt to society. They have the same right to seek employment as any other member of the community. On the other hand, there may be certain circumstances where a person with a particular criminal record poses an unacceptably high risk if he or she is employed in a particular position.⁴¹³

Given that the proposed attribute requires an assessment of relevance (that is, an *irrelevant* criminal record) recency and severity of a person’s criminal history will be relevant to whether or not potentially discriminatory actions, such as refusing to give someone a job, amount to unlawful discrimination.

In the context of implementing international labour law obligations, the Australian Government has included irrelevant criminal record as a protected attribute. The International Labour Convention 111, which is scheduled to the federal Australian Human Rights Commission Act,⁴¹⁴ includes the right to non-discrimination based on a list of non-exhaustive grounds. In 1989, the federal government added additional analogous grounds including ‘criminal record.’⁴¹⁵ In 2019, this was replaced with ‘irrelevant criminal record.’⁴¹⁶

In addition, the European Court of Human Rights has also determined that criminal record may be a ground of discrimination under the non-exhaustive list of grounds covered by the *Convention for the Protection of Human Rights and Fundamental Freedoms*, which is based on the rights in the *International Covenant on Civil and Political Rights*.⁴¹⁷

We consider that people with criminal records are a comparable group to people with existing attributes because:

- People with criminal records, spent convictions, and expunged homosexual convictions are groups that experience social disadvantage in many areas of public life.
- A criminal conviction is something that cannot be changed after it is on a person’s record, even if the person goes on to rehabilitate their life and become a contributing member of the community.
- The federal government has acknowledged that irrelevant criminal record is an analogous ground to expressly protected rights under international human rights obligations.

Comparative approaches

Three different approaches to protecting people from discrimination based on their criminal record have been adopted in Australian jurisdictions:

413 Australian Human Rights Commission, *Discrimination in Employment on Basis of Criminal Record* (Web page, 2022) <<https://humanrights.gov.au/our-work/rights-and-freedoms/human-rights-discrimination-employment-basis-criminal-record#e9>>.

414 *Australian Human Rights Commission Act 1986* (Cth).

415 *Human Rights and Equal Opportunity Commission Regulations 1989* (Cth) s 4 – No longer in force.

416 *Human Rights and Equal Opportunity Commission Regulations 2019* (Cth) s 6.

417 *Thlimmenos v Greece* [2000] ECHR 162.

- only protecting people from discrimination based on a spent conviction, as in Western Australia or Victoria⁴¹⁸
- protecting people from discrimination based on irrelevant criminal records, as in the ACT,⁴¹⁹ Northern Territory,⁴²⁰ Tasmania,⁴²¹ and the Commonwealth⁴²²
- separately protecting people from discrimination based on expunged homosexual conviction and spent convictions, as in Victoria.⁴²³

Spent convictions

A spent criminal conviction provision means that the need to disclose the offence has passed.⁴²⁴ In Queensland this is called the ‘rehabilitation period’ which is usually five to 10 years for more minor crimes (where a sentence of imprisonment was 2½ years or less). Under current protections, a person need not disclose the fact that they were charged with an offence if the charge was dropped, dismissed, or they were acquitted.⁴²⁵

The narrow approach reflected in Western Australian laws is to only cover discrimination on the ground of a person’s spent convictions. Victoria, which only recently introduced a spent conviction scheme, only protects people from discrimination based on their spent convictions.⁴²⁶

This approach means that only criminal convictions that are outside the rehabilitation of offences scheme are covered. In other words, people who are still in the rehabilitation period, or have more serious offences, would not be protected from discrimination, even if the circumstances in which the discrimination happens is not relevant to the offence.

In practice, basing an attribute on a spent convictions scheme set out in other legislation may be complex and potentially challenging for people with a criminal record or duty holders to navigate. To avoid discriminating, it is important to be able to easily ascertain whether a person is covered by the attribute or not.

Expunged homosexual conviction

Until 1991, people were criminalised for homosexuality in Queensland. Since 2017, people have been able to apply to have their historical convictions expunged (removed) in Queensland.⁴²⁷

In Victoria, people have been protected from discrimination on the ground of an expunged homosexual conviction since 2015.

Submissions on this topic told us that:

- Including this attribute would recognise that it is unjust to permit discrimination against a person based on a conviction that was only instituted against them due to historical prejudice.⁴²⁸
- Including this attribute would strengthen protections against discrimination under the expungement scheme.⁴²⁹

418 *Equal Opportunity Act 2010* (Vic), s 6(pb).

419 *Discrimination Act 1991* (ACT) s 7(1)(k).

420 *Anti-Discrimination Act 1992* (NT) s 19(p).

421 *Anti-Discrimination Act 1998* (Tas) s 16(r).

422 *Human Rights and Equal Opportunity Commission Regulations 2019* (Cth) s 6.

423 *Equal Opportunity Act 2010* (Vic), s 6(pa).

424 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld).

425 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 5.

426 *Spent Convictions Act 2021* (Vic) s 28 amended the *Equal Opportunity Act 2010* (Vic) to include a new attribute.

427 *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017* (Qld).

428 Legal Aid Queensland submission, 74; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 13.

429 Just.Equal Australia submission, 3.

- Prior convictions remain a burden on individuals and their families through continued fears of the convictions being found.⁴³⁰

Of the 74 survey respondents to a survey conducted by Queensland Council for LGBTI Health for this Review, 84% considered there to be a need to protect people from discrimination on the basis of expunged homosexual conviction,⁴³¹ particularly for older members of the community.⁴³² One person told us that:

*People live with the fear of past convictions. Sometimes overt protections can increase trust, improve confidence and reduce self-discrimination or people choosing not to act/engage due to past shame.*⁴³³

In 2016, the Queensland Law Reform Commission (QLRC) was asked to recommend how Queensland could expunge criminal convictions for historical homosexual offences from a person's criminal history.⁴³⁴ In that review, the QLRC considered whether the Anti-Discrimination Act should be amended to prohibit discrimination on the basis of expunged conviction. Although all submissions referenced supported the change, the QLRC did not recommend including this attribute because they considered it would already be covered by existing attributes.⁴³⁵

Irrelevant criminal record

Irrelevant criminal record is a protected attribute in Tasmania,⁴³⁶ Northern Territory,⁴³⁷ and the ACT.⁴³⁸ Each of these state and territory laws closely aligns in wording and effect, with the major differences being:

- Tasmania and Northern Territory have the wording 'records relating to arrest or interrogation' while ACT limits the application to an 'offence, or an alleged offence.'
- ACT includes 'infringement notices for the alleged offence.' This is not protected in Northern Territory or Tasmania.
- Tasmania does not include spent records.
- Northern Territory refers to spent convictions and expunged homosexual convictions within the meaning of irrelevant criminal record.

To ensure the scope of the attribute is clear, the state and territory jurisdictions have created detailed definitions of the attribute.

For example, the definition in the ACT states that an irrelevant criminal record means a record relating to an offence, or an alleged offence, if —

- the person has been charged with the offence but—
 - a proceeding for the alleged offence is not finalised; or
 - the charge has lapsed, been withdrawn or discharged, or struck out; or
- the person has been acquitted of the alleged offence; or

⁴³⁰ Queensland Council for LGBTI Health submission, 12.

⁴³¹ Queensland Council for LGBTI Health submission, 40.

⁴³² Survey participants (16, 17), QC LGBTI Health submission, 42.

⁴³³ Survey participant (14), QC LGBTI Health submission, 41.

⁴³⁴ Queensland Law Reform Commission, *Expunging criminal convictions for historical gay sex offences*, (Report No 74, 2016).

⁴³⁵ Queensland Law Reform Commission, *Expunging criminal convictions for historical gay sex offences*, (Report No 74, 2016), 7.21-7.25.

⁴³⁶ *Anti-Discrimination Act 1998* (Tas) s 3.

⁴³⁷ *Anti-Discrimination Act 1992* (NT) s 4.

⁴³⁸ *Anti-Discrimination Act 1991* (ACT) Dictionary.

- the person has had a conviction for the alleged offence quashed or set aside; or
- the person has been served with an infringement notice for the alleged offence; or
- the person has a conviction for the offence, but the circumstances of the offence are not directly relevant to the situation in which discrimination arises; or
- the person has a spent conviction or an extinguished conviction, within the meaning of the Spent Convictions Act,⁴³⁹ for the offence.

Criminal record or irrelevant criminal record?

While the Australian Industry Group did not support the expansion of the Act generally to include further attributes, it commented that the Federal Government's 2019 amendment to the Australian Human Rights Commission Regulation which changed the protected grounds from a 'criminal record' to 'irrelevant criminal record', strikes the right balance by providing:

clarity to employers by establishing it is now unlawful for an employer to discriminate against a job applicant on the basis of their criminal record if the applicant has an 'irrelevant criminal record,' rather than previously demonstrating that the applicant's criminal record was irrelevant to the inherent requirements of the job.⁴⁴⁰

The issue of inherent requirements was also raised by Clubs Queensland. While not opposed to introducing new attributes, Clubs Queensland considered it imperative that clubs can continue to meet their obligations under other legislative instruments when employees are working around gaming machines or large amounts of money. Clubs may need to reject applications of prospective employees or dismiss current employees because of a relevant criminal conviction.⁴⁴¹

Australian Discrimination Law Experts Group identified a specific issue with the name of the attribute being 'irrelevant criminal record' in circumstances where a person is imputed to have a criminal record but does not have such a record.⁴⁴² In such a case, the relevance factor in 'irrelevant criminal record' may lead to convoluted arguments.⁴⁴³ One way to resolve this is to add a specific reference to being discriminated against on the basis of imputation of a criminal record.⁴⁴⁴

Are there any potential risks?

Some submissions emphasised that, if this attribute is introduced, there need to be guarantees that protections from harm for children, older people, and people with a disability, would still be firmly in place.⁴⁴⁵

Currently, the risk management process for vetting workers to ensure they do not pose a risk to vulnerable people relies on checking criminal histories. In Queensland, the current risk management process involves the Working with Children Check (Blue Card) and Disability Worker Screening Systems (Yellow Card).⁴⁴⁶ Any criminal convictions that these schemes identify would be likely to be considered relevant criminal history, and therefore these circumstances would not be protected by the attribute.

⁴³⁹ *Spent Convictions Act 2000* (ACT).

⁴⁴⁰ Australian Industry Group submission, 12.

⁴⁴¹ Clubs Queensland submission, 77.

⁴⁴² Australian Discrimination Law Experts Group submission, 52-53.

⁴⁴³ Section 8 of the Act says that discrimination includes characteristics imputed to a person with an attribute, or an attribute that a person is presumed to have.

⁴⁴⁴ Australian Discrimination Law Experts Group submission, 53.

⁴⁴⁵ Queensland Council for Civil Liberties submission, 17; Respect Inc and DecrimQLD submission, 39; United Nations Association of Australia, Queensland Chapter, 1; Name withheld (Sub.026) submission, 9; PeakCare Queensland Inc submission, 13; Sisters Inside Inc submission, 8-9.

⁴⁴⁶ *Working with Children (Risk Management and Screening) Act 2000* (Qld); *Disability Services Act 2006* (Qld) pt 5.

Sisters Inside thought that Blue Card screening would not be affected, were the attribute to be introduced, because its primary function is to identify what prior convictions are or are not relevant.⁴⁴⁷ Other submissions suggested providing an additional exception to specifically protect vulnerable people, like the approaches taken in the Northern Territory, Tasmania, and the ACT.⁴⁴⁸

Are specific exceptions needed?

Both Tasmania and the Northern Territory have exceptions in relation to irrelevant criminal record. Tasmania allows for an exception specifically in relation to children, and the Northern Territory allows for the exception in relation to vulnerable persons.⁴⁴⁹

A ‘vulnerable person’ in the Northern Territory Act is defined to include children, aged persons, and persons with a physical or intellectual disability or mental illness. The exception applies in the area of work if the work principally involves the care, instruction or supervision of vulnerable people. This is qualified by the statement that it applies when ‘reasonably necessary to protect the physical, psychological, or emotional wellbeing of those vulnerable persons...’⁴⁵⁰

However, the Australian Discrimination Law Experts Group considers there is no need for these exceptions if the approach of either Northern Territory, Tasmania, or the ACT is taken⁴⁵¹ because these jurisdictions limit the attribute to only where it is not directly relevant to the circumstances.⁴⁵² A key factor for relevance is likely to be the potential impact on vulnerable persons.

The Queensland Act currently has two general exceptions that apply in circumstances where actions are taken to protect vulnerable people:

- A person may create genuine occupational requirements for a position,⁴⁵³ which could include holding a Blue Card or a Yellow Card.
- A person may do an act that is reasonably necessary to protect the health and safety of people at a place of work.⁴⁵⁴

In summary, the combination of including a ‘relevance’ factor, and the existing genuine occupational requirements and workplace health and safety exceptions mean that an additional, specific exception for vulnerable persons is likely to be redundant.

The Review’s position

The Review’s position is that:

- There is a gap in protection, people with criminal records experience marginalisation, and irrelevant criminal record has been included as a protected ground for discrimination at the federal level. The attribute meets our criteria for inclusion as a new attribute.
- Relevance of the criminal record is a key component of the attribute to ensure that there is a reasonable balance between the rights of the individual with a criminal record, and the need for reasonable decisions to be made in work, in the administration of State laws and programs, and other areas.

447 Sisters Inside Inc submission, 8-9.

448 Queensland Council of Unions submission, 32; and TASC National limited submission, 7-8.

449 *Anti-Discrimination Act 1998* (Tas) s 50; *Anti-Discrimination Act 1992* (NT) s 37.

450 *Anti-Discrimination Act 1992* (NT) s 27.

451 Australian Discrimination Law Experts Group, 52-54.

452 *Anti-Discrimination Act 1998* (Tas) s 3; *Anti-Discrimination Act 1992* (NT) s 4 cl (b)(ix); and *Discrimination Act 1991* (ACT) Dictionary.

453 *Anti-Discrimination Act 1991* (Qld) s 25.

454 *Anti-Discrimination Act 1991* (Qld) s 108.

- The attribute should be clearly defined so that the coverage is confined. The definition in the ACT legislation is appropriate, but to avoid complexity the Act should also add a specific reference to being discriminated against on the basis of imputation of a criminal record.
- There appears to be no justification for separate attributes to protect people from discrimination on the grounds of spent convictions or expunged homosexual convictions, as the definition of irrelevant criminal record can include these in the same way the Northern Territory definition does.
- As identified by the QLRC, while there may be some protection under the existing attribute of sexuality if a person were discriminated against because of a past homosexual conviction, to remove any doubt there is benefit in specifically referencing the expungement scheme within the definition of irrelevant criminal record. Reference to expunged homosexual convictions in the Act may address stigma and fear experienced by people who were unjustly treated in the past.

Recommendation 29

29.1 The Act should include a new attribute of irrelevant criminal record and it should be defined as in the *Discrimination Act 1991* (ACT) Dictionary definition. The definition should expressly include:

- convictions under the *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017*
 - spent convictions under the *Criminal Law (Rehabilitation of Offenders) Act 1986*; and
 - the imputation of a record relating to arrest, interrogation or criminal proceedings of any sort.
-

Physical features

The Review received 17 submissions⁴⁵⁵ related to physical features. Of those, 15 submissions⁴⁵⁶ supported the introduction of this attribute.

What are physical features?

Physical features may include characteristics of a person such as height, weight, size, birth marks, or other bodily characteristics or features.

⁴⁵⁵ Name withheld (Sub.008) submission; Name withheld (Sub.026) submission; Daniel Lowry submission; PeakCare Queensland Inc submission; Name withheld (Sub.065) submission; Maurice Blackburn submission; Australian Lawyers Alliance submission; Queensland Council for Civil Liberties submission; Queensland Catholic Education Commission submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Department of Transport and Main Roads (Qld) submission; Department of Education (Qld) submission; Queensland Transcultural Mental Health submission; Australian Discrimination Legal Experts Group submission.

⁴⁵⁶ Name withheld (Sub.008) submission; Name withheld (Sub.026) submission; Daniel Lowry submission; PeakCare Queensland Inc submission; Name withheld (Sub.065) submission; Maurice Blackburn submission; Australian Lawyers Alliance submission; Queensland Catholic Education Commission submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Department of Transport and Main Roads (Qld) submission; Department of Education (Qld) submission; Australian Discrimination Legal Experts Group submission.

In Victoria, case law has broadly interpreted bodily characteristics to include having a loud voice,⁴⁵⁷ being tattooed,⁴⁵⁸ or having facial hair.⁴⁵⁹

However, interpretation of this attribute by the tribunals and courts has identified some limits to what is considered a bodily characteristic, with one tribunal decision noting that the particular characteristic should be ‘out of the ordinary’ or ‘unusual’ because otherwise no meaningful comparison can occur.⁴⁶⁰ In another matter, body odour was considered not to be a physical feature.⁴⁶¹

Current approach

Queensland law does not protect people from discrimination on the ground of their ‘physical features.’

To a certain extent, people are protected from discrimination based on their physical features if the characteristic is related to an existing attribute,⁴⁶² such as race, sex, religious belief or activity, or impairment. For example, in the case of *Taniela v Australian Christian College*⁴⁶³ a Cook Island student’s enrolment was discontinued because he did not cut his hair to satisfy the school’s uniform policy. The student grew his hair as part of his culture, and the discontinuance of enrolment amounted to discrimination on the basis of race.

Is there a gap in protection?

The Review heard that people experience unfair treatment because of their physical features in areas such as employment, clubs, and goods and services. A Have Your Say survey participant told us that:

*I have a lazy right eye, born with it, so my right eye doesn’t look straight ahead, and has got more noticeable as I’ve got older, so I cop so much about, the list is endless... I try not to be bothered about it, but after so many years of being harassed about it, it does get to you... Until it’s taken seriously, and real action is taken when a complaint is made and you don’t end up being seen as a trouble maker nothing will change.*⁴⁶⁴

Submissions provided hypothetical examples of where the attribute might apply. For example, it may prevent a fast-food company from hiring only people with a certain ‘look’ – that is, a specific height, weight, and build⁴⁶⁵ – or prevent an employee being removed from reception duties after experiencing hair loss.⁴⁶⁶

Caxton Legal Centre considered that physical features discrimination is particularly relevant to women who continue to be held to arbitrary standards in many environments.⁴⁶⁷

457 *Ruddell v DHS* [2001] VCAT 1510.

458 *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849.

459 *Kuyken v Chief Commissioner of Police* [2015] VSC 204.

460 *Sagris v Chubb Security Australia Pty Ltd; Morros v Chubb Security Pty Ltd* [2008] VCAT 2334.

461 *Hill v Canterbury Road Lodge Pty Ltd* [2004] VCAT 1365.

462 *Anti-Discrimination Act 1991* (Qld) s 8(a).

463 *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249.

464 Name withheld (Form.570) survey response.

465 Maurice Blackburn Lawyers submission, 11.

466 Legal Aid Queensland submission, 82-83.

467 Caxton Legal Centre submission, 25-26.

Weight-related stigma has been considered by health researchers to be highly prevalent and has harmful impacts by worsening health outcomes.⁴⁶⁸ One submission commented that weight can be linked to social disadvantage, which may limit access to nutritional food and health care.⁴⁶⁹ Weight gain can be out of a person's control, such as when a person is taking medication, or is unable to exercise because of a disability or historic trauma.⁴⁷⁰ It is not certain whether weight on its own may be considered an impairment, and therefore already covered by an existing attribute. Adding the attribute of physical features would clarify this.⁴⁷¹

During initial consultations we heard from someone who told us about her experiences seeking work as a person of higher weight as a result of an auto-immune condition:

*Obviously, there are standards in most industries which are there for health and safety reasons. I'm not disputing those, I'm disputing where it has no basis on your ability, where it has, nothing to affect your capability at the job, it's just that somebody else has a prejudice or doesn't want doesn't like it so, you know, they kind of go oh well, we don't want to hire someone who looks like that.*⁴⁷²

Two individual submissions referred to experiences of being excluded from clubs, bars, and restaurants on the basis of being heavily tattooed.⁴⁷³ One of these submissions contains information gathered from a survey of 74 people with tattoos.⁴⁷⁴ Most people reported being refused entry to places based on dress code rules that require people to cover their tattoos. People with face and neck tattoos may not have a way to cover them up.

This theme was reflected in information obtained through our online survey, where one person told us that for many years, they have been denied entry to venues. They said:

*This has honestly been the most embarrassing thing being refused entry in public for what is a life choice of mine...*⁴⁷⁵

Submissions also mentioned that people with tattoos and piercings experience unfair treatment in relation to employment.⁴⁷⁶

During consultations we heard that this attribute may contribute to discrimination in combination with other attributes so that people face stigma about how they look, including people with variations of sex characteristics. We were told that the more evident the intersex trait is, the more likely somebody is to experience stigma and discrimination.⁴⁷⁷

While there is overlap with other attributes, there may be a gap in protection when discrimination is occurring based on physical features that are not a characteristic of an existing attribute.⁴⁷⁸ This attribute might also be argued in combination with other attributes, such as race or sex.

468 AJ Tomiyama, D Carr, EM Granberg et al, 'How and why weight stigma drives the obesity 'epidemic' and harms health' (2018) 16(1) BMC Med, 123.

469 Daniel Lowry submission, 4.

470 Micah Projects, consultation, 12 August 2021.

471 See *Hill v Canterbury Road Lodge Pty Ltd* [2004] VCAT 1365.

472 Intersex Peer Support Australia consultation (Eileen Harlow), 16 September 2021.

473 Daniel Lowry submission, 1; Name withheld (Sub.065) submission, 6.

474 Daniel Lowry submission, 20-34.

475 David (Form.716) survey response.

476 Name withheld (Sub.008) submission, 3; Daniel Lowry submission, 7.

477 Intersex Human Rights Australia and Intersex Peer Support Australia consultation, 9 September 2021.

478 See for example: Queensland Catholic Education Commission submission, 8; Legal Aid Queensland submission, 82-83; and Queensland Council for Civil Liberties submission, 18.

Are there any potential risks?

Unreasonably broad scope

The Queensland Council for Civil Liberties doubted whether the inclusion of a physical features attribute could be justified, because it can be distinguished from the nature of other attributes, such as disability, which have been clearly linked to social disadvantage.⁴⁷⁹

The New South Wales Law Reform Commission concluded that physical features were too broad and should not be a protected attribute, because it was not curing an underlying social problem, particularly where appearance is a matter of choice.⁴⁸⁰

This echoes the analysis of researchers Dr Alice Taylor and Joshua Taylor who, in their commentary on discrimination based on tattoos, beards and hairstyles, stated that:

While there are understandable reasons to prohibit discrimination on the basis of a range of physical features including weight and facial difference, the 'catch-all' category of physical features reflects a failure of the legislature and the courts to engage in the underlying reasons why discrimination should be unlawful.⁴⁸¹

The authors refer to a 'tension between immutability and choice,' and were of the view that there is a clear rationale for protecting people from discrimination where features are immutable, unusual, or challenging to change. But there is a less clear rationale for chosen characteristics based on a desire for free expression.⁴⁸² Another difficulty noted with the attribute of physical features is that there is not a clear or obvious link to a broader group identity which makes it challenging to identify the disadvantage gaps that exist.⁴⁸³

Health and safety and genuine occupational requirements

Two submissions supported the inclusion of this attribute, but considered that there was a need to create specific exceptions related to occupational requirements, and health and safety.⁴⁸⁴ For example, advertising a role for an actor with a particular physical feature,⁴⁸⁵ which would reflect the approach taken in the ACT Discrimination Act. In considering the potential scope of an exception, one submission suggested that people with tattoos that could be considered offensive should not be protected, but broader exceptions should be avoided.⁴⁸⁶

Exceptions in the Queensland Act currently permit employers to make decisions to ensure a person can meet the genuine occupational requirements of a role, and to protect public health and the health and safety of people at a place of work.⁴⁸⁷

The Queensland Catholic Education Commission raised concerns about schools being able to set dress codes and standards for both staff and students.⁴⁸⁸ While the scope of the attribute would

479 Queensland Council for Civil Liberties submission, 18.

480 New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) [5.228] – [5.231].

481 Dr Alice Taylor and Joshua Taylor, 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights*, 469.

482 Dr Alice Taylor and Joshua Taylor, 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights*, 475.

483 Dr Alice Taylor and Joshua Taylor, 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights*, 478-9.

484 Maurice Blackburn Lawyers submission, 12; Caxton Legal Centre submission, 25-26; see also *Anti-Discrimination Act 1991* (Qld) s 25; *Work Health and Safety Act 2011* (Qld); *Work Health and Safety Act 2011* (Cth).

485 Caxton Legal Centre submission, 25-26; Maurice Blackburn Lawyers submission, 11.

486 Daniel Lowry submission, 17.

487 *Anti-Discrimination Act 1991* (Qld) ss 25, 107, 108.

488 Queensland Catholic Education Commission submission, 8.

not include the clothing a person wears, it may include more permanent changes to the body including tattoos and piercings.

In arriving at the view that physical features should not be a protected attribute, the NSW Law Reform Commission considered that an employer should be able to make reasonable decisions regarding personal appearance.⁴⁸⁹

Comparative approaches

Both Victoria⁴⁹⁰ and the ACT⁴⁹¹ include physical features as a protected attribute in their discrimination laws. This protects people from discrimination because of characteristics such as height, weight, size, or other bodily characteristics such as birth marks.⁴⁹²

Neither definition clearly differentiates between intentional modifications to a person's body and features that cannot be changed.

In Victoria, the physical features attribute has been interpreted to include things done to a body by choice, such as tattoos⁴⁹³ although this was not the original intention.⁴⁹⁴

In recommending physical features as an attribute, the ACT Law Reform Commission considered that protecting people from discrimination based on physical features, including chosen features, such as tattoos, piercings, or hair styles supported equality before the law and freedom of expression.⁴⁹⁵ However, Taylor and Taylor consider that this is an 'unsustainable justification'.⁴⁹⁶

Is the proposed attribute of a comparable nature to those already covered by the Act?

We have considered whether people are experiencing unjustifiable discrimination on the basis of their physical features and whether the attribute is comparable to those already covered by the Act. This is not an easy question to answer, because the extent of stigma and marginalisation depends on the particular physical feature concerned.

In Victoria, physical features have been interpreted broadly, and encompasses characteristics that a person has from birth (for example, birth marks), characteristics that emerge or are acquired later in life (for example, weight, scars, burns) and those that are the result of deliberate altering of the physical appearance (for example, piercings, tattoos).

Some physical features such as height or weight are comparable to existing attributes that are inherent or only changeable with great difficulty; but other features that an individual has a degree of choice over, could be subject to change (for example, hair styles), and therefore fall into a different category.

The Review heard that physical features can lead to unjustifiable discrimination, and that some people are vulnerable to continued marginalisation because of their physical features. For example, people of higher weight may experience stigma and marginalisation, and their weight may be linked to a health condition and may not be easy to change.

489 New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) [5.231].

490 *Equal Opportunity Act 2010* (Vic) s 6(j).

491 *Discrimination Act 1991* (ACT) s7(m).

492 *Discrimination Act 1991* (ACT) Part 12 Dictionary; *Equal Opportunity Act 2010* (Vic) s 4.

493 *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849.

494 Victoria, Parliamentary Debates, Legislative Assembly, 4 May 1995, 1251.

495 ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)* (Final report, 18 March 2015) 82-83.

496 Dr Alice Taylor and Joshua Taylor, 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights*, 476.

Chosen alterations of a person's physical appearance can include tattoos, piercings, implants, or cosmetic procedures done for non-medical reasons, and other types of body modifications such as tongue splitting. It is difficult to identify broader structural or historical disadvantage suffered by people based on their tattoos, hair styles, or other cosmetic characteristics, other than when it is a manifestation of an existing attribute such as race.⁴⁹⁷

There may be sound reasons to justify discrimination in some circumstances, such as where a person has a tattoo representing a hate group, or an obscene or vilifying tattoo. It is difficult for the law to set an appropriate boundary on what may cause offence in a particular setting. In some work and educational environments, it may be too difficult to establish reasonable standards for employees and students, if a person can make a discrimination complaint on the basis of any bodily characteristic including cosmetic changes to their body. Clubs may reasonably wish to exclude persons with gang affiliated tattoos because of safety concerns.

The Review's position

The Review's position is that:

- The addition of physical features as an attribute may address a gap in coverage for people who experience discrimination based on their physical features if this is not also directly linked to existing attributes, for example race or religion.
- An overly broad definition of physical features might allow for unmeritorious complaints that could dilute the effectiveness of the Act.
- The definition of physical features should be confined to physical features based on the characteristics that are present from birth or acquired, other than through chosen cosmetic alterations – this would include scars or burn marks, but not tattoos, implants, or piercings.
- Existing attributes will continue to provide protection for many aspects of physical appearance. People who experience discrimination because of cultural or religious tattoos or piercings will still be covered under the race and religious belief or activity attributes. Disability discrimination will continue to provide protection in many circumstances, such as where a person has distinct facial or bodily features because of a disability.
- To remove any doubt about the continued protection of people under the Act from discrimination on the basis of alterations to physical appearance for cultural or religious reasons, the provision should be clearly drafted to reflect this position, and it should be explained in explanatory notes.
- Because of the narrower scope of the proposed attribute, no exceptions specific to physical features are required. Current exceptions in the Act permit employers to make decisions based on genuine occupational requirements, public health, and workplace health and safety, and indirect discrimination contains a reasonableness component, so that any additional specific exceptions related to physical features would be unnecessary duplications.

⁴⁹⁷ Dr Alice Taylor and Joshua Taylor, 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights*, 479.

Recommendation 30

30.1 The Act should include a new attribute of physical features. Physical features should be defined to mean weight, size, height, birth marks, scars, and bodily characteristics other than chosen alterations to a person's physical appearance such as cosmetic procedures, tattoos, piercings, hair styles, and other modifications, unless they are characteristics of other attributes.

Being subject to domestic or family violence

In the Discussion Paper we asked whether being subject to domestic or family violence should be included as an additional attribute, whether it should be defined, and if so how.

To address the complex and difficult domestic and family violence issues faced by our society, a variety of strategies are undoubtedly required.⁴⁹⁸ This section will address whether people who have experienced or are experiencing domestic violence should be protected from discrimination by the Act. We will use the terms victim and survivor in this section and acknowledge that some people prefer one term or the other.

We received 24⁴⁹⁹ submissions in response to this issue and 22⁵⁰⁰ of them were in support of introducing 'being subject to domestic or family violence' as an attribute.

Two submissions indicated that if this attribute were to be included, the definition should be gender neutral.⁵⁰¹ Our consultation with Basic Rights Queensland also gave support to inclusion.⁵⁰²

Current approach

The Act currently provides some protection to victims and survivors of domestic or family violence. For example, a person who has developed a mental health condition as a result of domestic or family violence may be protected under the Act. However, this protection is only available to a subset of victim-survivors who fit within current attributes, such as impairment.

498 *Not Now, Not Ever: Putting an end to domestic and family violence in Queensland*, Final report, Special Taskforce on Domestic and Family Violence in Queensland (2015) 11.

499 Queensland Council of Social Services submission, 4; Sisters Inside Inc submission, 8; Name withheld (Sub.008) submission, 2; Fibromyalgia/CFS Gold Coast Support Group submission, 13; Independent Education Union - Queensland and Northern Territory Branch submission, 1; PeakCare Queensland Inc submission, 14; One in Three Campaign submission, 17; Australian Lawyers Alliance submission, 16; Women's Legal Service Qld submission, 2; Australian Discrimination Law Experts Group submission, 56; Tenants Queensland submission, 6; Queensland Council of Unions, 33; Queensland Council for Civil Liberties submission, 19; Community Legal Centres Queensland submission, 2; Equality Australia submission, 43; Legal Aid Queensland submission, 84; Aged and Disability Advocacy Australia submission, 11; Respect Inc and DecrimQLD submission, 11; Caxton Legal Centre submission, 26; Queensland Advocacy Incorporated submission, 10; Queensland Law Society submission, 15; Queensland Department of Education submission, 13; Life Without Barriers submission, 1; Name withheld (Sub.026) submission, 10.

500 Queensland Council of Social Services submission, 4; Sisters Inside Inc submission, 8; Name withheld (Sub.008) submission, 2; Fibromyalgia/CFS Gold Coast Support Group submission, 13; Independent Education Union - Queensland and Northern Territory Branch submission, 1; PeakCare Queensland Inc submission, 14; Australian Lawyers Alliance submission, 16; Women's Legal Service Qld submission, 2; Australian Discrimination Law Experts Group submission, 56; Tenants Queensland submission, 6; Queensland Council of Unions, 33; Queensland Council for Civil Liberties submission, 19; Community Legal Centres Queensland submission, 2; Equality Australia submission, 43; Legal Aid Queensland submission, 84; Aged and Disability Advocacy Australia submission, 11; Respect Inc and DecrimQLD submission, 11; Caxton Legal Centre submission, 26; Queensland Advocacy Incorporated submission, 10; Queensland Law Society submission, 15; Queensland Department of Education submission, 13; Life Without Barriers submission, 1.

501 One in Three campaign submission, 17; Legal Aid Queensland submission, 84.

502 Basic Rights Queensland consultation, 15 September 2021.

The case of *Wright v Callvm Vacheron Wallace Bishop*⁵⁰³ illustrates the limits of relying on existing attributes. In that case, the applicant called her employer to report that she was not able to work one day after suffering an incident of domestic violence. The applicant was dismissed soon after, with the reason given being that she had ‘too many personal problems.’ The Tribunal did not accept the applicant’s argument ‘that being a victim of domestic violence is a characteristic that women generally have’ and so the applicant’s case of discrimination on the basis of sex failed.

Is there a gap in protection?

Examples of unfair treatment

Women’s Legal Service Queensland, who work extensively with victim-survivors of domestic violence, provided examples of the discrimination they are aware is being experienced by women who are, or have been, victims of domestic or family violence in workplaces and education settings. They told us:

...the other party put tracking and ‘stalking’ technology on a client’s computer and telephone that was also used for working-from-home arrangements during COVID – when she told her employer, she was disciplined, and performance managed by her employer...⁵⁰⁴

They also told us that:

a client [who] was trying to hide her address from school enrolment forms for safety from the other party and [the] school said they couldn’t accept the enrolment of the child because she would not provide her address.⁵⁰⁵

Last year a similar decision made by the Department of Education was overturned by Queensland Civil and Administrative Tribunal (QCAT), which considered several human rights under the Human Rights Act. The case involved a woman and her children who had moved in an attempt to escape domestic violence, and subsequently applied to homeschool one of her children. She did not want to disclose her address and the Department refused her application on that basis. The woman applied to QCAT for a review. QCAT decided that the woman was not required to disclose her address in order to be granted home education registration.⁵⁰⁶

Tenants Queensland gave the following examples of domestic or family violence discrimination experienced by their clients:

- tenants receiving poor references from real estate agents because of domestic violence-related noise or damage to property
- lessors and real estate agents refusing requests by tenants to make reasonable adjustments to the property, such as affixing security devices
- tenants being given notices to remedy breaches that allege interference with reasonable peace and comfort of neighbours as a result of domestic violence incidents.⁵⁰⁷

The Queensland Council of Unions gave the following example:

An aspiring leader seeking release from her classroom role was not provided with the release as a successful applicant for an acting promotional position in another school and setting, despite the employer being aware of her [domestic or family violence situation] as it

503 *Wright v Callvm Vacheron Wallace Bishop and Anor* [2018] QIRC 7.

504 Women’s Legal Service Qld submission, 3.

505 Women’s Legal Service Qld submission, 3.

506 *SF v Department of Education* [2021] QCAT 10.

507 Tenants Queensland submission, 6.

was viewed by management ‘that she would be better off sorting herself out’ prior to taking on a leadership role.⁵⁰⁸

Industrial protections

Existing industrial laws that apply in Queensland provide employees experiencing domestic or family violence with the right to request unpaid leave and flexible work arrangements.⁵⁰⁹ Rights to paid leave in those circumstances are protected for Queensland public servants.⁵¹⁰

Importantly, industrial laws only relate to the provision of leave in the workplace setting, and not to other issues that arise at work, such as not being given a promotion because of a perception that the domestic violence impedes performance. They also do not apply to the other areas of activity under the Act, such as education, accommodation and State laws and programs.

Is the proposed attribute of a comparative nature to those already covered under the Act?

The Justice Project, an initiative of the Law Council of Australia, points out that family violence has been a recent focus of federal, state, and territory governments, and significant policy, law reform, and funding measures have been put in place to address these issues.⁵¹¹

Gender-based violence, including domestic and family violence, has been recognised by international human rights law as a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on an equal basis with men.⁵¹²

Victim-survivors of domestic violence are a social group that is vulnerable, have suffered, and continue to suffer marginalisation. This group can be seen as comparable in nature to other groups already protected under the Act.

Comparative approach

Following a recommendation by the ACT Law Reform Commission, the attribute of ‘subjection to domestic violence’ is now protected in the ACT,⁵¹³ making it the only jurisdiction in Australia to do so. There is no definition of ‘domestic violence’ in that legislation.

The Northern Territory government has published a report⁵¹⁴ indicating that it will include this attribute in the 2022 amendments to the Anti-Discrimination Act.⁵¹⁵

New Zealand has protection on the basis of this attribute, but only in the work area.⁵¹⁶

Previous reviews and recommendations

In 2013 during the Consolidation of Commonwealth Anti-Discrimination Laws process, the Legal and Constitutional Affairs Committee recommended inclusion of this attribute, and took the view that despite the regulatory impacts of introducing ‘domestic violence’ as a protected attribute being unknown, the social cost of domestic violence on victims and families, especially children, outweighs any additional regulatory burden; and that there are benefits of providing protection

508 Queensland Council of Unions submission, 34.

509 *Fair Work Act 2009* (Cth) ss 65(1A)(e) and 106A-E.

510 *Industrial Relations Act 2016* (Qld) ss 52-54.

511 The Justice Project final report, Part 1 (August 2018), *People who Experience Family Violence*, 15.

512 Committee on the Elimination of Discrimination against Women, General recommendation No 19, 11th session (1992) [1].

513 *Anti-Discrimination Act 1991* (ACT) s7(x).

514 Northern Territory Government, *Territory Stories - Achieving Equality in the Northern Territory* (Tabled Paper, February 2022).

515 *Anti-Discrimination Act 1992* (NT).

516 *Human Rights Act 1993* (NZ) s 62A.

from discrimination and thereby enabling victims of domestic violence to achieve financial independence and secure a better future for themselves and their families.⁵¹⁷

At about that time, the Australian Law Reform Commission recommended that the Australian Human Rights Commission should examine the possible basis upon which the status as an actual or perceived victim of family violence could be included as a protected attribute under Commonwealth anti-discrimination law.⁵¹⁸

Misidentified ‘perpetrators’ of violence

Sisters Inside told us that many of the women they support have experienced domestic and family violence as both the ‘victim’ and the ‘perpetrator’ interchangeably, and that protecting people on the basis of ‘subjection to domestic violence’ does not reflect criminalised and imprisoned women’s experience of domestic violence-related discrimination, particularly Aboriginal and Torres Strait Islander women.⁵¹⁹ The Women’s Safety and Justice Taskforce has also commented on similar issues.⁵²⁰

We understand that there can be domestic violence orders in place involving multiple family members, and that a person can be both the ‘aggrieved’ and the ‘respondent’ to an order instigated by the police or by the individuals involved. This has particular relevance in family law proceedings. However, discrimination legislation is a different context. We were unable to identify a situation in which a person would not have protection of a new ‘subjection to domestic violence’ attribute simply because they also have a domestic violence order against them.

Does the attribute need to be defined?

Tenants Queensland propose the definition of ‘domestic violence’ should be linked to that in the Domestic and Family Violence Protection Act.⁵²¹ ‘Domestic violence’ in that legislation means behaviour in an intimate personal relationship, family relationship, or informal care relationship that is:

- physically or sexually abusive, or
- emotionally or psychologically abusive, or
- economically abusive, or
- threatening, or
- coercive, or
- in any other way controls or dominates and causes the person to fear for their safety or wellbeing or that of someone else.⁵²²

Two submissions commented on the need to have gender neutral language in any definition.⁵²³

Equality Australia suggested that the definition should recognise a broad range of circumstances in which domestic and family violence can occur, including from people who live with or are related to another person and are not necessarily intimate partners or legally recognised as

517 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (Report, 2013) [7.28].

518 Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks* (Report 117, 2012) Recommendation 16-8.

519 Sisters Inside Inc submission, 8.

520 Women’s Safety and Justice Taskforce, *Hear her voice: Addressing coercive control and domestic and family violence in Queensland* (Report 1, 2021) volume 1, 21.

521 *Domestic and Family Violence Protection Act 2012* (Qld).

522 *Domestic and Family Violence Protection Act 2012* (Qld) ss 8, 13.

523 Legal Aid Queensland submission, 84; One in Three Campaign submission, 17.

members of a family, such as members of a household, flatmates, or people formerly in those relationships.⁵²⁴ This definition is arguably broader than that contained in the Domestic and Family Violence Protection Act.

The Review's position

The Review's position is that:

- People who have experienced domestic or family violence are subject to unfair treatment in areas that are protected under the Act, including work and accommodation.
- A gap in protection exists for people who have experienced domestic or family violence, and the attribute is of a comparable nature to those already covered by the Act.
- The definition of 'domestic and family violence' should align with the definition in the *Domestic and Family Violence Protection Act 2012* (Qld) to give consistency with the primary legislation.

Recommendation 31

31.1 The Act should include a new attribute of 'subjection to domestic or family violence', and it should be defined as in section 8 of the *Domestic and Family Violence Protection Act 2012* (Qld).

Homelessness

In the Discussion Paper we asked whether 'accommodation status' should be included as an additional attribute, whether it should be defined, and if so, how.

We received submissions that framed this issue in three different ways – 'socio-economic status and/or social origin,' 'accommodation status,' and 'homelessness.' These categories were on a continuum from most confined category to very broad, with 'homelessness' the narrowest framing and 'socio-economic status and/or social origin' the broadest.

We received 20⁵²⁵ submissions in relation to this topic, 18 of which supported inclusion of at least one of the framings of this attribute.⁵²⁶

Four submissions proposed that either 'socio-economic status' or 'social origin' should be protected.⁵²⁷ Community Legal Centres Queensland and Suncoast Community Legal Centre supported the Ten Point Plan,⁵²⁸ which also advocates for this approach.

⁵²⁴ Equality Australia submission, 43.

⁵²⁵ Queensland Council of Social Services submission; Life Without Barriers submission; Australian Discrimination Law Experts Group submission; Caxton Legal Centre submission; Community Legal Centres Queensland submission; Suncoast Community Legal Service Inc submission; PeakCare Queensland Inc submission; Australian Lawyers Alliance submission; Sisters Inside Inc submission; Tenants Queensland submission; Women's Legal Service Qld submission; Queensland Council for Civil Liberties submission; Aged and Disability Advocacy Australia submission; Sex Workers Outreach Program (NT) and Sex Workers Reference Group submission; Respect Inc and DecrimQLD submission; Queensland Law Society submission; Legal Aid Queensland submission; Youth Advocacy Centre Inc submission; Department of Education (Qld) submission; Name withheld (Sub.026) submission.

⁵²⁶ Those that did not support inclusion were: Name withheld (Sub.026) submission; Department of Education (Qld) submission.

⁵²⁷ Queensland Council of Social Service submission; Australian Discrimination Law Experts Group submission; Caxton Legal Centre submission and Life Without Barriers submission.

⁵²⁸ Community Legal Centres Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland, (Web page) <<https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>>.

Ten submissions supported the approach that was outlined in the Discussion Paper of 'accommodation status'.⁵²⁹ Two submissions supported 'homelessness' being the protected attribute.⁵³⁰

Current approach

There is no protection in the Act from discrimination for people because of their socio-economic or accommodation status, or on the basis of experiencing homelessness.

Comparative approach

No Australian jurisdiction protects people on the basis of being homeless, although the ACT does include homelessness in its definition of accommodation status. In addition, international case law has confirmed that it is protected under the *International Covenant on Civil and Political Rights* as an 'other status'.⁵³¹

No Australian jurisdiction protects people under discrimination laws because of their 'socio-economic status' and/or 'social origin.' However, in the federal jurisdiction, the Fair Work Act gives protection from employers taking adverse action on the basis of social origin.⁵³²

Australian Capital Territory

'Accommodation status' is protected and defined as:

Accommodation status includes being –

- a) a tenant; and
- b) an occupant within the meaning of the *Residential Tenancies Act 1997*; and
- c) in receipt of, or waiting to receive, housing assistance within the meaning of the *Housing Assistance Act 2007*; and
- d) homeless.⁵³³

Being 'homeless' is not defined.

There is an exception in relation to this attribute in relation to the provision of accommodation, as follows:

...does not make it unlawful for a person to discriminate on the ground of accommodation status in relation to the provision of accommodation if the discrimination is reasonable, having regard to any relevant factors.⁵³⁴

International

In the general ambit of socio-economic status, New Zealand includes 'employment status' as a prohibited ground of discrimination.⁵³⁵

529 PeakCare Queensland Inc submission; Australian Lawyers Alliance submission; Tenants Queensland submission; Sisters Inside Inc submission; Women's Legal Service Qld submission; Queensland Council for Civil Liberties submission; Aged and Disability Advocacy Australia submission; Sex Workers Outreach Program (NT) and Sex Workers Reference Group submission; Respect Inc and DecrimQLD submission and Queensland Law Society submission.

530 Legal Aid Queensland submission; Youth Advocacy Centre Inc submission.

531 United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, 95th sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [18].

532 *Fair Work Act 2009* (Cth) s 351(1).

533 *Discrimination Act 1991* (ACT) Dictionary - accommodation status.

534 *Discrimination Act 1991* (ACT) s 26(2).

535 *Human Rights Act 1993* (NZ) s 21(k).

The provinces in Canada provide varying degrees of protection in this area, with some including the attribute of ‘source of income’ and others including ‘social condition.’

Recommendations of past reviews

The Gardner Review recommended that ‘homelessness’ be included as a protected attribute in Victoria, however this recommendation was not incorporated into the legislation.⁵³⁶ The report did not recommend any definitions or exceptions or refer to any submissions that commented on the issue of terminology around this attribute.

The Northern Territory government has recently published a report⁵³⁷ indicating that it will include ‘accommodation status’ and ‘socio-economic status’ as protected attributes in 2022 amendments to the Anti-Discrimination Act.⁵³⁸

Is there a gap in protection?

Of the submissions we received that addressed this topic, none contained specific case examples of discrimination because of socio-economic status, accommodation status, or homelessness.

Tenants Queensland said they are aware of people being discriminated against because they have no fixed address or security of tenure, including ‘couch surfing’ or residing in a hostel or refuge.⁵³⁹ The Youth Advocacy Centre works with young people who are homeless, and shared an observation that:

Particularly with respect to education, there is a need to ensure that children are not being suspended or excluded because they are struggling with uniform or homework requirements...⁵⁴⁰

The Gardner Review relied on submissions that included examples of unfair treatment towards people who were experiencing homelessness.⁵⁴¹ The Public Interest Law Clearing House Homeless Persons Legal Clinic consulted 183 homeless people in Victoria and found that 69% of them said that they experienced unfair treatment in the provision of accommodation, and 58% had reported experiencing discrimination in goods and services.⁵⁴² The final report included extensive commentary on the relationship between homelessness, disadvantage, and discrimination.⁵⁴³

The Australian Human Rights Commission has reported on homelessness and human rights issues, and identified examples from areas including employment:

‘I went to a job interview, and the lady was really nice to me and she asked me...if I was living at home, and I said no, and from there on she wasn’t nice to me...people just think that if you don’t live at home, that must have been your fault. You’ve done something wrong.’⁵⁴⁴

536 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008), 98.

537 Northern Territory Government, *Territory Stories - Achieving Equality in the Northern Territory* (Tabled Paper, February 2022).

538 *Anti-Discrimination Act 1992* (NT).

539 Tenants Queensland submission, 7.

540 Youth Advocacy Centre Inc submission, 4.

541 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008), 26.

542 Public Interest Law Clearing House Homeless Persons’ Legal Clinic, *Discrimination on the grounds of homelessness or social status: Report to the Department of Justice* (Report, 2007) 12-14.

543 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) [5.81] – [5.107].

544 Australian Human Rights Commission, *Homelessness is a Human Rights Issue* (Report, 2008) [6.6].

Research by Tamara Walsh and Monica Taylor has highlighted the impact of ‘move-on powers’⁵⁴⁵ on the homeless population in Queensland, and the fact that this group does not have recourse through discrimination laws to challenge what was seen as unfair treatment.⁵⁴⁶

Is the proposed attribute of a comparable nature to those already in the Act?

The United Nations Human Rights Committee (UNHRC) has indicated that they consider homelessness an area in which people can experience discrimination. In 2009, the United Nations Human Rights Council observed that Australia should increase its efforts to ensure that social, economic, and other conditions do not deprive homeless persons of the full enjoyment of the rights enshrined in the Covenant.⁵⁴⁷

The Australian Institute of Health and Welfare indicates that ‘people experiencing homelessness and at risk of homelessness are among Australia’s most socially and economically disadvantaged.’⁵⁴⁸

People who are homeless are a social group that is vulnerable⁵⁴⁹ and have suffered and continue to suffer marginalisation, and so can be seen as comparable in nature to other groups already protected under the Act.

Should this attribute be defined?

While submissions were supportive of the ‘accommodation status’ protection and definition given in the ACT legislation, we did not receive any submissions that provided a definition of ‘homelessness.’

The Supported Accommodation Assistance Act defines a person as being homeless ‘if, and only if, he or she has inadequate access to safe and secure housing.’⁵⁵⁰

The *Macquarie Dictionary* definition is simply ‘having no home.’

We consider that the dictionary meaning is broad enough to include people who are living in temporary situations such as hostels or refuges, or couch surfing.

Are exceptions needed?

When ‘accommodation status’ was included in the ACT, an exception in the provision of accommodation was introduced as outlined above, with the following comments in the Explanatory Notes:

The aim of this exception is to recognise that there may be situations where a person’s accommodation status is a relevant consideration in offering a person accommodation under a lease. For example, an agent might look into a person’s rental history as part of an assessment about the suitability of a prospective tenant for a particular offer of accommodation in a rental house.

The exception will allow people to take into account this kind of distinction between individuals on the basis of circumstances where it is reasonable. For instance, it is unlikely to be reasonable to refuse[d] accommodation to a person only because they

545 *Police Powers and Responsibilities Act 2000* (Qld) s 48 gives power to police officers to issue a direction for a person to leave a public place.

546 Tamara Walsh and Monica Taylor, ‘You’re Not Welcome Here: Police Move-On Powers and Discrimination Law’ (2007). 30(1) *University of New South Wales Law Journal*, 151-173.

547 United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee on Australia*, 95th session, UN doc CCPR/C/AUS/CO/5 (7 May 2009), [18].

548 Australian Institute of Health and Welfare, *Specialist homelessness services 2019-20 annual report* (Report, 2020) 4.

549 See for example M Johnstone et al, ‘Discrimination and well-being amongst the homeless: the role of multiple group membership’ (2015). *Frontiers in Psychology*, 6:739.

550 *Supported Accommodation Assistance Act 1994* (Cth) s 4(1).

became homeless for a period, or because their previous accommodation was in public housing premises.⁵⁵¹

The Queensland Council for Civil Liberties explicitly endorsed retaining the exception if the ACT definition of the attribute was recommended for inclusion.⁵⁵² It was unclear whether other submissions that supported the ACT definition were also supportive of the exception.

Should there be a broader 'social origin' attribute?

Caxton Legal Centre told us that discrimination on the basis of social origin should be protected, and gave broad comments such as 'many children from poorer homes struggled to find a quiet place to work let alone access support from a parent with the time and capacity to take on the role of a home-teacher.'⁵⁵³

Research by Philip Lynch and Bella Stagoll examines the discrimination faced by people who are homeless, unemployed, or recipients of social security payments in Victoria, based on experiences and consultations of the Homeless Persons' Legal Clinic.⁵⁵⁴ They give a number of examples of discrimination in provision of accommodation and goods and services and support inclusion of the attribute of 'social status' to address these issues.

We acknowledge that many people with low socio-economic status, or who have a particular social origin, are vulnerable to discrimination. In chapter 2 we explore the relationship between disadvantage and discrimination and how this affects a person's health, wellbeing, and social inclusion. In the evidence we have gathered for this Review there is sufficient basis to legislatively protect from discrimination those who are homeless. At this stage there is insufficient material for us to recommend the inclusion of social origin or socio-economic status as protected attributes.

In these circumstances, we have decided to prioritise protection from discrimination for people who are homeless.

Earlier in this chapter, we recommend that the Commission's current function be expanded to allow it to recommend to the Attorney-General the inclusion of new attributes when a threshold has been reached. This is one area in which further work needs to be done to establish whether or not a compelling basis exists for the introduction of accommodation status or social origin as protected attributes. As the Discussion Paper did not ask about the broader social origin attribute, we have not consulted with key stakeholders including business, industry and government.

Review position

The Review's position is that:

- People who are homeless are subject to unfair treatment in areas protected under the Act, including accommodation, education and employment, goods and services and state laws and programs.
- Adding the attribute of homelessness would fill a gap in protection for a sector of people experiencing marginalisation.
- The potential attributes of 'accommodation status' and 'social status and/or social origin' are broader than is necessary to protect people who are homeless.

551 ACT Legislative Assembly, *Discrimination Amendment Bill 2016 (ACT) Explanatory Statement*, 13.

552 Queensland Council for Civil Liberties submission, 19.

553 Caxton Legal Centre submission, 26.

554 Philip Lynch and Stella Bagoll, 'Promoting Equality: Homelessness and Discrimination', [2002] *Deakin Law Review*, 15.

- Further consideration would need to be given as to whether the threshold for inclusion of ‘social origin’ or ‘social status’ as a new attribute has been met, and whether there is a need for any exceptions.
- There is no need to define ‘homelessness’ and the word should take its ordinary meaning.

Recommendation 32

32.1 The Act should include a new attribute of ‘homelessness’, and it should not be defined.

Employment activity

Protection from discrimination on the basis of employment activity refers to the situation where a worker is penalised for making a reasonable request or communicating a concern about employment entitlements.

We received eight submissions⁵⁵⁵ on this topic, and of those, six submissions⁵⁵⁶ supported the inclusion of a new attribute of ‘employment activity.’

Current approach

The Act currently includes protection from discrimination because of trade union activity. ‘Employment activity’ may overlap with trade union activity, but would apply in circumstances where a person is trying to enforce their workplace rights, or may not be a member of a union.

Adverse action against an employee exercising a ‘workplace right’ such as a right to take annual or personal leave is unlawful under the Fair Work Act, which protects most workers in Australia.⁵⁵⁷ It is also unlawful under the Industrial Relations Act, which protects public sector workers in Queensland.⁵⁵⁸

Comparative approach

Victoria is the only state that specifically protects ‘employment activity,’ which supplements their attribute of ‘industrial activity.’ This attribute was included in 2007 soon after WorkChoices came into effect.

Is there a gap in protection?

The Queensland Nurses and Midwives Union told us that there is a potential gap in the coverage of general protections and adverse action law. Employment activity discrimination is a significant issue for their members when ‘raising concerns about their rightful entitlements including requests to be paid for working overtime and through meal breaks or wearing personal protective equipment to perform their duties.’⁵⁵⁹ It is not clear to us how such examples would fall outside of the current industrial laws.

⁵⁵⁵ Queensland Council of Unions submission; Queensland Nurses and Midwives Union submission; Australian Lawyers Alliance submission; Vision Australia submission; Aged and Disability Advocacy Australia submission; Legal Aid Queensland submission; Name withheld (Sub.026) submission; James Cook University submission.

⁵⁵⁶ Queensland Council of Unions submission; Queensland Nurses and Midwives Union submission; Australian Lawyers Alliance submission; Vision Australia submission; Aged and Disability Advocacy Australia submission; Legal Aid Queensland submission.

⁵⁵⁷ *Fair Work Act 2009* (Cth), ss 340, 341(1).

⁵⁵⁸ *Industrial Relations Act 2016* (Qld) ss 282-288.

⁵⁵⁹ Queensland Nurses and Midwives Union submission, 26.

The Queensland Council of Unions told us that ‘the jurisdiction of the Fair Work Act before the Federal Circuit Court or Federal Court is difficult to access and cost prohibitive.’⁵⁶⁰

None of the other submissions gave examples of situations where a person suffered unfavourable treatment because of making a reasonable request or communicating a concern about employment entitlements that are not protected under current industrial laws or by ‘trade union activity’ as a protected attribute in Queensland.

Is the proposed attribute of a comparable nature to those already covered under the Act?

We acknowledge that there is a power differential between workers and employers and that this potential attribute could be seen as akin to ‘trade union activity.’

The Review’s position

The Review’s position is that:

- On the basis of our consultations, submissions, and research, the Review has not identified a significant gap in the existing protections either under the Anti-Discrimination Act or state and federal industrial laws.
- While the Fair Work Act leads to a costs jurisdiction, few matters proceed to the Federal Court, and employees can access the free dispute resolution service offered by the Fair Work Commission. State public servants can use the Queensland Industrial Relations Commission which is a no costs jurisdiction.
- There is no compelling reason to introduce a new attribute of employment activity.

Irrelevant medical record

The Terms of Reference ask us to consider adding the additional attribute of irrelevant medical record.

In the Discussion Paper, we asked whether there is a need for the Act to cover discrimination on the grounds of irrelevant medical record. The Review received 18 submissions on this topic, of which 17⁵⁶¹ supported the introduction of this attribute. One submission suggested that ‘genetic discrimination’ should be separately protected.⁵⁶²

Current approach

The Queensland Act does not contain a separate ‘irrelevant medical record’ attribute, but existing attributes already provide protection.

Under the Act, discrimination is prohibited on the ground of impairment, which includes an attribute that a person had in the past.⁵⁶³

⁵⁶⁰ Queensland Council of Unions submission, 28.

⁵⁶¹ Queensland Council for Social Service submission; Name withheld (Sub.026) submission; Intersex Human Rights Australia submission; Dr Grazia Catalano submission; PeakCare Queensland Inc submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Maurice Blackburn Lawyers submission; Australian Lawyers Alliance submission; Women’s Legal Service submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Community Legal Centres Queensland submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission.

⁵⁶² Intersex Human Rights Australia submission.

⁵⁶³ *Anti-Discrimination Act 1991* (Qld) s 8(d).

Complaints by people in Queensland can be taken to the Australian Human Rights Commission on the ground of medical record in the area of employment but, as with criminal record, an investigation with non-binding recommendations is the only outcome available.⁵⁶⁴

Comparative approaches

Northern Territory and Tasmania⁵⁶⁵ include irrelevant medical record as a protected attribute, while ACT⁵⁶⁶ limits this attribute to include only discrimination based on genetic information.

Is there a gap in protection?

We received submissions that suggest discrimination is occurring because of a person's:

- history of claiming worker's compensation
- genetic characteristics and predispositions to a medical condition
- medical records
- mental health status or history
- sex characteristics
- gender identity.

Most of the circumstances described were about unfair treatment at work or in obtaining insurance.

One submission suggested that people may be dismissed from work after disclosing an irrelevant mental health report.⁵⁶⁷ Being required to disclose a medical record can be stigmatising and create additional psychological barriers for individuals.⁵⁶⁸ We heard that employers sometimes rely on irrelevant records that do not relate to the current capacity and ability of the potential employee.⁵⁶⁹

Trends towards greater availability of genetic screening means that a higher proportion of the population is likely to have identified genetic risks or predispositions to medical conditions, and this may lead to increased risk of unfair treatment. For example, people with variations of sex characteristics have reported that they pay increased insurance premiums for life insurance cover.⁵⁷⁰

Unnecessary duplication

After reviewing all the issues raised in submissions, we have formed the view that the current attributes in the Act provide sufficient protection, except for people with variations of sex characteristics. This will be remedied by including sex characteristics as an additional attribute, as recommended in this chapter.

If a transgender person is discriminated against because of their records being in a different sex, or a previous name, this will be covered by gender identity discrimination. We have also recommended an update to the gender identity definition in this chapter.

We have considered the issue of genetic predisposition to existing conditions in two areas of this report including in this chapter and in chapter 8. By suggesting updates to the definition of

⁵⁶⁴ International Labour Organization, *C111: Convention concerning Discrimination in Respect of Employment and Occupation*, adopted 25 June 1958, art 1(b).

⁵⁶⁵ *Anti-Discrimination Act 1998* (Tas) s 16(r); *Anti-Discrimination Act 1992* (NT) s 19(p).

⁵⁶⁶ *Discrimination Act 1991* (ACT) s 7(k).

⁵⁶⁷ Queensland Nurses and Midwives Union submission, 24-25.

⁵⁶⁸ Women's Legal Service Qld submission, 3-4; Caxton Legal Centre submission, 25; Queensland Advocacy Incorporated submission, 10; Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission, 4.

⁵⁶⁹ Queensland Council of Unions submission, 29-30.

⁵⁷⁰ Intersex Human Rights Australia submission, 24-25.

disability and exceptions applying to insurance providers, we address these concerns without the need for an additional attribute.

Discrimination based on worker's compensation history

The Act protects a person from being asked for unnecessary information on which discrimination might be based. This does not apply if the information is needed to comply with legal obligations or because it was reasonably required for a purpose that did not involve discrimination.⁵⁷¹ A specific example is included in the Act to demonstrate how this might work in practice:

Example— An employer would contravene the Act by asking applicants for all jobs whether they have any impairments, but may ask applicants for a job involving heavy lifting whether they have any physical condition that indicates they should not do that work.

During the recruitment stage an employer can make a written request to a job applicant to disclose any pre-existing injury or medical condition that might be aggravated by performing the duties of the job.⁵⁷²

However, using information about an applicant obtained in the recruitment process must be done in compliance with the Anti-Discrimination Act. An applicant who has been wrongly rejected from consideration because of misuse of medical information disclosed may have grounds to bring a complaint of impairment discrimination.⁵⁷³

Is the proposed attribute of a comparable nature to those already covered by the Act?

Given that we have not identified a gap in protection, we have not given full consideration to whether the attribute is comparable to others. On an initial view, as the proposed attribute of irrelevant medical record is about records that relate closely to attributes including impairment (disability), gender identity, and sex characteristics, it is likely to be comparable to the existing attributes.

The Review's position

The Review's position is that:

- We have been unable to identify any gaps in protection that are not addressed through recommendations to create a new sex characteristics attribute and updates to the definitions of impairment and gender identity.
- Concerns about unfair use of information obtained in a request to disclose any pre-existing injury or medical condition that might be aggravated by performing the duties of the job are not grounds to create a new attribute, as sufficient coverage currently exists.
- The Act should not be amended to create a new attribute of 'irrelevant medical record.'

Medical choice

We received a large volume of submissions and survey responses about concerns relating to management of the COVID-19 pandemic, including:

- mandatory wearing of masks
- vaccination requirements to enter venues and to travel

⁵⁷¹ *Anti-Discrimination Act 1991* (Qld) s 124.

⁵⁷² *Workers Compensation and Rehabilitation Act 2003* (Qld) ss 571B- 571C.

⁵⁷³ Queensland Human Rights Commission, *Medical information and recruitment* (Web page, 2022) <<https://www.qhrc.qld.gov.au/your-responsibilities/for-employers/recruitment/medical-information-and-recruitment>>

- vaccination requirements on employees in particular sectors.

We received over 900 responses to our online survey and 12 submissions⁵⁷⁴ on this topic. They were broadly suggesting that a new attribute of ‘medical choices’ should be introduced. Submissions used other terms to describe this concept, including ‘medical treatment’, or ‘medical status.’ All these terms are directed at encompassing any choice made by an individual to either receive or decline medical treatment or vaccinations.⁵⁷⁵ Some also suggested that protections should extend to the choice of wearing a face mask or not.⁵⁷⁶

The Medical Insurance Group of Australia’s submission highlighted the importance of retaining the existing exceptions in the Act for public health and workplace health and safety, especially in the context of the ongoing pandemic, and asked us to have regard to the burden on health care providers during this time.⁵⁷⁷

The timing of our submissions process coincided with strict restrictions on unvaccinated and unmasked people entering cafes, health settings, and other places, and imposing mandatory vaccination requirements for some workers.⁵⁷⁸ Many of these extraordinary measures have now reduced or ceased, although some workplace vaccination requirements are still in place.⁵⁷⁹

Many of the submissions we received indicated that people experienced high levels of distress because of these issues, including poor mental health, financial stress, and negative impact on relationships. Participants in public consultations across Queensland shared their views about similar concerns.⁵⁸⁰

Current approach

In a small number of cases, mandatory requirements for vaccination and mask-wearing may already be unlawful discrimination under the current Act, if certain circumstances are met.

Inflexible application of rules that require everyone to be vaccinated could amount to indirect discrimination, in certain circumstances. For example, if a person has experienced an anaphylactic reaction from a first dose of COVID-19 vaccine and obtained a medical opinion that a second dose would be unsafe or detrimental, to make no exception to the rules may be discrimination on the ground of impairment.

As vaccines have not yet been made available to children aged five and under, it is likely to be indirect age discrimination to not make an exception for an infant.

Reasonableness and exceptions

Indirect discrimination may be reasonable in some circumstances⁵⁸¹ which means that discrimination may be lawful in certain situations. For example, in aged care or high-risk clinical settings it might be necessary to discriminate to ensure that an infectious disease does not spread and result in loss of life. Where an employee complained of discrimination after refusing

574 The People’s Revolution submission; Name withheld (Sub.009) submission; Name withheld (Sub.010) submission; Name withheld (Sub.012) submission; Marianne Wickham submission; Name withheld (Sub.014) submission; Name withheld (Sub.015) submission; Name withheld (Sub.016) submission; Name withheld (Sub.017) submission; Name withheld (Sub.018) submission; Dr Conny Turni submission; Name withheld (Sub.105) submission.

575 Name withheld (Sub.105) submission, 3.

576 The People’s Revolution submission, 3.

577 Medical Insurance Group Australia submission, 3.

578 During a public emergency, the Chief Health Officer can issue a Public Health Direction under the *Public Health Act 2005* s 362B to assist in containing or responding to the spread of COVID-19.

579 Queensland Health, *Chief Health Officer Public Health Directions* (Web page, 2022) <<https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers>>.

580 The Review held four public consultations in regional Queensland during November and December 2021 – in Rockhampton, Townsville, Yarrabah, and Cairns.

581 *Anti-Discrimination Act 1991* (Qld) s 11. See also discussion on Indirect discrimination – reasonableness in chapter 4.

to be vaccinated for personal reasons (including that there is insufficient evidence about the effectiveness of vaccines) the NSW Tribunal observed that compliance with a public health order was reasonable.⁵⁸²

In addition, health and safety exceptions may apply in these situations, where it is reasonable and necessary to take protective steps.⁵⁸³ The Act also allows employers to impose 'genuine occupational requirements' for a position, which may include a requirement to be vaccinated to safely perform a certain job.⁵⁸⁴

Complaints made about discrimination on the ground of vaccination status may not succeed because the respondent can often successfully argue that a health and safety exception applies. For example, in NSW it was found that it was reasonable for TAFE to rely on the equivalent public health exception in relation to a policy requiring vaccinations for staff.⁵⁸⁵

Is there a gap in protection?

While some people will be protected from discrimination on the grounds of impairment, age, or religious belief or activity, those who make a personal choice not to wear a mask or to be vaccinated are not covered by the existing attributes. This leaves a gap in protection.

Is the proposed attribute of a comparable nature to the attributes already in the Act?

The proposed attribute of 'medical choice' is not comparable to other attributes in the Act. Medical choice is not an immutable characteristic like race or age, as demonstrated by the word 'choice.' We have also been unable to identify that people who have chosen not to be vaccinated, or to not wear a mask on the basis of their personal beliefs are a historically vulnerable or marginalised group.

One submission said that people experiencing 'medical choice discrimination' are a 'large group' in need of protection, particularly as some attributes represent smaller sections of the population - for example pregnancy or lawful sexual activity.⁵⁸⁶ However, the size of the group is not a primary consideration for the Review.

Experiences of temporary hardship from COVID-19 restrictions are not analogous to ongoing stigma and social disadvantage experienced over a lifetime by other groups with protected attributes.

Human rights considerations

Requiring people to be vaccinated to access goods and services or employment limits human rights, including the right to freedom of thought, conscience, religion or belief; the right not to be subjected to medical treatment without consent; the right to privacy; and the right to equality.⁵⁸⁷

However, it is lawful to limit rights under the Human Rights Act if those limitations can be justified in a free and democratic society based on human dignity, equality and freedom.⁵⁸⁸ Discriminatory treatment may be necessary to meet the legitimate aim of ensuring the health and wellbeing of the community and to uphold the right to life, particularly in high-risk settings.

582 *Filla v Independent Community Living Australia* [2022] NSWCATAD 108.

583 *Anti-Discrimination Act 1991* (Qld) s 107 and s 108.

584 *Anti-Discrimination Act 1991* (Qld) s 25.

585 *Petek v TAFE NSW* [2022] NSWCATAD 105.

586 Name withheld (Sub.105) submission, 2.

587 *Human Rights Act 2019* (Qld) ss 20, 17, 25, 15.

588 *Human Rights Act 2019* (Qld) s 13.

Considerations in deciding to limit human rights in the context of a pandemic would have included that vaccination programs are a key preventative healthcare measure that have been shown to save lives,⁵⁸⁹ while also saving spending on public health in the long term.⁵⁹⁰

Courts and tribunals in jurisdictions around the world have determined, in the vast majority of cases, that promoting public health or the health of workers can justify limits on the rights of individuals who have not been vaccinated.⁵⁹¹

The Review's position

The Review's position is that:

- While there may be a gap in protection under the Act for people who make medical decisions based on personal beliefs, the proposed attribute of medical choice is not comparable to other attributes in the Act because this group is not a historically vulnerable or marginalised group.
- The Act sufficiently protects groups who have an existing attribute where blanket rules or requirements indirectly discriminate against people, such as on the basis of a person's disability.
- An attribute that protects people because they choose not to have a vaccination would have limited benefit for the affected group in practice because health and safety exceptions would often apply. These exceptions must remain in the Act. Repealing or limiting health and safety exceptions would create an unfeasible situation for employers and businesses that are required to comply with both workplace health and safety laws and discrimination laws, while also owing a duty of care to customers, employees, and the public.
- Adding the attribute of medical choice could undermine public health now and in the future, resulting in social and economic costs to the government and the broader community.
- 'Medical choice' or another analogous term should not be a protected attribute under the Anti-Discrimination Act.

589 UNICEF, *Immunization* (Web page, 2022) <<https://www.unicef.org/immunization>>. Global childhood immunisations are estimated to prevent 2-3 million deaths annually. 23 million deaths were prevented by measles vaccinations in 18 years between 2000 and 2018.

590 Fangjun Zhou F, Abigail Shefer, Jay Wenger et al, 'Economic evaluation of the routine childhood immunization program in the United States, 2009' Vol 133 iss 4 *Pediatrics*. (2014), 577-85; Suresh Mehendra Raj, Abrar Ahmad Chughtai, Anurag Sharma et al, 'Cost-benefit analysis of a national influenza vaccination program in preventing hospitalisation costs in Australian adults aged 50-64 years old' *Vaccine* 37 (40) (September 2019), 5979-5985; David E Bloom, Daniel Cadarette and Maddalena Ferranna, 'The Societal Value of Vaccination in the Age of COVID-19' 111(6) *American Journal of Public Health* (June 2021), 1049-1054.

591 See for example cases on a range of requirements to be vaccinated, including for COVID-19: *Kassam v Hazzard*; *Henry v Hazzard* [2021] NSWSC 1320; *Kassam v Hazzard*; *Henry v Hazzard* [2021] NSWCA 299; (2021) 396 ALR 302; *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012; *Four Midwives v Minister for COVID-19 Response* [2021] NZHC 3064; *NZDOS V Minister for COVID-19 Response* [2022] NZHC 716; *Vavříčka v The Czech Republic* (European Court of Human Rights, Grand Chamber, Applications nos. 47621/13 and 5 others, 8 April 2021); *Kimber v Sapphire Coast Community Aged Care* [2021] FWCFB 6015.



Chapter 8:

Coverage of the Act

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Areas of activity

The Terms of Reference ask us to consider the areas of activity in which discrimination is prohibited.¹

The current areas of activity are work, education, goods and services, accommodation, disposition of land, club membership and affairs, superannuation, insurance, administration of state laws and programs, and local government.

We have considered whether there is a need for any reform to the areas of activity in which discrimination is prohibited, and whether discrimination should also be unlawful in other areas of public life.

Discrimination law in Queensland applies to conduct in public rather than private spheres with the notable exceptions of sexual harassment, which is unlawful everywhere,² and vilification, which relates to public acts.³

The Act includes defined areas of activity which makes it clear ‘where’ discrimination is unlawful, and the areas of activity are fairly consistent across Australian jurisdictions with little change over time.

The Review received few submissions regarding the areas of activity, and no obvious gaps in protection were identified during the consultation phase.

Activities ‘other than in private’

Previous reviews of discrimination laws have recommended reforms to ensure that all forms of unfair treatment that happen other than in private are covered. This would, in effect, remove the need for the Act to define areas of activity in which the Act applies.

An exposure draft Bill proposed to consolidate Commonwealth legislation included a provision which rendered all discriminatory conduct unlawful within ‘any area of public life’, which would have been a departure from the established approach.⁴ The ACT Law Reform Advisory Council recommended that the law cover discrimination in all areas of life with an exception for private conduct.⁵ Neither of these recommendations were incorporated into law.

We received two submissions that suggested similar approaches by either:

- listing areas of activity in a single provision and including coverage of ‘any activity that is not in private’⁶
- following the approach in the Racial Discrimination Act which includes the words ‘in the political, economic, social, cultural or any other field of public life.’⁷

Throughout our consultations and research, we did not identify gaps in protection that are created by the current coverage of areas of activity defined by the Act.

1 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(d).

2 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 49.

3 *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A.

4 Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 22(1) – this Bill did not pass into law.

5 ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991* (ACT) (Final Report, 2015) Recommendation 6.1, 12, 55.

6 Australian Discrimination Law Experts Group submission, 60-61.

7 LGBTI Legal Service Inc submission, 5, referring to *Racial Discrimination Act 1975* (Cth) s 9.

The Review's position

The Review considers that:

- As the law already sets out the key areas of public life in which discrimination occurs, and as no gaps in protection were identified, there is no justification for altering the areas of activity in the Act.
- Changing the law to refer to activity 'other than in private' or 'in any field of public life' may introduce ambiguity into the law and make it harder for duty holders to comply.
- Determining what is public as opposed to private conduct may prove contentious and create an unnecessary distraction from the central issues to be determined by tribunals and courts.

Exceptions and exemptions

The Terms of Reference ask us to consider whether there is a need for any reform to:

- enhance and update the Act⁸
- exemptions and other legislative barriers that apply to the prohibition on discrimination⁹
- ensure the compatibility of the Act with the Human Rights Act.¹⁰

‘Exemptions’ in the current Act are provisions that, in certain circumstances, permit discrimination that would otherwise be unlawful. Exemptions are available for each of the areas of activity in the Act, (except for Administration of State laws and programs and Local government areas), and General exemptions apply to all areas of activity.

The purpose of exemptions is to acknowledge that treating a person differently may be justified in some circumstances because of other considerations.¹¹ Some exemptions provide positive or protective measures. For example:

- allowing age-based benefits and concessions¹²
- allowing restrictions on access to sites of cultural or religious significance.¹³

Some exemptions reinforce the prohibition on discrimination in public areas of activity, rather than private areas of activity,¹⁴ such as in a person’s home. This is demonstrated by exemptions that allow discriminatory decisions about who provides domestic services in a person’s home and childcare for a person’s children at the person’s home.¹⁵

If a person or organisation seeks to rely on an exemption, they must raise the issue and prove the exemption applies.¹⁶

Throughout this chapter, we consider whether the coverage of the Act, as determined by the areas of activity and the exemptions that apply, achieves the right balance between providing protection from discrimination and allowing for differential treatment for a genuine reason, where it is reasonable, necessary, and proportionate.

During our initial consultations, we identified particular exemptions and areas of activity where reform may be required to meet current community needs and expectations, and to ensure the Act is compatible with human rights obligations under the *Human Rights Act 2019* (Qld).

Terminology

Most state discrimination Acts use the word ‘exception’ for provisions that allow discrimination in certain circumstances, and use the word ‘exemption’ for temporary exemptions from the operation of specific provisions that may be granted by a tribunal.¹⁷

8 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 2.

9 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(h).

10 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(a).

11 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 164.

12 *Anti-Discrimination Act 1991* (Qld) s 49.

13 *Anti-Discrimination Act 1991* (Qld) s 48.

14 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 49.

15 *Anti-Discrimination Act 1991* (Qld) ss 26–27.

16 *Anti-Discrimination Act 1991* (Qld) s 206.

17 *Anti-Discrimination Act 1977* (NSW), *Anti-Discrimination Act 1998* (Tas), *Discrimination Act 1991* (ACT), *Equal Opportunity Act 2010* (Vic), *Equal Opportunity Act 1984* (WA).

However, the Queensland Act conflates these two distinct operations of the Act by referring to both as ‘exemptions.’

The dictionary meaning of ‘exception’ includes ‘an instance or case not conforming to the general rule.’¹⁸ This accurately reflects what ‘exemption’ currently means under the Act. For example, an ‘exemption’ is available in relation to decisions made when a person hires someone to care for their children at home.¹⁹

The dictionary meaning of ‘exempt’ includes ‘freeing [a person] from an obligation or liability to which others are subject.’²⁰ This implies that an action is taken to grant release from an obligation, which is more closely aligned with the process of obtaining an exemption from a Tribunal.²¹

Australian Discrimination Law Experts Group proposed that the term ‘defences’ be used instead of exemptions,²² and the person relying on the defence be required to prove that it applies, on the balance of probabilities. This suggests an approach in which discrimination is presumed to have occurred unless a defence is available.

Christian Schools Australia proposed a change of terminology in relation to provisions involving religious bodies. In their view, the word ‘exemption’ is ‘inherently fraught’ and is a ‘poor mechanism to balance human rights’. They suggest changing the terminology to ‘balancing provisions’ to reflect the view that exceptions are about balancing competing interests.²³

The Review’s position

The Review considers that:

- Using the same word for two distinct operations of the Act creates confusion in the community and among duty holders.
- The term ‘defence’ is a legal term that implies an adversarial process involving duty holders and people who make a complaint under the Act.
- The term ‘balancing provisions’ does not accurately describe the substance of those provisions, which is that discrimination that would otherwise be unlawful is allowed in certain circumstances determined by the Act.
- Adopting either ‘defences’ or ‘balancing provisions’ would make the Act inconsistent with other Australian jurisdictions.
- ‘Exceptions’ is the most accurate term for provisions in the Act that allow discrimination in certain circumstances.
- ‘Exemptions’ continues to be an accurate term for the process of applying to the tribunal for release from the operation of specified provisions of the Act for a set time.

Recommendation 33

33.1 The Act should use the term ‘exceptions’ for provisions that allow discrimination in certain circumstances and use the term ‘exemptions’ for applications to the tribunal for an exemption from the operation of specific provisions for a fixed period.

18 *Macquarie Dictionary* (online at 20 June 2022) ‘exception’ (def 3).

19 *Anti-Discrimination Act 1991* (Qld) s 27.

20 *Macquarie Dictionary* (online at 20 June 2022) ‘exempt’ (def 1).

21 Under section 113 of the Act, the tribunal may grant an exemption to a person from the operation of a specified provision of the Act.

22 Australian Discrimination Law Experts Group submission, 14.

23 Christian Schools Australia submission, 20.

In this report, we use the words ‘exceptions’ to discrimination, rather than ‘exemptions’ as in the current Act.

Updating the exceptions

Considerations that apply

We consider that some exceptions should remain in the Anti-Discrimination Act, some should be amended, and some should be repealed entirely. In coming to this position, we have examined the current exceptions to see whether each one is still necessary; the scope is reasonable and proportionate, as required by the Human Rights Act; and whether the scope should be restricted to particular areas of activity or particular attributes.

Based on information obtained by the Review from sources including submissions, consultations, and previous reports, we have taken the following into account:

- the purpose of exceptions and whether that purpose remains relevant and significant
- how exceptions are being applied, and the nature and impact of discrimination that is being allowed because of them
- whether the exception perpetuates disadvantage or stigma against particular groups based on irrelevant assumptions or stereotypes
- approaches to exceptions in other jurisdictions
- ways to make the law simpler and easier for duty holders to comply, particularly if there is overlap between state and Commonwealth laws.

The recently introduced Human Rights Act provides a framework for balancing human rights with any proposed limitation on those rights. Human rights are not absolute and may be subject to reasonable limits that can be justified in a free and democratic society based on human dignity, equality, and freedom. The Human Rights Act sets out relevant factors for assessing whether a limitation is reasonable and justifiable.²⁴

In examining human rights compatibility, we consider whether each current exception promotes or limits the rights protected by the Human Rights Act, and whether the exception is a reasonable and proportionate limitation on rights that helps to achieve a legitimate purpose.

The Review has not undertaken an exhaustive human rights analysis of current and potential exception provisions. Any future amendment to the Act will require a Statement of Compatibility, which provides a mechanism for a comprehensive assessment of whether the provisions of the Bill are compatible with human rights. However, the obligation on public entities, which includes the Commission, to act and make decisions compatibly with human rights has informed our work at every stage.

While some provisions we deal with in this section are not framed as an exception in the current Act, the effect of these sections means that they operate like an exception to discrimination.²⁵

²⁴ *Human Rights Act 2019* (Qld) s 13(2).

²⁵ For example, s 46(2) confines references to a person who supplies goods or services to those that carry out their purposes for the purpose of making a profit, which has the same effect as an exception although it is not listed in Subdivision 2 where other exceptions to discrimination in the goods and services area are included.

Non-profit suppliers of goods and services

Current approach

Many non-profit organisations do not need to comply with the Act when supplying goods or services. While the Act provides that discrimination in the supply of goods or services is expressly covered by the Act ‘whether or not for reward or profit’, a broad exclusion dilutes this statement.

The Act has an exclusion for goods or services when provided by an association that –

- is established for social, literary, cultural, political, sporting, athletic, recreational, community service or any other similar lawful purposes; and
- does not carry out its purposes for the purpose of making a profit.²⁶

Non-profit services have been interpreted by the tribunal to include private hospitals,²⁷ sporting bodies,²⁸ and hospitality venues run by clubs,²⁹ and are likely to include aged care, social services, disability services, and art or cultural societies.

The non-profit exclusion applies regardless of the assets and income of the relevant body. The determinative factor is the purpose as set out in the constitution or rules of the association, and the way in which the association derives income.³⁰ In these circumstances, the non-profit exclusion operates as a complete defence to discrimination in relation to all attributes in the area of goods and services.

An overlap between the non-profit goods and services exclusion and the definition of a club, is addressed in the following section on clubs.

The Discussion Paper sought submissions about whether the area of goods and services should continue to exclude all non-profit associations. 17 submissions discussed this issue.³¹ Of these submissions, most supported a change to this approach, and two³² thought the Act should remain unchanged.

This topic was also explored with peak bodies representing a range of non-profit service providers during our initial consultation phase.³³

Fair access and social inclusion

Stakeholders that supported a change to the Act to ensure that non-profit organisations are included in the goods and services area told us that:

²⁶ *Anti-Discrimination Act 1991* (Qld) s 46(2).

²⁷ *Haycox v The Uniting Church in Australia Property Trust (Q) trading as the Wesley Hospital* [2005] QADT 35.

²⁸ *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471.

²⁹ *Yeo v Brisbane Polo Club Inc* [2014] QCAT 66.

³⁰ *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471 [34].

³¹ Clubs Queensland submission; Joint Churches submission; Legal Aid Queensland submission; Queensland Council of Social Service submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Youth Advocacy Centre Inc submission; Vision Australia submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Equality Australia submission; Name withheld (Sub.008) submission; Queensland Rugby League submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Australian Lawyers Alliance submission; Clubs Queensland submission; Maternity Choices Australia submission; Australian Association of Christian Schools submission.

³² Clubs Queensland submission, 4; Joint Churches submission, 16.

³³ Queensland Council of Social Services consultation, 12 October 2021. 98 participants from a range of non-profit organisations attended a workshop co-hosted with the Review Team.

- Fair access and engagement with community organisations is vital to achieve social inclusion³⁴ e.g., people with disability may rely on a non-profit RSL for their social life.³⁵
- Many people rely on goods and services providers for their most basic needs,³⁶ and the exclusion of many non-profits from the Act is particularly unfair for people who are vulnerable or disadvantaged,³⁷ or from regional or remote areas where there are fewer choices.³⁸
- It is unreasonable that non-profit organisations have responsibilities under Anti-Discrimination law to their employees but not to their clients,³⁹ particularly when contracted to provide public services on behalf of the State.⁴⁰
- This situation creates a misalignment with the Human Rights Act in which public entities⁴¹ are required to act compatibly with human rights, including the right to non-discrimination protected in section 15 of that Act.⁴²

Discrimination allowed because of the exclusion

Community legal services told us that the non-profit exclusion creates an additional layer of complexity for their clients.⁴³ We heard that for this reason, an otherwise meritorious complaint sometimes fails.⁴⁴ One person told us that he brought a complaint in Queensland, but it was unable to proceed because of the non-profit exclusion. When he lodged the same complaint with the Australian Human Rights Commission under the federal Sex Discrimination Act the complaint resolved with a formal apology. He commented that:

*My case demonstrates that the federal Sex Discrimination Act - which contains no exemptions for not-for-profit organisations - was effective at stopping gender-based discrimination when the Queensland ADA was not able to prevent discrimination. These exemptions cause real harm to real Queenslanders. They are outdated and serve no useful purpose - they need to go.*⁴⁵

Whether an entity carries out its business for the purpose of making a profit or not has been the source of some contention.⁴⁶ Complications at the tribunal stage can arise because it is often difficult for the person making a complaint, as well as the Commission, to identify whether the entity is non-profit, particularly where a non-profit organisation is acting as an agent for a State or private entity, or where a single organisation has both profit and commercial divisions.⁴⁷

34 Caxton Legal Centre submission, 31.

35 Queensland Advocacy Incorporated submission, 9.

36 Australian Lawyers Alliance submission, 19.

37 Queensland Council for Social Services submission, 6 – referring to sex workers, prisoners, LGBTIQ+ community members, and people with a history of mental illness; Vision Australia submission, 7 – referring to people with disability who rely on many non-profit organisations.

38 Maternity Choices submission, 1, 9 – noting that maternity services are organised by ‘catchment’ and there are limited alternatives available.

39 Youth Advocacy Centre submission, 4.

40 Youth Advocacy Centre submission, 4.

41 A public entity under the *Human Rights Act 2019* s 9(h) includes an entity whose functions are or include functions of a public nature when it is performing the functions for the State or a public entity (such as a contractor).

42 Legal Aid Queensland submission, 100; Youth Advocacy Centre submission, 4.

43 Legal Aid Queensland submission, 99-100.

44 Legal Aid Queensland submission, 99.

45 Name withheld (Sub.008) submission, 5-6.

46 For example, *Yeo v Brisbane Polo Club Inc* [2014] QCAT 66, a complaint about wheelchair access became about whether the Polo Club was non-profit.

47 Legal Aid Queensland submission, 99.

While people in Queensland can make their complaint to the Australian Human Rights Commission to avoid some of these issues, if they lodge in Queensland prior to seeking advice, they may be barred by federal statute from changing jurisdiction.⁴⁸

Community reliance on non-profit organisations

In Queensland, large numbers of services are provided by the non-profit sector, including aged care, private hospitals, disability services and social services.

When QUT Business School examined Australian Charities and Not-for-profits Commission data in 2014, it found that Queensland has the greatest percentage of large charities in Australia. In 2014, there were over 10,000 charities operating in Queensland, with most (65.4%) operating with an annual revenue of less than \$250,000.⁴⁹ Those with revenue between \$250,000 to \$999,000 made up 15.9%, and the remaining 18.6%, (amounting to 2,019 entities), were large charities with over \$1million in revenue.

The most common charitable purposes of these entities were 'advancement of religion', 'relief of poverty, sickness or the needs of the aged', 'advancement of education', and 'other purposes beneficial to the community'. Most bodies were carrying out religious activities, education, community development, culture and the arts, health services, social services, and aged care.⁵⁰

In 2005, the Queensland Anti-Discrimination Tribunal decided a case regarding access to services and treatment at The Wesley Hospital by a person with obesity and a mental health condition. The Wesley Hospital was found to be an association established for social or community services. The Tribunal determined that whether or not the Wesley Hospital makes a profit is irrelevant to whether the hospital 'carries out its purposes for the purpose of making a profit' and dismissed the matter.⁵¹

Ensuring the continuing work of non-profit organisations

Overall, there was strong support for changing the scope of the Act to include non-profit organisations when they are providing goods or services to the public on a commercial basis, or when providing goods or services on behalf of the State.

Of the material gathered by the Review, we did not identify strong opposition to the concept that non-profit organisations should be included in the goods and services area of the Act, particularly because stakeholders were aware of their obligations under federal laws which are broader.

During a consultation with Queensland Council of Social Service, the peak body for social services in Queensland, 49% of participants representing non-profit organisations thought the exclusion of non-profits from the operation of the Act should change; 11% of participants thought the status quo should be maintained; and 36% of participants thought it depends on the service and/or the relevant attribute.⁵² Many participants at the consultation were not aware that non-profit service providers were treated any differently under the Act.⁵³

Similar views were expressed in a survey of Queensland Rugby League's key stakeholders – 60% were unaware that non-profit organisations were excluded from the Act; 56% thought it should be

48 Legal Aid Queensland submission, 99.

49 Prof Myles McGregor-Lowndes and Marie Crittal, 'The State of Queensland Charities – An examination of the first Annual Information Statements of charities operating in Queensland', *QUT Business School*, ACPNS Working Paper no. 65, iii.

50 Prof Myles McGregor-Lowndes and Marie Crittal, 'The State of Queensland Charities – An examination of the first Annual Information Statements of charities operating in Queensland', *QUT Business School*, ACPNS Working Paper no. 65, 40-41.

51 *Haycox v Uniting Church in Australia Property Trust (Q) t/as the Wesley Hospital* [2005] QADT 35.

52 Queensland Council of Social Service consultation, 12 October 2021.

53 Queensland Council of Social Service submission, 5-6.

reviewed as there should be no lawful forms of discrimination; and 13% thought the exemption currently afforded to non-profit organisations should remain.⁵⁴

The Joint Churches submission, which represents the views of 11 churches in Queensland, thought the status quo should be maintained, noting that beneficial services, such as op shops, often depend on the support of volunteers and operate on very limited budgets.⁵⁵

Clubs Queensland, which represents the interests of many non-profit clubs in Queensland, submitted that the current exception should remain, but in the alternative, there could be a way of ensuring an exclusion for smaller, non-profit clubs.⁵⁶ Clubs Queensland was most concerned about an unfair burden on smaller clubs with a turnover of less than \$500,000.⁵⁷

Options for reform

Submissions suggested the following reform options:

- repeal the exclusion entirely, meaning that all non-profit goods and services providers are included in the Act⁵⁸
- repeal the exclusion and create a voluntary body exemption in its place.⁵⁹
- continue to exclude non-profit goods and services providers from the Act where they have a turnover of less than \$500,000.⁶⁰

Comparative approaches

While some jurisdictions have different ‘voluntary bodies’ exemptions,⁶¹ only Queensland permits discrimination by all entities that do not ‘carry out their purposes for the purpose of making a profit’.

The federal Racial Discrimination Act and the Disability Discrimination Act cover profit and non-profit services, and the Disability Discrimination Act additionally states that goods, services, and facilities include those that are ‘for payment or not’.⁶² However, the Sex Discrimination Act and Age Discrimination Act contain a voluntary body exemption that applies when people are admitted as members of a voluntary body or when services are provided to members of the body, but does not apply to services provided to the general public.⁶³

Under the Sex Discrimination Act, a voluntary body is defined as an association, whether incorporated or unincorporated, the activities of which are not engaged in for the purpose of making a profit. It does not include a club (see also the following section), registered organisation, government body, or financial association.⁶⁴

The Age Discrimination Act definition is similar,⁶⁵ to ensure the legislation ‘does not cut across the valuable contribution made by voluntary bodies throughout Australia.’⁶⁶ Had the Religious

54 Queensland Rugby League submission, 6. 124 survey respondents answered and 19 skipped the question, and respondents were able to select all that apply.

55 Joint Churches submission, 65.

56 Clubs Queensland submission, 2.

57 Clubs Queensland submission, 2. This figure comes from the definition of a small club under the Registered and Licenced Clubs Award 2020.

58 Australian Discrimination Law Experts Group submission, 69.

59 Equality Australia submission, 21; Queensland Council for Civil Liberties submission, 25.

60 Clubs Queensland submission, 2.

61 The ‘voluntary body’ exceptions in other equality jurisdictions allow for discrimination with respect to admission to membership and benefits, facilities and services received as members, but not when services are being provided to the public. See also clubs in this section.

62 *Disability Discrimination Act* (Cth) s 24.

63 *Sex Discrimination Act 1984* (Cth) s 39.

64 *Sex Discrimination Act 1984* (Cth) s 39.

65 *Age Discrimination Act 2004* (Cth) s 36.

66 Explanatory Memorandum, Age Discrimination Bill 2003 (Cth) 24.

Discrimination Bill 2022 passed into law, it would have included a voluntary body exemption because of the need to protect the right to freedom of association under the *International Covenant on Civil and Political Rights*, which protects the ‘freedom to choose who not to associate with, provided that choice does not have a publicly discriminatory effect’.⁶⁷

Importantly, the federal voluntary bodies exemptions can only be relied on by non-profit organisations in relationships with their members and not relationships with non-members.⁶⁸

Adopting this approach in Queensland would mean, for example, while a Catholic bible study group could be permitted to refuse membership or services to non-Catholics,⁶⁹ an op shop run by the Catholic Church would be subject to the Act when selling items to the general public.

Human rights considerations

Small voluntary-run bodies with few resources or facilities, and particularly those operated from private homes or conducted for the purposes of worship in community, are not drawn unreasonably into the operation of the Anti-Discrimination Act, and have considered the relevant rights protected under the *Human Rights Act 2019* (Qld):

- freedom of association⁷⁰
- freedom of conscience, thought and belief⁷¹
- right to privacy.⁷²

These rights must be weighed against protections for equality and non-discrimination, which may be unjustifiably limited under the current approach.⁷³ Including all voluntary bodies in the scope of goods and services when dealing with their members would protect the right to equality but may unreasonably limit other rights including the right to association, privacy and the right to freedom of thought, conscience, and belief.

By restricting the exclusion to the provision of goods or services to members, a voluntary body exclusion is intentionally targeted to ensure the purpose of promoting freedom of association and other key rights is achieved, without creating an unreasonable limitation on the right to equality.

The Review’s position

The Review considers that:

- Excluding non-profit service providers from the operation of the Act is creating an unfair barrier to accessing the Act, particularly considering the extent to which essential goods and services are provided by non-profit organisations.
- The current exception is likely to have a disproportionate effect on people who rely heavily on non-profit services including older people, people with disability, people experiencing socio-economic disadvantage, and people in remote or regional areas who have more limited options.

⁶⁷ Explanatory Memorandum, Religious Discrimination Bill 2022 (Cth) 23-24.

⁶⁸ *Gardner v All Australian Netball Association Ltd* (2003) 197 ALR 28 – where a netball association had imposed an interim ban preventing pregnant women from competing. Because only state and territory netball associations were members, it was determined that a pregnant netballer was receiving services as a player, and was not a ‘member’, and so the exemption did not apply.

⁶⁹ Explanatory Memorandum, Religious Discrimination Bill 2022 (Cth) 24.

⁷⁰ *Human Rights Act 2019* (Qld) s 22(2).

⁷¹ *Human Rights Act 2019* (Qld) s 20.

⁷² *Human Rights Act 2019* (Qld) s 25.

⁷³ *Human Rights Act 2019* (Qld) s 15.

- To improve consistency with the federal laws, and to ensure compatibility with the Human Rights Act, it is necessary to create a similar voluntary body exclusion.

Recommendation 34

34.1 The Act should not include the provision that excludes from the operation of the Act those associations established for social, literary, cultural, political, sporting, athletic, recreational, community service or other similar lawful purposes which do not carry out their purposes for the purpose of making a profit.

34.2 The Act should include a voluntary body exception based on the exception in the *Sex Discrimination Act 1984* (Cth) s 39, which is defined in s 4 of that Act.

Clubs

The Act prohibits discrimination in the area of club membership and affairs, and protects both prospective and current club members from discrimination.⁷⁴

‘Club’ under the Act means an association established for a particular purpose, such as social, literary, cultural, political, sporting, recreational, community service, or similar purpose, but only where the association carries out their activities for the purposes of making a profit.⁷⁵ Non-profit clubs are excluded from the Act’s area of club membership and affairs.

Clubs that are not likely to be covered by the definition of ‘club’ include bowls clubs, sporting clubs, surf lifesaving clubs, and RSL clubs.

In the Discussion Paper, we sought submissions about whether the definition of club should change. Eight submissions⁷⁶ addressed this issue, and all of them supported change to the definition.

There can be an overlap between the areas of club membership and affairs and the area of goods and services, which we discuss above.

Importance of clubs

The Review was told that clubs serve and strengthen the community. Clubs Queensland, the peak industry body for all registered and licenced clubs in Queensland, describe clubs as important ‘hubs of social interaction and engagement’ where members have ‘shared values and a sense of belonging that strengthens the social fabric and promotes strong community cohesion.’⁷⁷

Clubs Queensland said that it is important to their member clubs that they continue to be safe spaces where the values of equality and non-discrimination are practiced and promoted.⁷⁸

⁷⁴ *Anti-Discrimination Act 1991* (Qld) ss 94–95.

⁷⁵ *Anti-Discrimination Act 1991* (Qld) Dictionary (definition of ‘club’).

⁷⁶ Clubs Queensland submission; Australian Lawyers Alliance submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Youth Advocacy Centre Inc submission; Queensland Rugby League submission; Name withheld (Sub.026) submission.

⁷⁷ Clubs Queensland submission, 1.

⁷⁸ Clubs Queensland submission, 1.

Preserving clubs for particular groups

Several stakeholders stressed the importance of ensuring that clubs can continue to operate for the benefit of particular groups. For example, the Indian Cultural & Sports Club celebrates Indian culture, dance, music, sports and festivals, and the Moreton Club was founded as a club for women.⁷⁹

The Queensland Council for Civil Liberties suggested that in reconsidering the definition of a club the law should ensure it continues to support freedom of association.⁸⁰

The Act contains exceptions for discrimination in club membership and affairs for clubs established for minority cultures and disadvantaged people⁸¹ and to allow for clubs segregated by sex.⁸² However, unlike other jurisdictions with a broader meaning of clubs, Queensland does not have specific exceptions that allow for clubs to operate for the benefit of a certain age group (unless it is a 'disadvantaged' group), or for clubs based on political affiliation.⁸³

Discrimination allowed because of the exception

The narrow definition of 'club' may have been intended to prevent an unreasonable intrusion into private affairs or free association, which are protected under the Human Rights Act.⁸⁴ For example, it may not be reasonable to extend the reach of the Act to a social book club run from a person's private home.

Nonetheless, the narrow definition has permitted discrimination in a wide range of circumstances, including when basketballers of African descent were allegedly excluded from participation in a competition because of their race. Despite making profits and holding substantial assets, the respondent basketball associations were exempt because their constitutions did not cite profit-making as their purpose, and their revenue was used for the 'sporting purposes' under which they were established.⁸⁵

Queensland Rugby League noted that there was limited stakeholder awareness (15%) that only for-profit 'clubs' were included in the definition in the Act with survey participants commenting that:

- 'There should be no exemptions across the board.'
- 'We would not look to discriminate in any way but may not be able to help some groups because of a lack of funds.'
- 'Education is needed at the forefront behind reducing incidents of discrimination.'⁸⁶

The Australian Discrimination Law Experts Group commented that there appears to be no valid rationale for allowing most clubs in Queensland to operate outside the law, particularly because non-profit clubs have other relevant exceptions that they can rely on where necessary.⁸⁷ This view was shared by other stakeholders who supported change to the exclusion of non-profit associations from the goods and services area.⁸⁸

79 Clubs Queensland submission, 4; Caxton Legal Centre submission, 31; Name withheld (Sub.026) submission, 12.

80 Queensland Council for Civil Liberties submission, 25.

81 *Anti-Discrimination Act 1991* (Qld) s 97.

82 *Anti-Discrimination Act 1991* (Qld) s 98.

83 Clubs Queensland submission, 4–5.

84 *Human Rights Act 2019* s 22(2), 25.

85 *Yohan representing PAWES v Queensland Basketball Incorporated & Brisbane Basketball Incorporated (No 2)* [2010] QCAT 471.

86 Queensland Rugby League submission, 7.

87 Australian Discrimination Law Experts Group submission, 70.

88 Legal Aid Queensland submission, 100; Caxton Legal Centre submission, 31; Australian Lawyers Alliance submission, 19.

Comparative approaches

Rather than a non-profit test, which excludes most clubs from the operation of the Act, other Australian jurisdictions define clubs based on factors that include the number of members, whether the club provides and maintains facilities, and whether the club holds a liquor licence or not.⁸⁹ Small, less well-resourced clubs that do not provide and maintain facilities or sell liquor are not within the scope of a 'club', but larger, well-resourced clubs are covered.

Federal approach

In the Non-profit suppliers of goods and services section in this chapter, we recommend that a voluntary body exception consistent with federal laws be introduced into the Act. This would apply where organisations provide goods or services to members but not to the general public. In the federal jurisdictions with voluntary body exemptions, the law clarifies that voluntary bodies do not include clubs.⁹⁰

Several submissions referred to or recommended adopting the definition of club from other jurisdictions, including the federal Sex Discrimination Act.⁹¹

The Sex Discrimination Act defines a club as one with less than 30 members; which provides and maintains its facilities, in whole or in part, from the funds of the association; and sells or supplies liquor for consumption on its premises.⁹² A surf lifesaving club that operates a restaurant, bar, and pokies would not be allowed to discriminate against female patrons who are having dinner and a drink.

The Disability Discrimination Act provides a different definition of a club that does not refer to the number of members or the holding of a liquor licence. Instead, an association meets the definition of a club under the Disability Discrimination Act if it provides and maintains its facilities, in whole or in part, from the funds of the association, regardless of the number of members.⁹³ Providing or maintaining facilities is an indicator that the club has more of a public, rather than private character.

Adopting this approach would include clubs that have public premises but do not hold liquor licences, such as smaller sporting clubs. However, a knitting club that meets at local cafes would not fall under the scope of a 'club', and not have duties under the Act to members or prospective members.

Several jurisdictions are moving towards an approach more aligned with the Disability Discrimination Act. The Northern Territory's Discussion Paper released in 2017 explored whether the test of holding a liquor licence or not remained an appropriate and relevant one, considering modern society's use and expectations of clubs and associations.⁹⁴ The Northern Territory has subsequently confirmed that it will broaden the scope of clubs to 'remove the ability for clubs without a liquor licence to discriminate against individuals.'⁹⁵ The federal Religious Discrimination Bill 2022 was drafted to include an approach consistent with the Disability Discrimination Act,⁹⁶ and a recent Exposure Draft in the ACT has presented the same approach.⁹⁷

89 For example, see *Sex Discrimination Act 1984* (Cth) s 4.

90 For example – *Sex Discrimination Act 1984* (Cth) s 4; *Disability Discrimination Act 1992* (Cth) s 4.

91 Clubs Queensland submission, 3–4; Queensland Council for Civil Liberties submission, 25; Australian Lawyers Alliance submission, 19.

92 *Sex Discrimination Act 1984* (Cth) s 4.

93 *Disability Discrimination Act 1992* (Cth) s 4.

94 Department of the Attorney-General and Justice, *Discussion Paper: Modernisation of the Anti-Discrimination Act* (September 2017), 18.

95 Northern Territory Government, *Territory Stories – Achieving Equality in the Northern Territory* (Tabled Paper, February 2022), 8.

96 Religious Discrimination Bill 2022 (Cth) cl 5. Noting that the Bill did not ultimately pass.

97 Exposure draft, Discrimination Amendment Bill 2022 (ACT) cl 22.

Remove non-profit definition of a club

Some submissions told us that exclusions for non-profit clubs and associations should be entirely removed.⁹⁸ This would require compliance with the Anti-Discrimination Act regardless of the size and resources of the club.

Human rights considerations

As explored in the previous section on non-profit suppliers of goods and services, Anti-Discrimination laws have generally sought to exclude from the operation of the Act activities that have a private, rather than public character. Under the Queensland Human Rights Act, a person has the right to privacy, and to not have their privacy, family or home arbitrarily interfered with.⁹⁹ The Anti-Discrimination Act should also not unreasonably limit freedom of association,¹⁰⁰ by supporting the right of people to meet peacefully for a common purpose through community clubs.

We have also taken account of the need to preserve the capacity for groups to enjoy their culture or faith together in community, which is necessary to safeguard cultural rights¹⁰¹ and freedom of thought, conscience, religion and belief.¹⁰² These rights must be appropriately balanced with the right to non-discrimination.¹⁰³

Our recommendations will enhance the right to equality while safeguarding other rights.

The Review's position

The Review considers that:

- The scope of the current definition of a 'club' is narrow compared with the approach taken by other Australian jurisdictions.
- The law will be simplified for duty holders if the definition of a club is consistent with federal disability discrimination law, and will provide better protection from discrimination in these settings.
- No justification was presented to the Review that convinced us that selling alcohol is a relevant or appropriate threshold requirement to determine whether a club has a sufficient public character to be bound by the Act. The definition of club in the Disability Discrimination Act is preferable to the Sex Discrimination Act definition.
- Other jurisdictions that have broader meanings of club and have further specific exceptions, such as clubs for political purposes or for particular age groups. It may be necessary to consider whether the exceptions permitting specialist clubs are sufficient.

98 Legal Aid Queensland submission, 100; Australian Discrimination Law Experts Group submission, 70.

99 *Human Rights Act 2019* (Qld) s 25.

100 *Human Rights Act 2019* (Qld) s 22(2).

101 *Human Rights Act 2019* (Qld) s 27–28.

102 *Human Rights Act 2019* (Qld) s 20.

103 *Human Rights Act 2019* (Qld) s 15.

Recommendation 35

35.1 The Act should define a ‘club’ as per the definition in the *Disability Discrimination Act 1992* (Cth) s 4.

35.2 The Queensland Government should consider if any additional exceptions in the area of Club membership and affairs are required, for example on the basis of age or political affiliation.

Sport

In the Discussion Paper we asked for submissions on three issues:

- whether the General exception for sport in section 111 should be retained, amended, or repealed
- whether the words ‘competitive sporting activity’ in the exception should be defined
- whether ‘strength, stamina, or physique’ remain the appropriate requirements for an exception to be reasonable.

We received 19 submissions¹⁰⁴ with a diverse range of perspectives on the issue, and the sport exception was also discussed in several consultations.¹⁰⁵

While we invited engagement from sporting organisations, we received limited response from bodies that represent the interests of organised sport on this issue. This has limited our ability to incorporate this perspective.

The Queensland Council for LGBTI Health (QC) considered that more consultation is needed with LGBTIQ+ communities on this topic.¹⁰⁶

Current approach

Currently, participation in a competitive sporting activity may be restricted to either males or females¹⁰⁷ if the restriction is reasonable based on a range of considerations.¹⁰⁸ Participation may also be restricted on the basis of gender identity¹⁰⁹ if the restriction is reasonable having regard to the strength, stamina or physique requirements of the activity.¹¹⁰

Australia’s state and federal Anti-Discrimination laws include similar exceptions that are generally qualified to only apply to ‘competitive sporting activity’.¹¹¹

104 Caxton Legal Centre submission; Equality Australia submission; Queensland Council for LGBTI Health submission; Intersex Human Rights Australia submission; Pride in Law submission; Queensland Council for Catholic Education submission; Australian Association of Christian Schools submission; Pride in Law submission; Legal Aid Queensland submission; Fair go for Queensland women submission; Christian Schools Australia submission; Department of Education (Qld) submission; Queensland Council for Civil Liberties submission; Aged and Disability Advocacy Australia submission; Name withheld (Sub.118) submission; Dr Catherine Carol submission; Name withheld (Sub.026) submission; Maurice Blackburn Lawyers submission; Australian Lawyers for Human Rights submission.

105 Pride in Sport consultation, 30 August 2021; Save Women’s Sport consultation, 14 August 2021; Coalition for Biological Reality consultation, 30 August 2021; Australian Transgender Support Association Queensland consultation, 18 August 2021; Just.Equal Australia consultation, 17 September 2021.

106 Queensland Council for LGBTI Health submission, 11.

107 *Anti-Discrimination Act 1991* (Qld) s 111(2) is only applicable to people 12 years and above.

108 *Anti-Discrimination Act 1991* (Qld) s 111(1) gives the strength, stamina or physique requirements of the activity; or to people who can effectively compete; or to people of a particular age or age group; or to people with a specific or general impairment.

109 As noted in chapter 7, the current definition of ‘gender identity’ incorporates people ‘of indeterminate sex’, but the Review notes this is not wording used by people with variations of sex characteristics.

110 *Anti-Discrimination Act 1991* (Qld) s 111(3).

111 The words ‘competitive sporting activity’ appear in legislation but New South Wales and under the *Disability Discrimination Act 1992* (Cth).

Inclusion in sport

Inclusion of trans and gender diverse people

Several submissions were concerned that the current exception has the effect of excluding trans and gender diverse people from engaging in sport,¹¹² and observed that people were being excluded at a 'social' level where the exception is not likely to apply.¹¹³

Others felt that there was a double standard at play in that some natural sporting advantages are celebrated, but not when it comes to trans and gender diverse athletes.¹¹⁴

Perspectives on the sport exception were shared in an LGBTIQ+ community survey of 74 participants conducted by Queensland Council for LGBTI Health, in which we were told by one participant that:

*Trans people are forced to compete with their assigned gender at birth, which may prevent them from participating at all for personal reasons. In low stakes community games, this sort of regulation is completely unnecessary.*¹¹⁵

Another survey participant told us that:

*Sport is full of natural advantages and it's not fair for people to be excluded...*¹¹⁶

Some submissions referred to the experiences of non-binary people in sport, and that it is unclear how the exception may apply to them.¹¹⁷ In guidance material, Sport Australia (SportAus) and the Australian Human Rights Commission have recommended the following approach:

- creating gender-neutral teams
- allowing participants to elect which team they wish to join based on their gender identity
- allocating a number of gender non-specific positions in mixed competitions (for example, 40% women; 40% men; 20% non-specific) instead of a designated men/boys to women/girls ratio
- considering ways that the rules of a particular sport can be universally redesigned to accommodate non-binary players.¹¹⁸

The exception provisions use binary gendered language and refer to 'males or females.' We have recommended that protection of the Act should extend to non-binary people and as a consequence several areas of the Act that use binary language will require amendment. We consider this in chapter 7 – gender identity and gender.

Inclusion of intersex people

Intersex Human Rights Australia (IHRA) highlighted challenges faced by people with variations of sex characteristics when they access sporting activities, which can cause them to avoid

¹¹² Equality Australia submission, 45; Caxton Legal Centre submission, 28.

¹¹³ Caxton Legal Centre submission, 28.

¹¹⁴ Caxton Legal Centre submission, 28.

¹¹⁵ Survey participant (10), Queensland Council for LGBTI Health submission, 65.

¹¹⁶ Survey participant (11), Queensland Council for LGBTI Health submission, 65.

¹¹⁷ Pride in Sport submission, 2; Equality Australia submission, 8, 44; Legal Aid Queensland submission, 88.

¹¹⁸ Australian Human Rights Commission, *Guidelines for the inclusion of transgender and gender diverse people in sport* (June 2019), 37.

participation in sports because of experiences of body shaming, and the suggestion that their bodies are too masculine or too feminine.¹¹⁹

While intersex men have never been excluded by international sports' bodies, some women with innate variations of sex characteristics have been excluded from participating in their birth-observed sex category with other women. IHRA considers that generalised exceptions applying to intersex individuals for sport are unreasonable, unnecessary, and disproportionate.¹²⁰

IHRA's submission, which was endorsed by Australian Lawyers for Human Rights (ALHR) and others, sought assurances that intersex people will not be unnecessarily included in the sport exception if a new 'sex characteristics' attribute is created.¹²¹ No submissions proposed that people should be restricted from competing in sports based on their sex characteristics.

We note that in the ACT and Victoria, the equivalent sport exception does not apply to intersex people, but the federal Sex Discrimination Act does. ALHR observed that inclusion of female athletes with hyperandrogenism at the elite level since 2015 has not led to any evidence of detriment to women's sport.¹²²

Competitive sporting activity

The term 'competitive sporting activity' is not defined in the Act, but the Act provides guidance on what it does *not* include – namely coaching, umpiring, or administration.¹²³

When sport is 'social' in nature, it is unclear whether this could constitute a 'competitive' activity.

Some stakeholders thought there should be a clear delineation between competitive and social sport.¹²⁴ The Review heard that 'having fun should be open to everyone' and that a different approach for grassroots sport may be appropriate to support a least restrictive, and more inclusive, approach.¹²⁵ Maurice Blackburn Lawyers suggested a different approach should be adopted for school sport, amateur, and recreational clubs, where sport is focussed on health and teamwork.¹²⁶

Legal Aid Queensland considered that the term 'competitive' could be more clearly defined, such as by clarifying that competitive sporting activity only extends to elite sporting competitions.¹²⁷ However, this may be challenging in practice as sporting bodies and their participants may have varied and different ideas about what constitutes 'competitive'.¹²⁸ Some would think a local club that plays for a trophy is 'social' sport, whereas others might think it is highly 'competitive'. Without input from sporting bodies, we would not wish to make a decision about where to draw the line between social and competitive sporting activities.

In schools, physical education classes are unlikely to be considered 'competitive', but it is unclear whether intra-school or inter-school sports would be. The Australian Association of Christian Schools thought it was important for their members to maintain the ability to set standards for intra and inter-school sport.¹²⁹ The Queensland Catholic Education Commission expressed that

119 Intersex Human Rights Australia submission, 28.

120 Intersex Human Rights Australia submission, 28.

121 Intersex Human Rights Australia submission, 32-33; Australian Lawyers for Human Rights submission, 11-12; Just. Equal Australia submission, 4.

122 Australian Lawyers for Human Rights submission, 11.

123 *Anti-Discrimination Act 1991* (Qld) s 4.

124 See for example: Legal Aid Queensland submission, 88; Survey participant (15), Queensland Council for LGBTI Legal Service Inc submission, 66; Just.Equal Australia consultation, 17 September 2021.

125 See for example: Equality Australia submission, 45; Pride in Sport consultation, 30 August 2021; Just.Equal Australia consultation, 17 September 2021.

126 Maurice Blackburn Lawyers submission, 13-14.

127 Legal Aid Queensland submission, 88.

128 Pride in Sport consultation, 30 August 2021.

129 Australian Association of Christian Schools submission, 15.

they, 'would support a clearer definition of competitive sport and that any exemptions reflect contemporary research and understanding.'¹³⁰

Strength, stamina, and physique

Most jurisdictions contain the words 'strength, stamina and physique' in the sport exception when determining whether participation should be restricted to people over 12 years of age on the basis of sex or gender identity.

Australian cases have considered sport participation restrictions or exclusions based on strength, stamina, or physique. A Victorian case found that the exception did apply to girls who wished to play in an under 15s AFL team but not to girls who wished to play in under 14s, because the relative differences between the strength, stamina, and physique of boys and girls at the younger age was not shown to be sufficiently significant to participate in AFL competition.¹³¹

Determining whether a restriction is 'reasonable' is complex. Since sports differ with respect to the importance of strength, stamina, and physique, an individual assessment needs to be made in relation to each sport. Where a sport relies on other factors such as balance or hand-eye coordination, the exception may not apply. As lawn bowls does not generally require significant strength, stamina, or physique – but rather concentration and skill – the exception was found to not apply to a 19-year-old female student who wished to play in what had been an all-male competition.¹³²

While untested by courts, similar reasoning may apply on the basis of gender identity, depending on the particular sport and the circumstances of the participants.

Some stakeholders felt that strength, stamina, and physique as a standard is inherently unfair and unnecessary.¹³³

Several submissions indicated that the current exceptions should remain because:

- Having provisions consistent with the federal Sex Discrimination Act and other states and territories is important¹³⁴
- The exceptions allow a flexible approach that appropriately balances competing rights.¹³⁵
- The exceptions allow determination on a case-by-case basis, depending on the nature of the activity involved.¹³⁶
- The exceptions are required because there may be a continuing need to address differences in physiology for trans people who have been through male puberty (noting that this is not all trans people) where relevant to a sporting activity.¹³⁷

Submissions differed on whether there was evidence to indicate an advantage of people who have gone through male puberty. While some submissions cited unfairness with regard to a perceived competitive edge and concerns about safety for women and girls in sport based on existing evidence,¹³⁸ others thought that there was not yet enough sound evidence to determine

130 Queensland Catholic Education Commission submission, 9.

131 *Taylor and others v Moorabbin Saints Junior Football League and another* [2004] VCAT 158 (17 February 2004) [19]–[20].

132 *South v Royal Victorian Bowls Association* [2001] VCAT 207.

133 Equality Australia submission, 44; Queensland Council for LGBTI Health submission, 64; Australian Transgender Support Association Queensland consultation, 19 August 2021.

134 Pride in Law submission, 3.

135 Pride in Law submission, 3.

136 Legal Aid Queensland submission, 88; Department of Education (Qld) submission, 15.

137 See for example: Queensland Council for Civil Liberties submission, 20.

138 Fair go for Queensland women submission, 5; Christian Schools Australia submission, 21; Name withheld (Sub.118) submission, 5; Dr Catherine Carol submission, 1; Save Women's Sport consultation, 14 August 2021; Name withheld (Sub.026) submission, 11.

the extent to which physical characteristics and hormones were a definitive measure for identifying advantage in sports,¹³⁹ particularly because there are considerable variations between sports, and relevant factors such as the extent of physical contact between players.

One participant in the survey published by Queensland Council for LGBTI Health in their submission commented about the inherent limitations in data currently available:

In the case where levels of hormones are measured to determine “normal range” equivalency for a trans-athlete to compete in their affirmed gender category, those “normal range” levels need to be tested across populations from all racial groups across the world. At present discrimination is present because those levels are mostly tested on white bodies from western cultures. The impact of hormone therapy does more to negatively impact the body and therefore performance than any advantage from the person’s sex assigned at birth.¹⁴⁰

International Olympic Committee framework

International sporting bodies have until recently restricted the participation of transgender and intersex participants based on testosterone,¹⁴¹ which is generally associated with greater strength, muscle mass, and endurance. However, this approach had been criticised by some courts and academics, as other non-physical factors, such as skill, determination, training, genetics, nutrition, hardiness, and access to resources can be relevant to sporting ability.¹⁴² In 2021 the International Olympic Committee (IOC) released a new framework for the participation of transgender and intersex athletes in Olympic sports that reconsiders disproportionate advantage on the updated understanding that ‘performance is not proportional to your in-built testosterone’.¹⁴³ The framework requires that people should be able to compete in the category that best aligns with their self-identified gender, and that:

Eligibility criteria should be established and implemented fairly and in a manner that does not systemically exclude athletes from competition based on their gender identity, physical appearance and/or sex variations.¹⁴⁴

While Australian Lawyers Alliance and Australian Lawyers for Human Rights indicated some support for the IOC framework,¹⁴⁵ Pride in Law pointed to recent criticism of the framework, including that it focuses only on human rights but not scientific and medical issues, and leaves uncertainty when it comes to practical implementation.¹⁴⁶

139 Survey participant (16), Queensland Council for LGBTI Health submission, 68.

140 Survey participant (1), Queensland Council for LGBTI Health submission, 65.

141 For example, International Olympic Committee, *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (November 2015).

142 *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)* (Interim Arbitral Award) (Court of Arbitration for Sport, Case No 2014/A/3759, 24 July 2015) 154 [532]; Ross Tucker and Malcolm Collins, ‘What makes champions? A review of the relative contribution of genes and training to sporting success’ (2012) 46 *British Journal of Sports Medicine* 555, 560; Michael Sheard and Jim Goldby, ‘Personality hardiness differentiates elite-level sport performers’ (2010) 8(2) *International Journal of Sport and Exercise Psychology* 160, 166.

143 Alex Azzi, ‘Explainer: How will the IOC’s framework impact transgender athletes?’ *NBC Sports* (Webpage, 17 November 2021) <<https://onherturf.nbcsports.com/2021/11/17/international-olympic-committee-framework-transgender-intersex-athletes/>>.

144 International Olympic Committee, *IOC Framework of Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations*, principle 3.1.

145 Australian Lawyers Alliance submission, 17; Australian Lawyers for Human Rights submission, 11.

146 Pride in Law submission, referring to Fabio Pigozzi et al, ‘Joint position statement of the International Federation of Sports Medicine (FIMS) and European Federation of Sports Medicine Associations (EFSMA) on the IOC framework on fairness, inclusion and non-discrimination based on gender identity and sex variations’ (2022) 8(1) *British Medical Journal Open Sport & Exercise Medicine* 1.

Comparative approaches

Every Australian state and territory jurisdiction contains a sport exception relating to competitive sporting activities,¹⁴⁷ and the federal sex and disability legislation contains these exceptions.¹⁴⁸ In almost every jurisdiction, the test is whether the restriction or exclusion is reasonable based on 'strength, stamina and physique' relevant to the activity. Whereas Queensland refers to 'restricting' participation, other jurisdictions refer to 'excluding' people from participation.¹⁴⁹

However, jurisdictions vary as to which attributes may be restricted or excluded, and not every jurisdiction restricts or excludes people on the basis of gender identity.¹⁵⁰ The federal Sex Discrimination Act, which also applies to trans, gender diverse, and intersex people who play sport in Queensland, has exceptions that apply on the basis of sex, gender identity, and intersex status for children over 12 years of age.¹⁵¹

Another point of difference in Australian legislation is that the Victorian sport exception provides a list of factors to determine 'reasonableness' which takes into account the nature and purpose of the activity, and the alternative opportunities provided to players.¹⁵² Whether or not the exclusion is reasonable must have regard to:

- the nature and purpose of the activity; and
- the consequences of the exclusion or restriction for people of the excluded or restricted sex; and
- whether there are other opportunities for people of the excluded or restricted sex to participate in the activity.¹⁵³

Options for reform

Suggestions to improve the law included:

- repeal the section altogether¹⁵⁴
- narrow the exception to apply only to sex (or gender) but not gender identity¹⁵⁵
- expand the exception so that it applies to people under 12 years of age based on sex assigned at birth¹⁵⁶
- define what 'competitive' means¹⁵⁷
- provide further guidance to determine reasonableness, to incorporate consideration of the impact on the person being excluded.¹⁵⁸

147 In New South Wales it is confined to 'organised sporting competitions' - *Anti-Discrimination Act 1977* (NSW) s 22(2).

148 *Sex Discrimination Act 1984* (Cth) s 42; *Disability Discrimination Act 1991* (Cth) – noting that s 28 has exemptions specific to disability and refers to 'sporting activity'.

149 *Equal Opportunity Act 2010* (Vic) s 72; *Equal Opportunity Act 1984* (SA) s 48; *Equal Opportunity Act 1984* (WA) s 35.

150 We note that there is no exception based on gender identity in South Australia, Tasmania or ACT.

151 *Sex Discrimination Act 1984* (Cth) s 42.

152 We note that the Queensland exception uses the word 'restriction', not 'exclusion'.

153 *Victorian Equal Opportunity Act 2010* (Vic) s 72.

154 Caxton Legal Centre submission, 28 – noting that if retained it should be substantially narrowed to require an evidence-based approach; Equality Australia submission, 44; Australian Transgender Association of Queensland consultation, 18 August 2021.

155 Equality Australia submission, 44; Just.Equal Australia consultation, 17 September 2021.

156 Christian Schools Australia submission, 21, referring to a Private Member's bill introduced in February 2022 – Sex Discrimination and Other Legislation Amendment (Save Women's Sport) Bill 2022.

157 Legal Aid Queensland submission, 88.

158 Equality Australia submission, 44; Maurice Blackburn Lawyers submission, 13–14.

Human rights considerations

Under Queensland's Human Rights Act, there is no human right to participate in sport. However, the human rights that may be limited by this exception include:

- equality before the law – based on sex and gender identity
- right to privacy.¹⁵⁹

Human rights may be subject to reasonable limitations¹⁶⁰ to meet legitimate purposes, such as to ensure the fairness of sporting activities and the safety of players. In relation to this exception, a restriction on the right to equality may be justified because there is significant variation in the relevance and importance of strength, stamina, and physique between sports, and decisions may need to continue to be made on a case-by-case basis.

Scientific research about the relevance of strength, stamina, and physique to particular sporting activities is a relatively new and emerging field. Further research regarding trans and gender diverse people in sport is a developing discipline.¹⁶¹

The existing provision allows for a considered approach because it:

- uses the words 'restrict participation' rather than 'exclude'
- does not apply to non-competitive sport
- does not apply to children under 12
- applies only where strength, stamina, or physique are relevant.

Conversely, it would be incompatible with human rights to broaden the exception to all ages, as this would result in young children being unfairly restricted from participating in sport when there is no evidence of physiological differences under the age of 12.

The Review's position

The Review considers that:

- As a similar provision that restricts or excludes people from sports based on their gender identity remains in the Sex Discrimination Act and in most Australian jurisdictions, repeal of the exception would be likely to create complexity for holding sporting competitions where competitors come from different states and territories.
- Defining what is 'competitive' may be too difficult and would require significant consultation outside the scope and resources of this Review.
- Determining what is 'reasonable' when restricting participation in sport should be a proportionate decision that properly considers context, risks, and impacts, and participants, schools, and sporting bodies may benefit from further clarity on this.
- Intersex people should be able to play or compete in their birth-observed sex category and should not be included in the sport exception if 'sex characteristics' is included as an attribute in the Act.

159 *Human Rights Act 2019* (Qld) ss 15, 25.

160 *Human Rights Act 2019* (Qld) s 13.

161 See for example: University of Melbourne, Austin Health, *Trans Health Research: Life Without Barriers* (Web page, 2022) <<https://www.transresearch.org.au/ongoingresearch?fs=e&s=cl>> – This world-first study will follow people over the first 12 months of gender affirming hormones to monitor muscle strength, fitness and power (based at the specialised elite sports facility at Victoria University in Footscray). Monitoring includes exercise testing, blood and muscle sample collections, and body composition scans over 1 year.

- Inclusion for people who identify outside the gender binary can be improved by slightly changing the wording of the provision.
- Human rights considerations weigh in favour of not changing the approach, but the provision should be monitored to ensure that the exception remains relevant, evidence-based, and necessary in future.

Recommendation 36

36.1 The Act should retain a sport exception in the same form as the current version.

36.2 The exception should change the wording that refers to restricting participation ‘to either males or females’ to neutral language such as ‘on the basis of sex’.

36.3 The exception should explain that in determining what is a ‘reasonable’ restriction, a person must have regard to:

- the nature and purpose of the activity; and
- the consequences of the restriction for people of the restricted sex or gender identity; and
- whether there are other opportunities for people of the restricted sex or gender identity to participate in the activity.

Religious bodies

The Anti-Discrimination Act prohibits discrimination on the ground of religious belief or religious activity.

The right to freedom of thought, conscience, religion and belief is protected under international human rights instruments, the Human Rights Act, and in a more restricted way by the Australian Constitution. This protection is acknowledged in the Act primarily through exceptions (called ‘exemptions’) for religious bodies.

In chapter 7, we discuss current protections from discrimination on the ground of religious belief or religious activity.

General exceptions from discrimination currently contained in the Act mean that it does not apply to religious bodies in certain circumstances. Religious bodies can lawfully discriminate so that their members can practice their religious beliefs including in the ordination, training, and selection of people for involved in religious observance or practice.¹⁶²

Exceptions provided in relation to specific areas of the Act mean that it is not unlawful for religious bodies to discriminate if the exception applies:

- when providing services and accommodation, if the discrimination is in accordance with the doctrine of the religion and is necessary to avoid offending the religious sensitivities of people of the religion¹⁶³
- in the employment relationship with employees of an educational institution or body established for religious purposes, if the discrimination is reasonable and it is a genuine

¹⁶² *Anti-Discrimination Act 1991* (Qld) s 109(1)(a)–(c).

¹⁶³ *Anti-Discrimination Act 1991* (Qld) ss 90, 109(1)(d).

occupational requirement that employees act in a way that is consistent with the employer's religious beliefs¹⁶⁴

- when restricting access to sites of cultural or religious significance or in selling sites of cultural or religious significance¹⁶⁵
- when excluding applicants for enrolment at an educational institution set up wholly or mainly for students of a particular sex or religion who are not of that sex or religion (education area).¹⁶⁶

In the Discussion Paper we asked whether the scope of exceptions for religious bodies should change. We also asked specific questions about how exceptions should apply to certain areas and attributes.

Forty-four submissions responded to these issues.¹⁶⁷ We also conducted consultations with representatives from combined Christian churches and other faith groups, including the Sikh and Muslim communities.¹⁶⁸

A common theme across many submissions was that the current exceptions are complicated and difficult to apply. Different views were expressed about how the existing exceptions could be simplified, with some suggesting that exceptions be narrowed or removed entirely to better balance the right to freedom of religion with other rights. Others suggested it was necessary to broaden the exceptions to recognise the contributions that religious organisations make to the community and to better protect the right to religious freedom.

Human rights considerations

This section commences with human rights considerations, then moves on to consider material provided to the Review.

In examining the human rights compatibility of exceptions for religious bodies, we consider whether:

- each current exception promotes or limits the rights protected by the Human Rights Act

164 *Anti-Discrimination Act 1991* (Qld) s 25. Note – This exemption does not allow discrimination on the basis of age, race, or impairment, and does not allow an employer to seek information on which discrimination might be based.

165 *Anti-Discrimination Act 1991* (Qld) ss 48, 80.

166 *Anti-Discrimination Act 1991* (Qld) s 41.

167 Name withheld (Sub 008) submission; Name withheld (Sub.026) submission; Intersex Human Rights Australia submission; Public Advocate (Qld) submission; Scripture Union Queensland submission; Joint Churches submission; Rainbow Families Queensland submission; Diversity Queensland Incorporated submission; Independent Education Union – Queensland and Northern Territory Branch submission; Australian Christian Lobby submission; PeakCare Queensland Inc submission; Australian Christian Higher Education Alliance submission; Christian Schools Australia submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Associated Christian Schools submission; Queensland Alliance for Mental Health submission; Pride in Law submission; Dr Nicky Jones submission; LGBTI Legal Service Inc submission; Australian Lawyers Alliance submission; Human Rights Law Alliance submission; Independent Schools Queensland submission; Australian Discrimination Law Experts Group submission; TASC National Limited submission; Queensland Council of Unions submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; FamilyVoice Australia submission; Just.Equal Australia submission; Caxton Legal Centre submission; Queensland Council for LGBTI Health submission; Australian Lawyers for Human Rights submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission; Freedom for Faith submission; Australian Association of Christian Schools submission; Adjunct Assoc Prof Mark Fowler submission.

168 Queensland Churches Together consultations (Christian churches and multi-faith representatives), 13 and 16 September 2021; Associated Christian Schools consultation, 8 August 2021; Australian Christian Higher Education Alliance consultation, 21 September 2021; Brisbane Bahá'í Community consultation, 12 August 2021; Queensland Catholic Education consultation, 20 August 2021; Islamic College of Brisbane consultation, 8 August 2021; Islamic Women's Association of Queensland consultation, 16 September 2021; Sikh Nishkam Society of Australia consultation, 9 August 2021.

- any international human rights standards apply to specific rights
- the exception is a proportionate limitation on rights to achieve a legitimate purpose
- in balancing rights, any associated limitation on rights can be justified in a free and democratic society based on human dignity, equality, and freedom.¹⁶⁹

Points of tension can arise between the doctrines of the religion, sensitivities of people of the religion, and the need to ensure all people are protected from discrimination when they are provided with services, education, or are employed by a body established for religious purposes. In seeking to weigh up these elements, we must consider the specific human rights protected by the Human Rights Act, including:

- freedom of thought, conscience, religion and belief¹⁷⁰
- recognition and equality before the law (the right to equality and non-discrimination).¹⁷¹

Other rights that may be relevant when considering limits on access to services provided by religious bodies include the rights of children, the right to privacy for employees, and the right to receive health services.¹⁷²

How best to respect, protect, and fulfil these rights, or if necessary, to proportionately limit them, is central to our conclusions about the present exceptions for religious bodies.

When determining the circumstances in which religious bodies should be permitted to engage in conduct that would otherwise be unlawful, any resulting gap in protections should be identified.

Right to freedom of religion – nature and scope

The *International Covenant on Civil and Political Rights* (ICCPR) was frequently referred to in submissions and includes:

- the right to adopt a religion of one's choice and worship individually or in community
- freedom to manifest religion or beliefs
- respect for parent's choices as guardians of their children to ensure religious and moral education.¹⁷³

Submissions cited other international legal instruments and cases regarding these rights,¹⁷⁴ although not all rights raised in submissions are contained in Queensland's Human Rights Act.¹⁷⁵ While we have considered this material, the Terms of Reference specifically ask us to consider compatibility with the Human Rights Act, so this will form the focus of our consideration.

¹⁶⁹ *Human Rights Act 2019* (Qld) s 13(1) and relevant international law.

¹⁷⁰ *Human Rights Act 2019* (Qld) s 20.

¹⁷¹ *Human Rights Act 2019* (Qld) s 15(3).

¹⁷² These include freedom of association and peaceful assembly (s 22), freedom of expression (s 21), right to privacy (s 25), right to education (s 36), and right to access health services (s 37). The rights of children and family in s 26 is informed by the *Convention on the Rights of the Child* which recognises children as rights holders of the right to freedom of religion or belief and the rights and duties of a child's parents or legal guardians to provide direction to their child in the exercise of this right in a manner consistent with the evolving capacities of the child. Also relevant is that the best interests of the child are taken as a primary consideration in all actions concerning children.

¹⁷³ United Nations General Assembly, *International Covenant on Civil and Political Rights*, res 2200A (XXI) (16 December 1966), art 18. ('*International Covenant on Civil and Political Rights*').

¹⁷⁴ *Human Rights Act 2019* (Qld) s 48(3) states that international law and the judgments of foreign and international courts relevant to a human right may be considered in interpreting rights. However, the High Court has warned the application of foreign judgments to interpret domestic human rights legislation should be consulted with discrimination and care, including because they arise within a different constitutional framework: *Momcilovic v R* (2011) 245 CLR 1, 213 [554], 215 [561] (Crennan and Kiefel JJ).

¹⁷⁵ For example: United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights* res 2200A (XXI) (16 December 1966) art 13(3)–(4), regarding choice and establishment of religious schools is not specifically adopted by the Human Rights Act. The right to education has been incorporated in *Human Rights Act 2019* (Qld) s 36.

The ICCPR distinguishes freedom of thought, conscience, religion and belief from freedom to manifest religion or belief. The freedom to hold a religion is absolute, whereas the freedom to manifest a belief may be limited.

The communal nature of the right to religious freedom has been recognised in international law as imposing a duty on the State to protect the autonomy of the church, and that religious institutional authority is indispensable for pluralism in a democratic society and is at the heart of the protection.¹⁷⁶

The United Nations Human Rights Committee has provided guidance on the scope of the right, noting that it includes:

Acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and freedom to prepare and distribute religious texts or publications¹⁷⁷

Some submissions suggested the unique nature of the right to freedom of religion means it needs to be strictly interpreted and protected in all of the areas in which the Act applies.¹⁷⁸ We were told that this is because the individual, communal, private, and public aspects of religious freedom touch all areas of public and private life.

Submissions suggested that international human rights require that:

- Only specific aspects of the freedom to manifest religion may be limited, and only when such limitations are ‘necessary’ as that is the term used in the ICCPR.
- The term ‘necessary’ must be interpreted with reference to the United Nations’ *Siracusa Principles*, which provide guidance on how to permissibly limit rights, and suggest that ‘in applying a limitation, a state shall use no more restrictive means than are required’.¹⁷⁹
- The liberty of parents and guardians to ensure the religious education of their children in conformity with their own beliefs cannot be restricted.
- A test of ‘reasonable and proportionate’ – as used in some jurisdictions – does not align with the test of ‘necessity’.
- Case law from the United Nations and European Court of Human Rights emphasises strong protections for employment decisions made by faith-based schools, which must be able to control their leadership, staff, and volunteers in order to offer students a holistic religious education in accordance with applicable religious convictions.¹⁸⁰

176 Anja Hilkemeijer and Amy Maguire, ‘Religious Schools and Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence’ (2019) 93 *Australian Law Journal* 752, 756 – particularly footnote 38 citing *Travas v Croatia* (European Court of Human Rights, Second Section, Application No 75581/13, 4 October 2017) [86]; *Delgado v Colombia* (1990) 195/1985, UN Doc CCPR/C/39/D/195/1985.

177 Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)* 48th sess (27 September 1993) UN Doc CCPR/C/21/ Rev. 1/Add. 4, [4].

178 See for example: FamilyVoice Australia submission, 3; Joint Churches submission, 8; Adjunct Associate Professor Mark Fowler submission, 25; Human Rights Law Alliance submission, 6–7.

179 United Nations Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, (28 September 1984) E/CN.4/1985/4 Part I A [11] (Siracusa Principles). Recommendation 2 of the Religious Freedom Review was that state and territory governments should have regard to these principles when drafting laws that limit freedom of religion: Expert Panel into Religious Freedom, *Religious Freedom Review* (Report, 18 May 2018).

180 See for example: FamilyVoice Australia submission, 3, 6; Joint Churches submission, 8-9; Adjunct Associate Professor Mark Fowler submission, 4-5, 12-14, 25-26; Australian Christian Higher Education Alliance submission, 17; Human Rights Law Alliance submission, 6-7.

When may freedom of religion be limited?

The ICCPR provides that freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental freedoms of others.¹⁸¹

The United Nations Human Rights Committee has confirmed that the ICCPR:

- does not permit any limitations whatsoever on the right to freedom of thought and conscience or freedom to have or adopt a belief; but
- freedom to manifest religion or belief can be limited where necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others including to protect the right to equality and non-discrimination of others.¹⁸²

In considering the tension between the right to manifest religious belief and the right to equality, the Special Rapporteur has concluded that there is no hierarchy of rights, and the focus should be on ensuring all rights are protected, including through reasonable accommodation.

In its recent report into the now lapsed Religious Discrimination Bills, the Australian Parliament's Joint Committee on Human Rights (the PJCHR), commented that:

Of course, the right to freedom of religion must be balanced against other fundamental human rights. A human rights-based framework stresses the principles of universality, equality and freedom and where rights conflict it is important to ensure that all human rights are protected as far as possible.¹⁸³

Submissions from religious bodies suggested that the appropriate threshold of 'necessity' for limiting freedom of religion under international law is a higher standard than the general limitations clause in the Human Rights Act¹⁸⁴ and the standard of reasonableness applied for permissible limitations on the right to equality under the ICCPR.¹⁸⁵

The PJCHR cited case law from the European Court of Human Rights that demonstrates the Court has considered the 'necessity' of a measure as part of the assessment as to whether a limitation of a right is proportionate.¹⁸⁶ Nonetheless the Committee recommended that exceptions within the Religious Discrimination Bill 2022 explicitly include the concept of necessity. This was to ensure better alignment with international human rights law where 'reasonableness' and 'necessity' were important considerations in assessing limitations on rights to freedom of religion and equality.¹⁸⁷

Hijkelmeijer and Maquire, academics who specialise in constitutional, human rights, and international law, have observed that in applying the test of 'necessity' the European Court of

¹⁸¹ *International Covenant on Civil and Political Rights* art 18(3).

¹⁸² Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion* (Art. 18), 48th sess (27 September 1993) UN Doc CCPR/C/21/ Rev. 1/Add. The right to equality is specified in articles 2, 3, and 26.

¹⁸³ Joint Committee on Human Rights, Parliament of Australia, *Religious Discrimination Bill 2021 and related bills* (Inquiry report, February 2022), x (Chair's Foreword).

¹⁸⁴ *Human Rights Act 2019* (Qld) s 13.

¹⁸⁵ See for example Joint Churches submission, 8; Australian Association of Christian Schools submission, 20-21; Joint Churches submission, 8-9; Adjunct Associate Professor Mark Fowler submission, 13-14, 25-26; Human Rights Law Alliance submission, 6.

¹⁸⁶ Joint Committee on Human Rights, Parliament of Australia, *Religious Discrimination Bill 2021 and related bills* (Inquiry report, February 2022), [2.64], [3.66] including citing *Black and Morgan v Wilkinson* Court of Appeal of England and Wales [2013] EWCA Civ 820; *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber) Application No. 56030/07 (2014) [123], [125]; *Staatkundig Gereformeerde Partij v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]; *Travas v Croatia*, European Court of Human Rights, Application No 75581/13 (2017) [75]–[113].

¹⁸⁷ Joint Committee on Human Rights, Parliament of Australia, *Religious Discrimination Bill 2021 and related bills* (Inquiry report, February 2022), [3.67].

Human Rights has particularly considered the ‘specific mission’ assigned to an employee as a ‘relevant consideration in determining whether they should be subject to a heightened duty of loyalty’ and the nature of the post occupied is an important element to be taken into account when assessing proportionality. Therefore, an exception would be a disproportionate limitation on rights if it allowed any employee to be dismissed on the basis of their sexual orientation, no matter how far removed the nature of their work is from the mission of the religious organisation.¹⁸⁸

Considering what is necessary is part of the test of proportionality required by the Human Rights Act.¹⁸⁹ Yet, consistent with the approach of the PJCHR we have particularly considered whether limitations on freedom of religion are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others including to protect the right to equality and non-discrimination of others.

Is a limitation on religious freedom necessary to protect others from harm?

In considering the tension between rights to manifest religious belief and the right to equality, the Special Rapporteur¹⁹⁰ has concluded there is no hierarchy of rights, and the focus should be on ensuring all rights should be protected, including through reasonable accommodation.¹⁹¹ In particular, the Special Rapporteur has clarified that using the right to religious freedom to justify or perpetuate discrimination against women or the LGBTQ+ community in the provision of goods and services in the public sphere is ‘injurious’ and ‘not permissible’.¹⁹²

Recent analysis by the Special Rapporteur considered that religious organisations are entitled to autonomy in the administration of their affairs, but not to the extent that they may discriminate against ‘non-ecclesiastical employees’ on the grounds of religious belief, sexual orientation or gender identity.¹⁹³

The comments of the Special Rapporteur also provide helpful guidance:

When these rights ultimately clash, every effort must be made, through a careful case-by-case analysis, to ensure that all rights are brought in practical concordance or protected through reasonable accommodation.¹⁹⁴

After careful consideration of the human rights standards and information provided to the Review, it is necessary to reframe exceptions for service provision and employment by religious bodies to ensure that the impact of any limitation on the rights of employees, service users, and others is proportionate to the valid purpose of upholding religious freedoms.

188 Anja Hilkemeijer and Amy Maguire, ‘Religious Schools and Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence’ (2019) 93 *Australian Law Journal* 752, 758-759.

189 Explanatory Notes, Human Rights Bill 2018, 17 – in explaining the assessment of ‘whether there are any less restrictive and reasonably available ways to achieve the purpose’ in s 13(2)(d), the explanatory note states that ‘in proportionality analysis this element is sometimes called necessity’. See also: Explanatory Statement, Human Rights Bill 2003 (ACT) on which s 13 of the Queensland Act is based.

190 An expert who works for the United Nations to promote rights and examine, monitor, and report on relevant issues and challenges.

191 Explanatory Notes, Religious Discrimination Bill 2021 (Cth) 14 - which says that ‘these principles reflect the well-established and foundational principle of international human rights law that all rights must be treated with equal importance, and no right should be prioritised at the expense of any other. These principles clarify the relationship between human rights and recognise that all rights are interconnected and interdependent, and that there is no hierarchy of rights at international law.’

192 Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion and belief*, UN Human Rights Council, (28 February 2018) UN Doc A/HRC/37/49 [39]-[40].

193 Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion and belief: Gender-based violence and discrimination in the name of religion or belief*, (28 February 2018) UN Doc A/HRC/43/48 [47]-[48].

194 Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion and belief*, (28 February 2018) UN Doc A/HRC/37/49 [47].

Ordination, training, and selection for religious observance and practice

Current approach

The Act currently provides an exception to the ordination or appointment of priests, ministers of religion or members of a religious order, as well as the training or education of people seeking to be ordained or appointed to such positions. The exception also extends to selecting or appointing people to perform functions or participate in any religious observance or practice.¹⁹⁵

In the Discussion Paper we asked if consideration should be given to extending the existing exception for ordination, training, and selection to lay representatives who have an important spiritual role within a faith. Six submissions commented on this topic in detail,¹⁹⁶ and gave general support for ensuring, at a minimum, the exception is retained in its current form.

Expanding scope to other spiritual roles

Freedom for Faith commented that it is very common for churches and other groups to have lay ministers who serve in key spiritual areas of church life, and the Act should not prevent these bodies from making appointments to such positions in accordance with their religious commitments.¹⁹⁷ Scripture Union Queensland suggested an exception should cover the employment for religious professions or vocations, rather than listing specific occupations.¹⁹⁸ Similarly, Australian Christian Higher Education Alliance suggested this protection should extend ‘to all staff who are required to uphold the publicly expressed beliefs of the institution’.¹⁹⁹ Exceptions for employment in religious organisations are considered further below.

No submissions suggested that lay people should not be recognised under the training and ordination provisions.

Comparative approaches

All jurisdictions contain an exception that enable religious bodies to discriminate in relation to the ordination, training, and appointment of ministers of religion.²⁰⁰

The *Human Rights Act 1993* (NZ)²⁰¹ provides an exception for employment discrimination based on religious or ethical belief where the sole or principal duties of the position are, or are substantially the same as, those of recognised spiritual leaders (eg pastor) or otherwise involve the propagation of that belief.

The Review’s position

The Review considers that:

- The exception should be expanded to include ordination, training, and selection of lay people because this would better reflect the right to freedom of religion by ensuring that all people who play an important spiritual role within a religious body can be ordained, trained, and selected according to the religious values and practices.

¹⁹⁵ *Anti-Discrimination Act 1991* (Qld) s 109(1)(a)–(c).

¹⁹⁶ Pride in Law submission, 3; Queensland Council for Civil Liberties submission, 23; Australian Lawyers for Human Rights submission, 12; Freedom for Faith submission, 3; Australian Christian Higher Education Alliance submission, 16; Scripture Union submission, 22.

¹⁹⁷ Freedom for Faith submission, 3

¹⁹⁸ Scripture Union Queensland submission, 22

¹⁹⁹ Australian Christian Higher Education Alliance submission, 16.

²⁰⁰ *Anti-Discrimination Act 1998* (Tas) s 52; *Equal Opportunity Act 1984* s 50 and s 85ZM.

²⁰¹ *Human Rights Act 1993* (NZ) s 28(2)(b)(i).

Recommendation 37

- 37.1** The Act should retain an exception from discrimination for the ordination, training, and selection of religious leaders and this be broadened to include lay people who have a role which is the same as, or is similar to, the role of a priest, minister of religion, or member of a religious order, or where the person otherwise has a role that involves the propagation of that faith.
-

Provision of services and accommodation by religious bodies

In the Discussion Paper we asked whether religious bodies should 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.

Current approach

The Act permits discrimination in the provision of services by bodies established for religious purposes on the basis of any attribute, except in the areas of work and education, provided the discrimination is in accordance with the doctrine of the religion and is necessary to avoid offending the religious sensitivities of people of the religion.²⁰²

Another exception allows for discrimination in the accommodation area where:

- the accommodation is under the direction or control of a body established for religious purposes
- the discrimination is in accordance with the doctrine of the religion, and
- is necessary to avoid offending the religious sensitivities of people of the religion.²⁰³

The broad definition of accommodation includes business premises, a house or flat, boarding house or hostel, caravan, caravan site, camp site, manufactured home, and building or construction sites.²⁰⁴

Complex tests

Submissions suggested that the present exceptions are overly complex.²⁰⁵ The Australian Association of Christian Schools recommended replacing the genuine occupational requirements exception in the work area with a general limitations clause, an approach discussed further below.²⁰⁶ A submission from a number of Christian Churches suggested that relevant exceptions should depend on only one of the following criteria being satisfied, not both as is currently the case:

- in accordance with the doctrine of the religion, and
- necessary to avoid offending the religious sensitivities of people of the religion.²⁰⁷

Similar criteria are used in discrimination law in other Australian jurisdictions, but many require only one of these tests to be satisfied.²⁰⁸ The test of avoiding injury or offence to the religious

202 *Anti-Discrimination Act 1991* (Qld) s 109(1)(d).

203 *Anti-Discrimination Act 1991* (Qld) s 90.

204 *Anti-Discrimination Act 1991* (Qld) ss 90 and sch Dictionary (definition of 'accommodation').

205 See for example: Freedom for Faith submission, 4; Joint Churches submission, 16.

206 Australian Association of Christian Schools submission, 21.

207 Joint Churches submission, 15 referring s 109(1)(d) and s 90(b).

208 As discussed in Liam Elphick, 'Sexual orientation and 'gay wedding cake' cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38 *Adelaide Law Review* 151, 159-160.

sensitivities of adherents to a religion has been described as ‘vague’,²⁰⁹ ‘problematic’,²¹⁰ and providing little guidance to either religious schools or their potential employees.²¹¹ It is also considered difficult to apply in situations where religious adherents do not have a single, cohesive position on a particular issue.²¹²

Discrimination when receiving goods and services

During the Review, we heard from groups representing some communities that:

- Religious exceptions are being used to justify unfair treatment or interference with the private lives of people, including in the area of goods and services.²¹³
- Disadvantaged members of the community often rely on subsidised services available to the public that are provided by bodies established for religious purposes to obtain essential care and support in areas such as healthcare, aged care, education, and social services.²¹⁴
- In some parts of Queensland, there is limited choice for essential services, other than through religious organisations.²¹⁵
- Religious exceptions reinforce structural prejudices and discrimination experienced by LGBTQ+ communities.²¹⁶
- Sex workers experience discrimination or conditional support when accessing services provided by religious bodies.²¹⁷

One person who completed a community survey published by Queensland Council for LGBTI Health in their submission said that:

*Many older people who are LBGTQIA+ find aged care a challenging place because it is primarily provided by religious organisations. I've never been willing to work in private religious schools because of the requirement to make "lifestyle declarations" which would force me to deny the existence of my family.*²¹⁸

Similar issues were raised with the Expert Panel for the Religious Freedom Review, where submissions and consultations highlighted the stress on LGBTQ+ communities in having to hide or ‘edit’ themselves depending on the context.²¹⁹

209 Caroline Evans, *Legal Aspects of the Protection of Religious Freedom in Australia*, 2009, 40.

210 Liam Elphick, ‘Sexual orientation and “gay wedding cake” cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions’ (2017) 38 *Adelaide Law Review* 151, 160.

211 Caroline Evans and Leilani Ujvari, ‘Non-Discrimination Laws and Religious Schools in Australia’ (2009) 30 *Adelaide Law Review* 31, 53.

212 For example: *Christian Youth Camps v Cobaw Community Health Service Ltd* [2014] VSCA 75 at [522] “The question as to when a religion requires that a person behave in a certain way is a vast and contentious one. Religions vary widely in the degree to which they prescribe certain behaviours’ (per Redlich JA). See also *OV v Wesley Mission* [2010] NSWCA 155 and *OW v Members of the Board of the Wesley Mission Council* [201] NSWADT 293, which contrasted the belief of a particular Wesley Mission with the beliefs of the overarching Uniting Church.

213 Diversity Queensland Inc submission, 4; Dr Nicky Jones submission, 2; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 14; Equality Australia submission, 16; Respect Inc and DecrimQLD Submission, 44.

214 Legal Aid Queensland Submission, 90; TASC National Ltd submission, 13.

215 Name withheld (Sub.008) submission, 4; Queensland Positive People, HIV/AIDS Legal Centre and National Association of People with HIV Australia submission, 15.

216 Queensland Alliance for Mental Health submission, 4-5

217 Scarlet Alliance, Australian Sex Workers Association submission, 13.

218 Survey participant (20), Queensland Council for LGBTI Health submission, 62.

219 Expert Panel, *Religious Freedom Review* (Report, May 2018), 1.216; 1.400

Research has been conducted on the harm that discrimination against LGBTQ+ people can cause, including when accessing health care and social services.²²⁰ This is in the context of increased outsourcing of Commonwealth and State welfare services to religious bodies, including unemployment services and early intervention services to families and children in recent decades.²²¹

Community attitudes have shifted considerably in the last 30 years, as shown by the majority support for equal marriage in the 2016 postal survey.²²² A more recent community attitudes survey found that three-quarters of people do not support religiously affiliated service providers discriminating against LGBTQ+ people in their employment relationship or as recipients of services.²²³

However, Freedom for Faith and the Human Rights Law Alliance said that, in their view, there was insufficient evidence to show that religious bodies are discriminating against people,²²⁴ and considered that the only time this may arise is in relation to adoption and fostering services where religious groups have a strong belief that a 'traditional man/woman marriage' is the best context for child raising.²²⁵

Commercial and public services

Some submissions suggested that the exception should only apply if the service provider receives government funding, or the service is commercial in nature.²²⁶

These submissions said that public funds should not be used to support discriminatory practices, and religious bodies should not be able to discriminate when they offer services on the open market.²²⁷ Aged and Disability Advocacy Australia considered that services provided on behalf of the State should support and prioritise the needs of the person who is receiving the service over the religious sensitivities of the institution that provides the service.²²⁸

However, Equality Australia was concerned about linking the exception to the receipt of public funds because of the difficulty for a complainant to ascertain if a service is government funded and from which level of government. Equality Australia favoured a 'reasonable and proportionate' test in which relevant factors might include sources of funding.²²⁹ Similarly, Just.Equal Australia supported a test that any 'discrimination is reasonable and proportionate in the circumstances' rather than differentiating services according to public funding.²³⁰

Some submissions argued that the existing exceptions should be expanded to better support the services routinely provided by religious bodies that benefit the community, and that religious bodies should not be forced to act counter to their beliefs.²³¹ The Australian Christian Lobby

220 See for example: Adam O Hill et al, 'Private lives 3: The health and wellbeing of LGBTIQ people in Australia' (Report, Australian Research Centre in Sex, Health and Society, La Trobe University, 2020); Gabi Rosenstreich, 'LGBTI People Mental Health and Suicide' (Briefing paper, revised 2nd edition, National LGBTI Health Alliance, 2013); Ilan Meyer and David M Frost D, 'Minority Stress and the Health of Sexual Minorities' in Charlotte J Patterson and Anthony R D'Augelli (eds.), *Handbook of Psychology and Sexual Orientation* (Oxford University Press, 2013) 252–266.

221 Dougal Ezzy et al, 'LGBTQ+ non-discrimination and religious freedom in the context of government-funded faith based education, social welfare, health care, and aged care' (2022) *Journal of Sociology*, 1-21.

222 Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Arrangements for the postal survey*, (Report, 2018).

223 Nicola McNeil et al, 'Australian Survey of Social Attitudes, 2020' (Survey, Australian Consortium for Social and Political Research Inc, 2021).

224 Human Rights Law Alliance submission, 9; Freedom for Faith submission, 4-5.

225 Freedom for Faith submission, 4-5.

226 See for example: Queensland Network of Alcohol and Other Drug Agencies Ltd submission, 3; Dr Nicky Jones submission, 2; Legal Aid Queensland submission, 89; Caxton Legal Centre submission, 29-30.

227 Legal Aid Queensland submission, 90.

228 Aged and Disability Advocacy Australia submission, 12.

229 Equality Australia submission, 19.

230 Just.Equal Australia submission, 9.

231 See for example: Australian Christian Higher Education Alliance submission, 8 and 17; Scripture Union Queensland submission, 1; Joint Churches submission, 15; Human Rights Law Alliance submission, 9; FamilyVoice Australia

supported freedom for Christian organisations to conduct their affairs fully in accordance with their doctrines, tenets, and beliefs.²³²

Comparative approaches

While all Australian jurisdictions contain exceptions for religious bodies that provide goods and services to the public, the exceptions vary widely in scope, including the applicable attributes and areas.

In 2013, the exceptions for religious bodies in the Commonwealth Sex Discrimination Act were narrowed so that they no longer applied to conduct connected with Commonwealth-funded aged care services. This amendment was intended to promote equal access to health services.²³³

Amendments to the Victorian Equal Opportunity Act make government funding a consideration in some exceptions for religious bodies.²³⁴

Victorian law permits religious bodies to discriminate on the basis of some attributes, but the action must be reasonable and proportionate in the circumstances and:

- conform with the doctrines or beliefs of the religion, or
- be reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.²³⁵

The ACT Government recently released an exposure draft Discrimination Amendment Bill 2022. The Bill proposes to amend religious bodies' exceptions to make discrimination lawful in relation to employment of a person if:

- the discrimination is on the ground of religious conviction; and
- conformity with the doctrines, tenets or principles of the religion is a genuine occupational qualification for the position; and
- the discrimination is reasonable, proportionate, and justifiable in the circumstances.²³⁶

This exception will not apply to discrimination in relation to the employment of a person at an educational institution, or to a religious body whose sole or main purpose is a commercial purpose.²³⁷

Guidance material accompanying the exposure draft suggests the requirement for an action or practice to be reasonable, proportionate, and justifiable in the circumstances will 'ensure that different human rights are considered when a religious body relies on this exception.'²³⁸

submission, 4; Australian Association of Christian Schools submission, 16.

232 Australian Christian Lobby submission, 5.

233 Supplementary Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth), 4.

234 From 14 December 2022, when providing goods or services funded by the Victorian Government, religious bodies will only be able to discriminate based on a person's religious belief. They will not be able to discriminate based on other personal characteristics. See *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic) cl 12, including a new s 82A.

235 *Equal Opportunity Act 2010* (Vic) s 82. The relevant attributes being: religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status, or gender identity. This exception applies outside of employment and decisions about school students,

236 Exposure draft, Discrimination Amendment Bill 2022 (ACT) cl 15–19.

237 Exposure draft, Discrimination Amendment Bill 2022 (ACT) cl 16.

238 Australian Capital Territory Government, *Public Exposure Draft: Discrimination Amendment Bill 2022* (Web page, 2022), 2 <https://hdp-au-prod-app-act-yoursay-files.s3.ap-southeast-2.amazonaws.com/5616/5413/0668/Fact_Sheet_-_Exposure_Draft_Discrimination_Amendment_Bill_2022.pdf>.

The Review's position

The Review considers that:

- Religious bodies provide essential services throughout Queensland, and many promote inclusion and equality in doing so.
- Under the Act's current exceptions, people with protected attributes can be discriminated against in a way that may leave them deprived of essential services.
- People in areas where resources and services are scarce, such as remote and regional areas of Queensland, may be at higher risk of discrimination related to application of the religious bodies' exceptions.
- It is necessary to limit religious freedom to protect the fundamental rights and freedoms of others, and to the extent that religious exceptions may be disproportionately limiting the rights to equality, privacy, health services and other protected rights, exceptions in the Act are not currently striking the right balance.
- Where religious bodies offer services to the public, recipients of those services should not be required to conform with the body's religious doctrines and beliefs, or be required to avoid injury to religious sensitivities in order to receive services without discrimination.
- Exceptions for religious bodies should include a test of reasonableness and proportionality in order to achieve a balance between upholding religious freedoms and protecting the right to equality and non-discrimination.
- Relevant considerations of what is reasonable and proportionate depend on the particular case. Whether the service is of a public nature is one such relevant consideration, however, a test based on 'public funding' may introduce unnecessary complexity.

Recommendation 38

38.1 A general religious bodies exception and religious accommodation exception should be retained, but should only apply to the attribute of religious belief or activity where the conduct by an organisation or related entity established for religious purposes ('religious organisation') is:

- to conform to the religious doctrines, tenets or beliefs of the body; and
- reasonable and proportionate in all the circumstances.

38.2 The Act should include a non-exhaustive list of factors to guide whether it is reasonable and proportionate, such as:

- the importance of the relevant conduct in protecting the ethos of the religious organisation and the religious susceptibilities of adherents of that religion
 - whether the religious organisation is a public entity under the Human Rights Act when engaging in the conduct
 - if the religious organisation operates in a commercial manner when engaging in the conduct
 - the reasonable availability of alternative services
 - whether the services are essential services
 - the rights and interests of the person receiving, or proposed to receive, goods and services or accommodation.
-

Work in religious educational institutions and other organisations

In the Discussion Paper we asked if the exception applying to the area of work for religious educational institutions and other bodies established for religious purposes should be retained, changed, or repealed. If retained, we sought submissions on whether further attributes should be removed from the scope.

Current approach

The Act currently permits discrimination in relation to employment in an educational institution under the direction or control of a body established for religious purposes, or other work for a body established for religious purposes, if the work genuinely and necessarily involves adhering to and communicating the body's religious beliefs.²³⁹

Where it is a genuine occupational requirement for an employee to act in a way consistent with the employer's religious beliefs, the employer may discriminate in a way that is not unreasonable, if the person 'openly acts' in a way that is contrary to those beliefs.

Whether the discrimination is unreasonable depends on all the circumstances of the case including factors such as whether the action taken by the employer is disproportionate to the behaviour, and the consequences for both the person and the employer. This exemption does not apply to discrimination on the basis of age, race, or impairment, and does not allow an employer to seek information on which discrimination might be based.

Comparative approaches

Most jurisdictions in Australia have exceptions that make it lawful for religious bodies or educational institutions to discriminate in the area of work where the discrimination is necessary to conform with doctrines, beliefs, or principles of the religion, or is necessary to avoid injury to religious sensitivities of the adherents of the particular religion. Some jurisdictions confine the relevant exception to specific attributes.²⁴⁰

State and territory exceptions

The Tasmanian Act permits discrimination in employment on the basis of religious belief or affiliation or religious activity, only if the participation of the person in the teaching, observance, or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.

A religious educational institution may discriminate against an employee on the ground of religious belief or affiliation or religious activity, if the discrimination enables the educational institution to be conducted in accordance with its tenets, beliefs, teachings, principles, or practices.²⁴¹ The South Australian Law Reform Institute recommended following the Tasmanian approach,²⁴² which accords with the European Union approach.²⁴³

Recent changes in Victoria mean that religious bodies and schools are only permitted to discriminate in employment decisions (or decisions about school students) on the basis of

239 *Anti-Discrimination Act 1991* (Qld) ss 25(2)–(8).

240 See for example: *Anti-Discrimination Act 1992* (NT) s 37A – the exception is limited to religious belief or activity and sexuality.

241 *Anti-Discrimination Act 1998* (Tas) s 51.

242 South Australian Law Reform Institute, 'Lawful Discrimination': *Exceptions under the Equal Opportunity Act 1984 (SA) to Unlawful Discrimination on the Grounds of Gender Identity, Sexual Orientation, and Intersex Status* (Report, June 2016).

243 European Communities. *Council Directive 2000/78/EC* of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, Art 4(2).

religious belief or activity in limited circumstances, if the discrimination is reasonable and proportionate.²⁴⁴

As outlined above, the proposed ACT changes would add the test of 'reasonable, proportionate and justifiable' to religious exceptions that apply to workplaces.

Other submissions received by the Review recommended the Queensland Act adopt exceptions consistent with the provisions of the lapsed federal Religious Discrimination Bill 2022, section 38 of the Sex Discrimination Act, or the recommendations of the Religious Freedom review.²⁴⁵

Federal exceptions

The federal Sex Discrimination Act²⁴⁶, which also applies to schools in Queensland, contains provisions whereby it is not unlawful for a religious school to discriminate against employees and contract workers, where this is done in good faith, to avoid injury to the religious susceptibilities of adherents of that religion.²⁴⁷ The Australian Christian Lobby suggests, 'this rightly recognises that when a religious school exercises its rights to religious freedom it is *prima facie* not unlawfully discriminating'.²⁴⁸ However, this exception has been contentious because it does not require a process of balancing rights,²⁴⁹ and may be the subject of review by the Australian Law Reform Commission.²⁵⁰

In 2018, the Religious Freedom Review recommended that the Sex Discrimination Act be amended to provide that religious schools can discriminate in relation to employment in certain situations, including if the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced.²⁵¹ The lapsed Religious Discrimination Bill 2022 would have adopted this approach.²⁵²

'Don't ask, don't tell' approach

Several submissions²⁵³ considered that the current exception unreasonably limits the rights of teachers and other employees, particularly women and LGBTQ+ workers. A specific concern was that the current Act requires employees to hide or suppress who they are in the workplace. Hiding or suppressing sexuality and gender identity has been linked to psychological harm and can lead to ongoing mental health issues and suicidal ideation.²⁵⁴ Submissions suggested that the

244 *Equal Opportunity Act 2010* (Vic) ss 81–83A. Religious bodies and schools can now only discriminate against employees (and potential employees) based on the person's religious belief or activity and only where: conformity with religious beliefs is an inherent requirement of the job and the other person cannot meet that inherent requirement because of their religious belief or activity.

245 See for example: Family Voice submission, 6; Christian Schools Australia submission, 12, 22; Scripture Union submission, 4, 24; Adjunct Associate Professor Mark Fowler submission, 26–27.

246 *Sex Discrimination Act 1984* (Cth) s 38

247 On the basis of their: sex, sexual orientation, gender identity, marital or relationship status or pregnancy – where the educational institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.

248 Australian Christian Lobby submission, 5–6.

249 Anja Hilkmeyer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the Basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence' (2019) 93 *Australian Law Journal* 752, 760.

250 *Review into the Framework of Religious Exemptions in Anti-Discrimination Legislation*, presently 'on hold' < <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-Anti-Discrimination-legislation/> >

251 Religious Freedom Review, *Report of the Expert Panel* (18 May 2018), Recommendation 5. See also Recommendation 7 in relation to discrimination of students. Recommendations 6 and 8 of that Review also recommended that jurisdictions should abolish any exceptions to Anti-Discrimination laws that provide for discrimination by religious schools on the basis of race, disability, pregnancy, or intersex status.

252 Clause 7. See also clause 8 in relation to religious hospitals, religious aged care facilities, religious accommodation provider or religious disability service provider; and clause 40 (exception relating to accommodation and facilities).

253 See for example: Intersex Human Rights Australia submission, 34; Dr Nicky Jones submission, 2; Independent Education Union submission, 2–3.

254 Timothy W Jones et al, *Preventing Harm, Promoting Justice: Responding to LGBT conversion therapy in Australia*, 2018 < <https://www.hrlc.org.au/reports/preventing-harm> >, 38–41.

protection of religious beliefs should not come at the cost of employees' mental health.²⁵⁵ It was noted that being LGBTQ+ and holding a religious belief are not mutually exclusive.²⁵⁶

The LGBTI Legal Service said that they are aware that 'many LGBTQIA+ teachers and employees fear termination as it has often been the case that their identity or connection with their LGBTQIA+ status is inconsistent with certain religious beliefs or practices'.²⁵⁷

Rainbow Families Queensland, which represents LGBTQ+ parents and their children, acknowledges that many religious schools and other organisations are becoming more inclusive places for LGBTQ+ staff, but that teachers in some schools feel they need to remain in the closet to remain employed. This can become an untenable situation where a teacher becomes pregnant because it:

... can become impossible to continue to hide one's gender identity or sexuality and who their family is. Remaining in the closet can lead to huge stress and anxiety and contribute to feelings of shame and ostracism for the parents and their child.²⁵⁸

Pride in Law note that 'more and more, people are encouraged to bring their whole selves to work'. Yet, 'teachers face disciplinary action and adverse employment decisions for simply being who they are in the workplace'.²⁵⁹

A respondent to the Have Your Say survey who identified as an LGBTIQ+ teacher in a private school and living in a regional area told us that:

*I worked for a Christian school linked to a church that was (still is) anti-LGBTIQ. So much discrimination! I resigned, lost the community. So much trauma! Multiple therapy sessions. I have a wonderful rainbow community now and have some friends I've confided in.*²⁶⁰

The impact of the exception is also experienced outside of the LGBTQ+ community. Aside from age, race, or 'impairment', the exception applies to all other protected attributes including sex, relationship status, and family responsibilities.

Independent Education Union told us that in their experience with members in religious schools they have:

... encountered examples where the exemption has a disproportionate effect on women. An unmarried pregnant woman may be accused of acting "openly" in a way contrary to the employer's religious beliefs, due to an obvious pregnancy, while there is no consequence for the father of the child as he has not acted "openly" given he does not carry the pregnancy.²⁶¹

Some submissions suggested that this exception should only apply to the protected attribute of religious belief or activity and be narrowed further to apply only to specific positions.²⁶²

255 Rainbow Families Queensland submission, 6; Queensland Alliance for Mental Health submission, 4–5.

256 Rainbow Families Queensland submission, 6.

257 LGBTI Legal Service Inc submission, 6.

258 Rainbow Families Queensland submission, 6–7

259 Pride in Law submission, 4.

260 Name withheld (Form.733) survey response.

261 Independent Education Union – Queensland and Northern Territory Branch submission, 3.

262 Just.Equal Australia Submission, 8; Australian Discrimination Law Experts Group, 15; Equality Australia submission, 19.

Ensuring faith-based schools can maintain ethos

Independent Schools Queensland considered that schools should be able to operate in accordance with their religious doctrines to ensure integrity of choice and diversity in education.²⁶³ Several submissions considered that changes to exceptions might undermine the capacity of schools to operate in a manner consistent with their ethos or religious convictions.²⁶⁴

Some of the submissions on behalf of religious organisations advocated for the Act to be amended to better protect the establishment and operation of religious organisations and schools. They said that it is essential to the goal of these organisations that they provide spiritual support to employees, students, and staff to ensure that all employees' beliefs align with that of the organisation.²⁶⁵ This has been described as the process of faith being 'caught not taught'.²⁶⁶ A spiritual education involves more than teaching content in classes and includes the overall environment that supports teaching and learning. It was said that it is necessary for staff to model the religious convictions of the faith community and uphold, or at least not undermine, the religious ethos of the school.²⁶⁷

Some submissions proposed that an organisation be permitted to develop an institutional ethos by applying a preference for staff who share their faith across the employee cohort wherever possible.²⁶⁸ It was suggested that only applying exceptions for designated roles within an organisation would create division and imply that some roles are more important, holy, or spiritual.²⁶⁹ Australian Association of Christian Schools told us that:

Our schools exclusively employ Christian staff to maintain the religious character and ethos of the school and to ensure that students receive an authentic Christian education. Authenticity is the key concept here, it is not enough for our staff to uphold or submit to the beliefs of the school, they must also have a personal faith which is consistent with the beliefs of the school... Faith is an inherent requirement of any position at our schools because they are established as Christian communities where parents entrust their children to mentors with an expectation of adherence to, and instruction in, the biblical moral code.²⁷⁰

A representative of the Islamic College of Brisbane told us that:

I think as far as religious freedom is concerned, my understanding is that as long as the people of faith are allowed to teach what's within their faith, you know, they should not be discriminating against people in employment, proactively because of their sexual identity or gender identity, but they should be allowed to teach what they want to teach within the realm of their faith.²⁷¹

Commenting on the suggested approach of the Religious Freedom Review in permitting discrimination if there is a publicly available policy,²⁷² the Australian Discrimination Law Experts Group considered that this would be contrary to a primary aim of discrimination law which is to reduce stigma in society and that:

263 Independent Schools Queensland submission, 3.

264 Australian Christian Higher Education Alliance submission, 4; Human Rights Law Alliance, 9; Associated Christian Schools submission, 1–2.

265 Australian Association of Christian Schools submission, 20; FamilyVoice Australia submission, 6; Associated Christian Schools submission, 1–2; Scripture Union Queensland submission, 2.

266 Adjunct Associate Professor Mark Fowler submission, 3, 21.

267 Expert Panel on Religious Freedom, *Religious Freedom Review* (Report, May 2018) 56 [1.210].

268 Adjunct Associate Professor Mark Fowler submission, 21. See also Christian Schools Australia submission, 6.

269 Australian Christian Higher Education Alliance submission, 9.

270 Australian Association of Christian Schools submission, 17.

271 Islamic College of Brisbane (Ali Kadri) consultation, 5 August 2021.

272 Expert Panel, *Religious Freedom Review* (Report, May 2018), 2, Recommendation 5.

explicitly providing that individuals with certain attributes cannot obtain employment in an organisation does not lessen stigma or ameliorate other harm that individuals will face as a consequence of a religious educational organisation or other religious bodies' refusal to employ persons on the basis of an attribute.²⁷³

It cannot be assumed that circumstances of a staff member's private life will remain static. On starting work at a school, a person may be able to comply with a policy that requires married staff to be in a heterosexual marriage. Subsequently, they may not be able to continue to comply with the policy if they become divorced, re-partner, or later identify as gay, transgender, or gender diverse.

The Review's position

The Review considers that:

- Protections in international human rights law recognise the importance of protecting religious beliefs and freedoms which includes 'respect for the liberty of parents' to educate their children in accordance with their religious beliefs.
- Religious organisations make a significant contribution to the community, including as faith leaders, employers, and educators, and many promote inclusion and equality.
- It is necessary to limit religious freedom as recommended to uphold the rights to privacy and non-discrimination of staff in religious bodies.
- Allowing discrimination on religious grounds where the organisation has a publicly available policy outlining its position may have the unintended consequence of entrenching discriminatory views while minimising the opportunity for policy review. This approach assumes that people's sexuality and gender identity are fixed, whereas people may come out at all stages of their lives, and other circumstances may also change such as a person may separate, divorce, become pregnant or re-partner.
- Provisions based on current or proposed general exceptions in Tasmania, Victoria, and the ACT allow more consistent protection of religious beliefs and activity in the areas of employment, education, and service provision.
- Include a criterion based on reasonableness and proportionality for an exception for religious bodies incorporates the element of balance that is required to ensure that religious freedoms are upheld while protecting rights to equality and discrimination.
- Relevant considerations of what is reasonable and proportionate depend on the particular case and should include balancing factors to allow the balancing of religious freedoms, the right to equality and other protected rights.

Recommendation 39

39.1 The current genuine occupational requirements exceptions relating to work in educational institutions or other bodies established for religious purposes (s 25 (2)-(8)) should be repealed, along with a legislative note in s 25(1) which indicates that discrimination on the basis of religion will always be a 'genuine occupational requirement' at a religious school.

39.2 A new exception should be created to allow discrimination on the ground of religious belief or religious activity in relation to work for an organisation or related entity established for religious purposes ('religious organisation') if reasonable and proportionate in the circumstances and the participation of the person in the teaching, observance or practice

273 Australian Discrimination Law Experts Group submission, 64–65.

of a particular religion is a genuine occupational requirement. This should not provide an exception from unnecessary questions that may be asked for a discriminatory purpose.

39.3 The Act should include a non-exhaustive list of factors to guide whether it is reasonable and proportionate, such as:

- the importance of the relevant conduct in protecting the ethos of the religious organisation and the religious susceptibilities of adherents to that religion
- the proximity between the person's actions and the religious organisation's proclamatory mission
- whether the religious organisation is a public entity under the Human Rights Act when engaging in the conduct
- whether the religious organisation operates in a commercial manner when engaging in the conduct
- the reasonable availability of alternative employment
- the rights and interests of the employee.

39.4 The Act should include examples to demonstrate that the exception does not permit discrimination against employees who are not involved in the teaching, observance or practice of a religion, such as a science teacher in a religious educational institution.

Students in religious educational institutions

While not specifically addressed in the Discussion Paper, some submissions expressed support for the present exceptions that permit single sex and religious schools to discriminate against students on the basis of sex or religion at the time of enrolment.²⁷⁴

Some suggested that the exception relating to students should be expanded, including by adopting the approach of the federal Sex Discrimination Act.²⁷⁵

Most faith-based schools in Australia provide an environment that is free from discrimination, and some have established best practice in supporting students with diverse sexualities or gender identities.

Submissions refer to recent media reports which have raised concerns about a minority of faith-based schools across Australia that seek to impose contractual arrangements on parents and/or school staff that may be contrary to discrimination law, including through changes that may alter the terms of enrolment for existing students.²⁷⁶ This discussion has focused on the harmful impacts of discrimination on parents, teachers, and their communities, and particularly on LGBTQ+ people.

The Review heard that these policies may lead to exclusion and psychological harm.²⁷⁷

274 See for example: Queensland Catholic Education Commission submission, 9; Just.Equal Australia submission, 5.

275 See for example: Human Rights Law Alliance submission, 4; Freedom for Faith submission, 4. The *Sex Discrimination Act 1984* (Cth) s 38(3) provides an exemption for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

276 Australian Lawyers for Human Rights submission, 13; Equality Australia submission, 17–18; Australian Discrimination Law Experts Group submission, 64.

277 Rainbow Families Queensland submission, 6.

One person told us that:

*I once had a teacher denounce my sexuality at length in class
and there was nothing I could do to protect myself....*²⁷⁸

Current approach

As set out above, the Act provides a general exception for bodies established for religious purposes, but it does not apply in the education area.²⁷⁹ Instead, the Act contains a specific exception in the education area to allow an educational authority to operate an educational institution wholly or mainly for students of a particular sex or religion.²⁸⁰

This exception allows a school or other educational institution to lawfully exclude applicants who are not of the particular sex or religion. For example, an Islamic school may offer enrolment to only Muslim students.

This exception only applies at the time of applying to enrol and the education area of the Act lists ways in which an educational authority must not discriminate in relation to a student after enrolment.²⁸¹ This means, for example, that if a person is no longer of the particular sex or religion during their education, they cannot be disciplined or expelled because of the change in the nature of their attribute.

Submissions confirmed a general understanding that the exception for institutions wholly or mainly for students of a particular sex or religion applies to prospective students only. The Human Rights Law Alliance advocated that this exception be expanded beyond the enrolment stage based on the Sex Discrimination Act, because it is 'necessary for religious schools to be able to continue to provide an education that reflects the religious mission and identity that parents have specifically chosen for their children'.²⁸²

The Australian Discrimination Law Experts Group along with other submissions described the existing exception as 'the preferred international human rights law approach' and 'a best practice approach in Australia'.²⁸³

This exception is confined to 'the particular religion' as opposed to a religious belief generally. The provision does not use the words of the protected attribute of 'religious belief or religious activity'. It applies where a school operates wholly or mainly for students of a particular religion, to permit the school to exclude applicants who are not of that particular religion. This means that as long as an applicant is of the particular religion, their other attributes such as gender identity or sexuality are not relevant to the exception.

The Review's position

The Review considers that:

- The current approach effectively protects students after enrolment, without unreasonably restricting the operation of religious and single sex schools.
- We consider that it should be made clearer that the section 41 exception for religion only applies in relation to a person's 'religion' (not 'religious belief or activity') and that it only applies on enrolment.

278 Survey participant (17), Queensland Council for LGBTI Health submission, 62.

279 *Anti-Discrimination Act 1991* (Qld) s 109(1)(d).

280 *Anti-Discrimination Act 1991* (Qld) s 41.

281 *Anti-Discrimination Act 1991* (Qld) s 39.

282 Human Rights Law Alliance Submission, 4.

283 Australian Discrimination Law Experts Group submission, 63; Australian Lawyers for Human Rights submission, 13; Just. Equal Australia submission, 5 – describes the provision as 'best practice' at 5.

Recommendation 40

- 40.1** The exception allowing discrimination on enrolment on the basis of sex or religion should be retained with the addition of a legislative note to clarify that this section applies to students enrolling for the first time, and is on the basis of ‘religion’ not ‘religious belief or activity’.
-

Superannuation and insurance

The Act currently contains broad exceptions to discrimination in the areas of superannuation and insurance with respect to impairment and age. These exceptions, which are common across jurisdictions, are based on proof of actuarial or statistical data, or where no such data exists, where it is reasonable having regard to the ‘any other relevant factors.’²⁸⁴

In the Discussion Paper we asked whether exceptions that permit discrimination in the areas of superannuation and insurance with respect to impairment and age should be retained or changed.

We received 19 submissions on this topic.²⁸⁵ Of those:

- 10 submissions supported changes to the exceptions or that they be repealed.²⁸⁶
- Eight submissions urged that the Act should not extend exceptions to apply to sex workers.²⁸⁷
- One submission indicated the exceptions should be retained.²⁸⁸

The Review received no submissions on this topic from insurance or superannuation providers. To inform ourselves of relevant considerations, we identified and considered submissions made on behalf of the insurance industry to a previous inquiry regarding this issue.²⁸⁹

Current approach

The Act currently contains broad exceptions to discrimination in the areas of superannuation and insurance that apply to impairment and age.²⁹⁰ These exceptions apply where:

- discrimination is based on reasonable actuarial, statistical, or other data from a source on which it is reasonable for the person to rely, and the discrimination is reasonable having regard to the data and any other relevant factors; or
- no reasonable actuarial, statistical, or other data exists, and the discrimination is ‘reasonable having regard to any other relevant factors.’²⁹¹

284 *Anti-Discrimination Act 1991* (Qld) s 61–63 (superannuation) s 74–75 (insurance).

285 Public Advocate (Qld) submission; Queensland Network of Alcohol and other Drugs Agencies submission; Queensland Alliance for Mental Health submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission; Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc. and DecrimQLD submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Remi submission; Professor John Scott submission; Intersex Human Rights Australia submission; PeakCare Queensland Inc submission; Name withheld (Sub.061) submission; Name withheld (Sub.064) submission; Magenta submission.

286 Public Advocate (Qld) submission; Queensland Network of Alcohol and other Drugs Agencies submission; Queensland Alliance for Mental Health submission; Australian Discrimination Law Experts Group submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Intersex Human Rights Australia submission; PeakCare Queensland Inc submission.

287 See for example: Scarlet Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission.

288 Queensland Council for Civil Liberties submission, 24–25.

289 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, vol 1 (Inquiry Report, 30 April 2004).

290 Ch 2 divs 5–6. Under s 59 the Act also permits discrimination by superannuation funds on the grounds of sex or relationship status, where permitted by the *Sex Discrimination Act 1984* (Cth).

291 *Anti-Discrimination Act 1991* (Qld) ch 2 divs 5–6.

This means that it is not unlawful in Queensland to discriminate on the grounds of age or impairment if it is reasonable to do so, whether or not actuarial, statistical – or in fact any reliable data – is available to prove the discrimination is necessary in order to reduce risk to the insurer or superannuation fund. Aside from actuarial or statistical data, other relevant data sources or ‘factors’ might include medical opinions, opinions from professional groups, actuarial advice or opinion, information about the consumer, or practices of other insurers in the industry.²⁹²

The Queensland Anti-Discrimination Tribunal²⁹³ provided an opinion about the refusal of a life insurance policy needed to cover a loan to a person based on a history of depression. The Tribunal found that the actuarial and statistical data relied on by the insurer was insufficient because it was not Australian data (and there was no explanation why it was not local information) and evidence from a qualified psychiatrist could be applied to any person with the same condition. The Tribunal found that there was not enough information to know whether the person presented ‘an unacceptable risk.’²⁹⁴

Similar exceptions that exist in other jurisdictions have been argued successfully to defend an exclusion clause in mortgage protection insurance for a person living with HIV²⁹⁵ and to deny travel insurance on the ground of mental illness.²⁹⁶

Comparative approaches

All states and territories have similar exceptions, which apply to a variety of attributes depending on the jurisdiction.²⁹⁷ Exceptions apply to age and disability (or ‘impairment’) in all jurisdictions.²⁹⁸

The federal Disability Discrimination Act and Age Discrimination Acts contain similar exceptions to Queensland.²⁹⁹ This legislation also allows the Australian Human Rights Commission to seek a copy of the relevant actuarial or statistical data, and it is an offence to fail to comply.³⁰⁰

Tasmania permits discrimination in relation to insurance and superannuation where it is:

- based on actuarial, statistical, or other data from a reliable source; and
- reasonable having regard to such data and any other relevant factors.³⁰¹

Unlike Queensland, in Tasmania the exception does not apply where there is an absence of actuarial or statistical data, which may impose a higher level of accountability for insurance and superannuation companies.

The Sex Discrimination Act only permits sex discrimination when providing insurance based on actuarial or statistical data from a source on which it is reasonable for the insurer to rely, and requires that a provider gives the client a document containing the data or makes it available for inspection at the client’s request.³⁰²

An Exposure draft of the Discrimination Amendment Bill 2022 (ACT)³⁰³ suggests an even narrower approach that allows discrimination only where it is based on actuarial or statistical data on which

292 Australian Human Rights Commission, *Disability: Guidelines for Providers of Insurance and Superannuation*, (Web page, 31 December 2005) [4.7.] <<https://humanrights.gov.au/our-work/disability-rights/publications/disability-guidelines-providers-insurance-and->>.

293 This Tribunal predates the current tribunals, operating from 1992 to 2009.

294 *Opinion re: Elizabeth Kors and AMP Society* [1998] QADT 23.

295 *Xiros v Fortis Life Assurance Ltd* (2001) 162 FLR 433; [2001] FMCA 15.

296 *Ingram v QBE Insurance (Australia) Ltd* [2015] VCAT 1936.

297 The exceptions in the Northern Territory apply to all attributes: *Anti-Discrimination Act* (NT) s 49.

298 See for example: *Equal Opportunity Act* (WA) ss 66T, 66ZR.

299 *Disability Discrimination Act* 1992 (Cth) s 46; *Age Discrimination Act* (Cth) s 37.

300 *Disability Discrimination Act* 1992 (Cth) s 107; *Age Discrimination Act* (Cth) s 37(4)–(5).

301 *Anti-Discrimination Act* 1998 (Tas) s 30, 33, 34 and 44.

302 *Sex Discrimination Act* 1984 (Cth) s 41.

303 Exposure draft, *Discrimination Amendment Bill 2022* (ACT) cl 7.

it is reasonable to rely, and the discrimination is ‘reasonable, proportionate and justifiable in the circumstances.’ Under a new draft provision, the service provider must give the consumer a document containing the data or make it available for inspection.

Discrimination allowed because of the exception

Our research found that people are experiencing increased premiums, excessive restrictions on policies, and rejection of cover once a mental health issue has been disclosed.³⁰⁴ While blanket exclusions from many travel and life insurance services have lifted following inquiries and reports in a number of jurisdictions,³⁰⁵ a recent report indicates that barriers to equitable access and discrimination are still regularly experienced.³⁰⁶

We also heard that discrimination may be occurring based on a predisposition to a disease. Intersex Human Rights Australia identified a study of 174 Australian consumers with genetic traits that predispose them to cancer who found that they had difficulties obtaining insurance despite most having no medical history or symptoms, even after risk-reduction strategies.³⁰⁷

Submissions from organisations representing people with psychosocial disability,³⁰⁸ intersex people,³⁰⁹ and people living with HIV³¹⁰ recount experiences of unfair and unreasonable treatment in the area of insurance. The submissions told us that:

- Insurance companies continue to discriminate on the basis of a history of mental illness, regardless of recency, relevance, or severity, even if that illness has negligible or no discernible effect on risk.³¹¹
- The insurance industry has acknowledged the difficulty in identifying risks based on mental illness because of issues including the subjective nature of diagnosis, challenges in understanding the severity, appropriate treatment options, and prospects of recovery.³¹²
- People living with HIV are either immediately refused coverage or face higher premiums.³¹³
- People with variations of sex characteristics report paying higher insurance premiums, as some intersex variations are associated with higher risks of gonadal cancer.³¹⁴
- This may be a disincentive to seeking medical help because of fear of needing to disclose a diagnosed condition to an insurer.³¹⁵

304 Mental Health Council of Australia and beyondblue, *Mental Health Discrimination and Insurance: A Survey of Consumer Experiences* (2011) <<https://www.beyondblue.org.au/about-us/about-our-work/discrimination-in-insurance>>.

305 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019); Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019); Parliamentary Joint Committee on Corporations and Financial Services (Cth), *Life Insurance Industry* (Inquiry Report, March 2018); Productivity Commission (Cth), *Mental Health* (Inquiry Report, June 2020).

306 Public Interest Advocacy Centre, *Mental Health Discrimination in Insurance* (Report, October 2021) <<https://piac.asn.au/project-highlight/mental-health-and-insurance>>.

307 Intersex Human Rights Australia submission, 24, referring to Jane Tiller et al. ‘Genetic Discrimination by Australian Insurance Companies: A Survey of Consumer Experiences’ (2020) *European Journal of Human Genetics* 28 (1).

308 See for example: Queensland Advocacy Incorporated submission, 9; Queensland Alliance for Mental Health submission, 6.

309 Intersex Human Rights Australia submission, 24.

310 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 16.

311 Public Advocate (Qld) submission, 5; Queensland Alliance for Mental Health submission, 6; Caxton Legal Centre submission, 30–31; Queensland Advocacy Incorporated submission, 9.

312 Legal Aid Queensland submission, 77 – referring to Actuaries Institute, *Mental Health and Insurance Green Paper* (Report, October 2017) 2.

313 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 16.

314 Intersex Human Rights Australia submission, 24.

315 Queensland Alliance for Mental Health submission, 6; Caxton Legal Centre submission, 30–31; Queensland Advocacy Incorporated submission, 9.

- Potentially, a person who has failed to address a mental health condition may have a cheaper premium than a person who has been treated and whose condition is well managed.³¹⁶
- Trends towards greater availability of genetic testing means that a higher proportion of the population are likely to have identified risks, and discrimination on these grounds can deter people from undergoing this beneficial testing.³¹⁷
- When a customer seeks evidence of risk, they are often denied requests for actuarial data, so there is no way to verify if the decisions are based on historical outcomes for conditions or based on modern, advanced treatment options.³¹⁸

We also heard concerns that the Commission does not have the power to obtain a copy of actuarial or statistical data, which means it is only at the Tribunal stage that this information can be scrutinised.³¹⁹

In 2019 the Victorian Commission released an investigation report on practices in relation to mental health in the travel insurance industry, which identified that several insurers included a blanket mental health exclusion.³²⁰ The investigation found that, over an eight-month period, three major insurers sold more than 365,000 policies containing terms that discriminated against people with mental health conditions.

Submissions on behalf of sex workers indicated that this group experiences significant barriers to accessing superannuation, income protection, or other insurances, and are charged high premiums.³²¹ While there are currently no Queensland exceptions on the basis of lawful sexual activity, these submissions were concerned that further exceptions may be added.

Impact on the insurance and superannuation industries

One submission maintained that risk assessments are a reality of insurance and superannuation decisions and raised concerns about the flow-on effects from any change in approach, with the potential to increase premiums overall.³²² This submission suggested an alternative might be to give the Commission powers to investigate on its own motion.

The Explanatory Memorandum for the Disability Discrimination Act which explains that the exception is in place to recognise that superannuation and insurance are provided on the basis of a risk assessment, and in many cases, it is likely that persons with disability might receive payments sooner than those without disability.³²³

Some commentary suggests that market efficiency may be assisted by a high level of access to information including statistics based on social and medical indicators.³²⁴ When the Disability Discrimination Act was reviewed by the Productivity Commission,³²⁵ both the Insurance Council of Australia (ICA) and the Investment and Financial Services Association (IFSA) explained that

316 Caxton Legal Centre submission, 30–31.

317 Intersex Human Rights Australia submission, 24.

318 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 16; Legal Aid Queensland submission, 77–78; Caxton Legal Centre submission, 30–31.

319 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 16; Caxton Legal Centre submission, 31.

320 Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019).

321 See for example: Respect Inc and DecrimQLD submission, 50–51.

322 Queensland Council for Civil Liberties submission, 24–25.

323 Explanatory Memorandum, Disability Discrimination Bill 1992, 17.

324 Dean Carrigan and Penny Holloway, 'Recent Cases and Developments in Discrimination and Privacy', *Allens Arthur Robinson* (Web page, 7 April 2004), 3. <<https://data.allens.com.au/pubs/pdf/insur/ins7apr04.pdf>>

325 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, vol 1 (Inquiry Report, 30 April 2004), Rec 12.1, 56.

changes to the exception under the Disability Discrimination Act would lead to unjustifiable hardship for the industry and increase costs to all consumers.³²⁶ The ICA also said that the exemption can be justified because insurance providers were already at a disadvantage because customers do not reveal all aspects of their health status. IFSA also commented that there is limited actuarial and statistical data in the small Australian market to rely upon, and a flexible approach that allows for other relevant information to be considered was necessary for practical reasons.³²⁷

The Productivity Commission ultimately recommended that while the exception in the Disability Discrimination Act should remain, consideration of ‘other relevant factors’ should not be based on stereotypical assumptions about disability and unfounded assumptions about risks related to disability. This was consistent with IFSA’s submission that agreed it was problematic to use a formulaic approach, and inappropriate to rely on stereotypes.³²⁸ IFSA suggested that clarification about what other factors might include could be qualified to read, ‘factors relevant to the nature and extent of the cover’.

Options for reform

Two submissions thought that the exceptions should be repealed³²⁹ and two suggested the only exceptions should be by application for a tribunal exemption, which would require public disclosure of the risk assessment on which the insurance decisions are made.³³⁰

Legal Aid Queensland acknowledged a need for insurers and superannuation providers to adjust products they offer to levels of need and risk, but questioned whether it was ever reasonable to permit discrimination in the absence of relevant actuarial or statistical data.³³¹

Rather than suggesting repeal of the exceptions for insurance and superannuation, the Australian Discrimination Law Expert Group considered that the provisions should be more limited and based on the Tasmanian approach.³³² They also recommend that new provisions, or a legislative note, should incorporate the following guidance to interrogate the veracity of the data, namely that the data:

- must be contemporarily relevant
- must state that the condition of the person seeking insurance is an unacceptable risk
- should come from an Australian source or, if there is no Australian source for the data, the insurance provider should provide further materials as to the local relevance and applicability of data from overseas, together with an explanation for why there is no Australian data upon which to rely.³³³

326 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, vol 1 (Inquiry Report, 30 April 2004), 328–329.

327 Investment and Financial Services Association (IFSA), Submission in response to the Productivity Commission Issues Paper and Review of Disability Discrimination Act 1992, 5 June 2003, 26.

328 Australian Government Productivity Commission, *Review of the Disability Discrimination Act 1992*, vol 1 (Inquiry Report, 30 April 2004), 336.

329 Queensland Advocacy Incorporated submission, 9; PeakCare Queensland Inc submission, 50.

330 Caxton Legal Centre submission, 31; Queensland Advocacy Incorporated submission, 9.

331 Legal Aid Queensland submission, 95.

332 Australian Discrimination Law Experts Group submission, 66–67, referring to *Disability Discrimination Act 1992* (Cth) s 46(1)(f) and *Anti-Discrimination Act 1998* (Tas) s 34.

333 Australian Discrimination Law Experts Group submission, 66–67. These points are drawn from the following cases: *QBE Travel Insurance v Bassanelli* [2004] FCA 396 [30]; *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 [17]; *Opinion re: Elizabeth Kors and AMP Society* [1998] QADT 23.

Human rights considerations

The insurance and superannuation exceptions limit human rights protected under the Human Rights Act including:

- equality before the law³³⁴
- right to health services without discrimination.³³⁵

Human rights may be subject to reasonable limitations.³³⁶ Some limitation of rights may be necessary to ensure that insurance and superannuation providers can continue to operate their businesses effectively, and to prevent increased costs to consumers across the market.

While it may be necessary to permit insurance providers to make reasonable decisions based on risk, we question whether the provisions are necessary and proportionate in circumstances where they permit 'reasonable' discrimination in the absence of actuarial and statistical data. An approach that places less restrictions on the right to equality has been outlined below.

The Review's position

The Review considers that:

- The insurance and superannuation exceptions are having a disproportionate and adverse impact on older people, people with disability, people with mental health conditions, and people predisposed to genetic conditions.
- Insurance and superannuation providers need to make reasonable decisions based on risk in order to avoid increased costs and premiums for all consumers.
- Insurance and superannuation providers operate on a national basis and an approach that is inconsistent with the federal age and disability discrimination legislation (as well as that of most other states and territories) is not desirable.
- Consistent with the recommendations of the Productivity Commission in 2004, there are advantages in including specific factors to determine what is 'reasonable', and to make it clearer that the evidence relied upon must be relevant, contemporary, and not based on assumptions or stereotypes.
- Determinations of courts and guidance material developed by the Australian Human Rights Commission³³⁷ is instructive in identifying what 'relevant factors' should include.
- Ensuring that there is a power to compel access to actuarial, statistical, or other information relied on by the provider for use at the conciliation stage will assist early resolution of complaints.
- The exceptions should not be broadened to allow for discrimination on the basis of additional attributes, including sex workers.

³³⁴ *Human Rights Act 2019* (Qld) s 15(3).

³³⁵ *Human Rights Act 2019* (Qld) s 37(1).

³³⁶ *Human Rights Act 2019* (Qld) s 13(1).

³³⁷ Australian Human Rights Commission, *Disability: Guidelines for Providers of Insurance and Superannuation*, (Web page, 31 December 2005) [4.7.]

Recommendation 41

41.1 The insurance and superannuation exceptions should be included in the Act in relation to age and disability, and be updated to include a non-exhaustive list of factors which provide guidance on whether it is reasonable to rely on actuarial or statistical data or other relevant factors.

41.2 These factors may include whether the data source:

- is up to date
- is relevant to the type and terms or conditions of the policy
- indicates that the person poses an ‘unacceptable risk’
- is a reasonable source
- is from an Australian data source, or if from overseas, how it is applicable in the local context.

41.3 The provisions should also require that, on request, the data on which the service provider is relying is provided to a consumer within a reasonable timeframe.

41.4 The Act should provide the Commission the power to compel an insurance or superannuation provider to disclose the source of actuarial or statistical data on which discrimination was based.

Prisoners

See also: chapter 5 – complaints by prisoners.

Changes made in 2008 to the Corrective Services Act (the ‘Corrective Services Act modifications’) modify the tests for direct and indirect discrimination for complaints by prisoners against prisons, service providers in prisons (protected defendants), and community corrections.³³⁸ The stated purpose of these changes is to maintain a balance between respecting the dignity of prisoners and the financial and other constraints to which protected defendants are subject.³³⁹

In the Discussion Paper we asked whether the Corrective Services Act modifications should be retained, changed, or repealed. We received 11 submissions, all suggesting review or repeal of these provisions.³⁴⁰ Submissions indicated that the Corrective Services Act modifications deter complaints about genuine issues and reduce the effectiveness of the Act to deal with systemic issues in prison.³⁴¹

During a consultation with the Review, Queensland Corrective Services indicated that while they did not wish to comment on substantive government policy issues, they observed that any changes to the complaint model may have an operational impact.³⁴²

³³⁸ *Corrective Services Act 2006* (Qld) pt 12A.

³³⁹ *Corrective Services Act 2006* (Qld) s 319B.

³⁴⁰ Sisters Inside Inc submission; Youth Advocacy Centre submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Australian Discrimination Law Experts Group submission; Equality Australia submission; Community Legal Centres Queensland submission; Queensland Advocacy Incorporated submission; Queensland Council for Civil Liberties submission; PeakCare Queensland Inc submission; Queensland Law Society submission.

³⁴¹ See for example: Caxton Legal Centre submission; Legal Aid Queensland submission.

³⁴² Queensland Corrective Services consultation, 24 February 2022.

Current approach

For all discrimination laws across Australia, the meaning of direct discrimination does not incorporate an aspect of ‘reasonableness’, which is a usual consideration in relation to complaints about indirect discrimination. See also: chapter 4 – defining discrimination.

The Corrective Services Act modifications add a reasonableness aspect to complaints of direct discrimination by prisoners. Where discrimination relates to less favourable treatment of a prisoner with an attribute compared to a prisoner without the attribute, it is not discrimination if a protected defendant can prove the treatment was reasonable. In deciding the reasonableness question, the tribunal must consider factors that include security and good order, costs, administrative and operational burden, disruption, budget, resources, availability of alternatives, the prisoner’s dignity, and unfair prejudice to other prisoners.³⁴³

If a protected defendant imposes or proposes to impose a term with which a prisoner with an attribute cannot comply, but a higher proportion of prisoners can comply, it may be indirect discrimination. Consistent with indirect discrimination provisions generally, if the term is reasonable, then it is not discrimination. Under the Corrective Services Act modifications the same list of reasonableness factors noted above, such as security and good order, must also be considered by the tribunal.³⁴⁴

The Corrective Services Act modifications also changed the outcomes available to prisoners through the discrimination complaint process. Compensatory orders are only available for prisoners where ‘bad faith’ on the part of the respondent can be proved.³⁴⁵ This represents a departure from the established position in discrimination law that a person’s motive for discriminating is irrelevant.³⁴⁶ If compensation is awarded, the payment of money cannot be directed to the prisoner, but must go to a victim trust fund.³⁴⁷

Barriers to complaining

In chapter 5, we explore the difficulties prisoners who wish to make a discrimination complaint face. The prison population includes disproportionate representation of First Nations people and people with disability. There are low literacy rates and challenges caused by a paper-based process in a prison environment, as well as the additional internal complaints processes required for prisoners. Submissions made to us about the Corrective Services Act modifications indicate that changes to the test for discrimination and adding the requirement to prove ‘bad faith’ are creating yet more barriers to complaining.³⁴⁸

Reasonableness

The Australian Discrimination Law Experts Group stated that the list of factors to determine reasonableness reduces flexibility in interpretation and unreasonably constrains courts and tribunals when making decisions.³⁴⁹ Three submissions were concerned that tribunals and courts would accept a justification of security and good order at face value without exploring whether sufficient evidence for this claim is present.³⁵⁰

343 *Corrective Services Act 2006* (Qld) s 319G.

344 *Corrective Services Act 2006* (Qld) s 319H.

345 *Corrective Services Act 2006* (Qld) s 319I.

346 *Anti-Discrimination Act 1991* (Qld) s 10(3).

347 *Corrective Services Act 2006* (Qld) s 319I and Part 12B.

348 Caxton Legal Centre submission, 16; Legal Aid Queensland submission, 21-22; Sisters Inside Inc submission, 10–11.

349 Australian Discrimination Law Experts Group submission; 66.

350 Australian Discrimination Law Experts Group submission, 66; Legal Aid Queensland submission, 21-22; Caxton Legal Centre submission, 16 – referring to the original decision of *Tafao v State of Queensland* [2018] QCAT 409 at [91] where it was found that using female pronouns for a prisoner would compromise the good order and security of the facility in an overcrowded male prison.

Sisters Inside commented that security and good order is hard to challenge because information is not publicly available and ‘determination is largely inscrutable’.³⁵¹

Submissions also felt that resource constraints should not be a factor that is allowed to justify unfavourable treatment of people who are in the care of the State.³⁵²

Compensation

Sisters Inside considered that it is punitive and unfair to set such a high bar as ‘bad faith’ for the threshold to award compensation.³⁵³ Caxton Legal Centre indicated the Corrective Services Act modifications discourage prisoners from pursuing complaints, which reduces the incentive for prisons to build a culture that respects the human rights of prisoners.³⁵⁴

Human rights considerations

We determined under chapter 5 that mandating an internal complaints process for prisoners is likely to limit human rights in a way that is not reasonable and proportionate as required by the Human Rights Act. The reasoning in that section is also relevant to the Corrective Services Act modifications we explore in this section.

Since 2008 two key developments have increased prisoners’ human rights protections in Queensland: the passing of the Human Rights Act, and the ratification of the *Optional Protocol to the Convention against Torture* (OPCAT), which is a human rights treaty aimed at preventing mistreatment of people in places of detention.

The Corrective Services Act modifications limit key rights recognised by the Human Rights Act, and particularly the rights to:

- equality before the law³⁵⁵
- humane treatment when deprived of liberty.³⁵⁶

The Corrective Services Act modifications limit equality before the law for people who are in custody compared with the general population. A separate and more challenging legal test for discrimination applies to them, and limited capacity for compensation is available.

We consider that these provisions may unreasonably limit the right to humane treatment when deprived of liberty. Humane treatment includes ensuring that a person’s rights should only be curtailed to the extent necessary due to the confinement.³⁵⁷

Human rights may only be subject to reasonable limits that can be ‘demonstrably justified in a free and democratic society’.³⁵⁸ Determining whether a limitation on rights is reasonable and justified involves considering various factors to strike the right balance between protecting human rights and achieving a lawful and legitimate purpose.³⁵⁹

While resourcing constraints and security concerns can make prison environments challenging to maintain for the State, this must be weighed against serious limitations on the right of prisoners to be free from discrimination. Although the reasonableness factors set out in the Corrective Services Act modifications do acknowledge the rights and dignity of prisoners, this seems to be

351 Sisters Inside submission, 9.

352 Sisters Inside submission, 10; Australian Discrimination Law Experts Group submission, 65.

353 Sisters Inside submission, 10.

354 Caxton Legal Centre submission, 16.

355 *Human Rights Act 2019* (Qld) s 15.

356 *Human Rights Act 2019* (Qld) s 30.

357 Explanatory Notes, Human Rights Bill 2018 (Qld) 25.

358 *Human Rights Act 2019* (Qld) s 13(1)

359 *Human Rights Act 2019* (Qld) s 13(2).

overshadowed by resourcing, costs, security, and other factors. This creates a tension with the Human Rights Act which provides a balanced approach to weighing up human rights against the need to achieve a legitimate purpose.³⁶⁰

The Review's position

The Review considers that:

- As we have recommended new tests for direct and indirect discrimination,³⁶¹ retaining the Corrective Services Act modifications which set out modified versions of the current legal definitions would further entrench reduced protections against discrimination for prisoners compared with the general population.
- On balance, the Corrective Services Act modifications may be incompatible with the Human Rights Act.
- The Corrective Services Act modifications unnecessarily import the concept of reasonableness into direct discrimination and constrain the considerations of tribunals and courts when deciding whether discrimination has occurred.
- The requirement to prove 'bad faith' in order to receive compensation is too high a bar when added to the challenges of proving discrimination that complainants face, and discrimination is no less harmful if it was done in 'good' faith.
- Prisoners experience barriers to making discrimination complaints and the Corrective Services Act modifications compound this effect and discourage complaints by prisoners. This in turn limits the opportunities for prisons and service providers to identify trends and issues to be addressed and to promote good practice.

Recommendation 42

42.1 Sections 319G, 319H and 319I of the *Corrective Services Act 2006* (Qld), which alter the tests for direct and indirect discrimination and create restrictions on compensation orders, should be repealed.

Work with children

An exception for discrimination in the work area that is unique to Queensland permits discrimination on the basis of gender identity or lawful sexual activity in relation to employment that involves the care or instruction of minors.³⁶² The exception applies where it is 'reasonably necessary to protect the physical, psychological or emotional wellbeing of minors, having regard to all the relevant circumstances of the case, including the person's actions.'

A working with children risk management and screening process – the 'blue card system' – has existed in Queensland since 2001 and aims to ensure safe environments for children when participating in activities or receiving services. Blue card checks involve screening, ongoing monitoring, and risk management. As the current exception applies only where it is reasonably necessary, having regard to all the relevant circumstances of the case, including the person's actions, the exception appears to be redundant given the rigorous blue card screening processes that are already required for people who work with children.

³⁶⁰ *Human Rights Act* (Qld) s 13(2)(a)–(g).

³⁶¹ Chapter 4 of this Review report – Refining key concepts.

³⁶² *Anti-Discrimination Act 1991* (Qld) s 28.

In the Discussion Paper we noted that:

- No other jurisdiction specifically permits discrimination against sex workers, transgender, or intersex people³⁶³ in this way.
- The exception perpetuates harmful stereotypes about risks posed to children by people with the named attributes.

We asked whether there were any reasons why the working with children exception should not be repealed. The Review received 48 submissions to the Discussion Paper about this topic,³⁶⁴ and concerns about this issue were also raised in consultations³⁶⁵ and in our Have your Say online survey responses.

One submission on behalf of Christian schools suggested that the exception be partly retained because they do not support removing the exception in relation to sex workers to the extent this would present on a working with children check.³⁶⁶

Submissions from a broad range of community organisations, legal services, and organisations representing LGBTIQ+ people and sex workers argued the exception should be entirely removed because:

- The blue card system objectively considers whether a person poses a risk to children.³⁶⁷
- The provision sends a harmful message that trans and gender diverse people, intersex people, and sex workers should not be permitted to work with children, which is against community standards and is not based on evidence.³⁶⁸
- This exception does not exist in any other Australian jurisdiction, which is an indication that it is redundant and unnecessary.³⁶⁹
- The exception is unlikely to be used because all people who work with children are required to go through the blue card check and hold a blue card. If an employer took steps to protect

363 See also: chapter 7 – gender identity and sex characteristics. The Review understands that people who have variations of sex characteristics do not use the term ‘indeterminate sex’ or consider that the Act protects them from discrimination under the ‘gender identity’ attribute, and neither the definition of the attribute as it refers to indeterminate sex, nor the work with children exception have been tested in a tribunal or court.

364 Name withheld (Sub.008) submission; Intersex Human Rights Australia submission; Rainbow Families Queensland submission; Just.Equal Australia submission; Queensland Law Society submission; Aged and Disability Advocacy Australia submission; Queensland Council for Civil Liberties submission; Australian Discrimination Law Experts Group submission; PeakCare Queensland Inc submission; Australian Lawyers Alliance submission; Equality Australia submission; Pride in Law submission; Diversity Queensland Incorporated submission; Caxton Legal Centre submission; Legal Aid Queensland submission; LawRight submission; Maurice Blackburn Lawyers submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Australian Lawyers for Human Rights submission; LGBTI Legal Service Inc submission; Queensland Council for LGBTI Health submission; Abigail Corrin submission; Name withheld (Sub.022) submission; Remi submission; Name withheld (Sub.043) submission; Respect Inc and DecrimQLD submission; Scarlet Alliance, Australian Sex Workers Association submission; Sex Workers Outreach Project Inc NSW submission; Sex Workers Outreach Program (NT) and Sex Workers Reference Group submission; Sienna Charles submission; Magenta submission; Name withheld (Sub.062) submission; Name withheld (Sub.089) submission; Name withheld (Sub.084) submission; Natasha submission; SIN (South Australia) submission; Alistair Witt submission; Stonewall Medical Centre submission; Touching Base Inc. submission, Dr Zahra Stardust submission; Name withheld (Sub.069) submission; Prof John Scott submission; Name withheld (Sub.026) submission; Australian Association of Christian Schools submission; Community Legal Centres Queensland submission; Department of Education (Qld) submission; Name withheld (Sub.066) submission.

365 See for example: Just.Equal Australia consultation, 17 September 2021; Australian Transgender Support Association Queensland consultation, 19 August 2021; Respect Inc consultation, 12 August 2021.

366 Australian Association of Christian Schools submission, 22.

367 See for example: Dr Zahra Stardust submission, 3; Abigail Corrin submission, 1; LawRight submission, 4; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Australian Lawyers for Human Rights submission, 15.

368 See for example: Rainbow Families Queensland submission, 7; Intersex Human Rights Australia submission, 36; Queensland Council for LGBTI Health submission, 11; Just.Equal Australia submission, 9–10; Pride in Law submission, 4.

369 See for example: Equality Australia submission, 21–22; Just.Equal Australia submission, 9–10; Scarlet Alliance, Australian Sex Workers Association submission, 22–23.

children, this would be considered reasonable for the purposes of indirect discrimination,³⁷⁰ or a health and safety exception may apply.³⁷¹

- The exception is likely to be incompatible with a person's right to privacy³⁷² and reputation, and right to equality before the law³⁷³ protected under the *Human Rights Act 2019*³⁷⁴ and in potential contravention of the International Labour Organisation (ILO) *Convention 111 – Discrimination (Employment and Occupation) Convention*, 1958, which requires equality of opportunity and treatment in employment.³⁷⁵

Many stakeholders felt that the provision was offensive and stigmatising, and has serious, negative impacts on the lives of people by:

- preventing people from affected communities obtaining work and volunteer positions³⁷⁶
- generating anxiety and fear about losing employment and career opportunities, which in turn negatively affects mental health in communities that already have higher rates of mental health issues than the general community³⁷⁷
- reducing the ability of sex workers to find alternative employment and leave the adult industry, should they wish to do so.³⁷⁸

A participant in the Respect Inc and DecrimQLD's community survey published in their submission expressed that:

*I would like to study social work or being a teacher's aid but I know I cannot do that at the same time as being a sex worker because I would be excluded from employment because of my sex worker status.*³⁷⁹

The impact on trans and gender diverse people was expressed by a participant in a community survey of LGBTIQ+ people published in the Queensland Council for LGBTI Health submission, who said that:

*To disqualify trans and gender diverse people from working with children is to deny them a significant portion of the workforce, one which some trans folks may be passionate about. It may also result in the further ostracization of individuals from their cisgender peers, creating additional room for dysphoria and the myriad of problems that come as a result of said dysphoria.*³⁸⁰

Two submissions said that the government should issue a formal apology to the affected communities.³⁸¹

370 Equality Australia submission, 21–22.

371 *Human Rights Act 2019 (Qld)* s 107–108

372 *Human Rights Act 2019 (Qld)* s 25.

373 *Human Rights Act 2019 (Qld)* s 15.

374 Respect Inc and DecrimQLD submission, 45–46, 53.

375 Australian Lawyers for Human Right submission, 17.

376 Name withheld (Sub.008) submission; Sienna Charles submission, 5–6; Name withheld (Sub.062) submission, 3.

377 Rainbow Families Queensland submission, 44; Queensland Council for LGBTI Health submission, 11.

378 Scarlet Alliance, Australian Sex Workers Association submission, 13–14; Sienna Charles submission, 5–6.

379 Survey participant (35), Respect Inc and DecrimQLD submission, 35.

380 Survey participant (6), Queensland Council for LGBTI Health submission, 69.

381 Intersex Human Rights Australia submission, 36; Australian Lawyers for Human Rights submission, 17.

Human rights considerations

The exception for work with children limits human rights protected by the Human Rights Act including the:

- right to equality before the law³⁸²
- right to privacy and reputatio.³⁸³

Human rights may be subject to reasonable limitations.³⁸⁴ Safeguarding the right of children to receive the protection that they need (because they are children), and that is in their best interests,³⁸⁵ is a legitimate purpose to be achieved. However, we do not consider the working with children exception is necessary to protect children's rights, when the existing mechanism of the blue card system is in place. It is incorrect and offensive to suggest that people are a risk to children solely because of their gender identity, intersex status, or because they are or have been a sex worker.

The Review's position

The Review considers that:

- there is no justification to retain the current section 28 because it:
 - is redundant
 - is offensive and stigmatising
 - may not be compatible with the Human Rights Act.

Recommendation 43

43.1 That the Act should repeal the 'work with children' exception which allows discrimination on the basis of lawful sexuality activity or gender identity in the area of work.

Assisted reproductive technology

The current Act permits assisted reproductive technology service providers to discriminate on the grounds of sexuality and relationship status.³⁸⁶ The exception was inserted in 2002 when relationship status and sexuality were added to the protected attributes in the Act, and allowed clinicians to lawfully refuse services based on 'clinical and ethical standards.'³⁸⁷

Since then, society's attitudes have changed as shown by the passing of marriage equality laws. The largest fertility service provider in Queensland actively advertises to and provides services for same-sex couples and single parents.³⁸⁸

In the Discussion Paper, we asked whether there were any reasons why the Act should not apply to providing assisted reproductive technology services (such as artificial insemination, IVF, and

382 *Human Rights Act 2019* (Qld) s 15(3).

383 *Human Rights Act 2019* (Qld) s 25.

384 *Human Rights Act 2019* (Qld) s 13.

385 *Human Rights Act 2019* (Qld) s 26 (2).

386 *Anti-Discrimination Act 1991* (Qld) s 45A.

387 Explanatory notes, Discrimination Law Amendment Bill 2002 (Qld) 15.

388 Queensland Fertility Group, 'Options for single women' *Queensland Fertility Group* (Web page, 23 November 2021) <<https://www.qfg.com.au/trying-to-conceive/options-for-single-women>>; Queensland Fertility Group, 'Same sex IVF', *Queensland Fertility Group* (Web page, 23 November 2021) <<https://www.qfg.com.au/trying-to-conceive/same-sex-ivf>>.

other treatment). We received 18 submissions on this topic, and all said that the provision should be removed,³⁸⁹ because:

- Assisted reproductive services, like other health services, should be available to anyone who needs them regardless of their relationship status or sexual orientation.³⁹⁰
- The exception implies that single parents and non-heterosexual couples are not worthy of assistance to become parents and perhaps should not become parents at all, which is contrary to all research in this area,³⁹¹ and inconsistent with the introduction of marriage equality.³⁹²
- Fertility service providers in Queensland do not exclude people based on their sexuality or relationship status and some target their services to the LGBTQ+ community,³⁹³ which shows that the law is not reflecting practice.

The Queensland Council for LGBTI Health sought community views about access to assisted reproductive technology services,³⁹⁴ and one survey participant described a discriminatory comment when accessing these services:

*My wife was told she needed a good man.*³⁹⁵

However, because of the current exception this type of discrimination may not be unlawful.

Inconsistency with federal laws

Submissions highlighted that service providers are currently required to comply with the federal Sex Discrimination Act,³⁹⁶ which has protected people from sexual orientation discrimination since 2013.³⁹⁷

Three submissions considered that, based on their understanding of existing case law,³⁹⁸ the exception may not stand up to a challenge based on section 109 of the *Australian Constitution*, which says that, 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

In *McBain v Victoria*, the Federal Court found that an exception in the now repealed *Infertility Treatment Act 1995* (Vic), which permitted refusal of infertility treatment because of marital status, was inconsistent with the Sex Discrimination Act, and therefore inoperative under section 109 of the *Constitution*.³⁹⁹

389 Name withheld (Sub.008) submission; Name withheld (Sub.026) submission; LGBTI Legal Service Inc submission; Equality Australia submission; Just.Equal Australia submission; Diversity Queensland Incorporated submission; Rainbow Families Queensland submission; Maurice Blackburn Lawyers submission; Australian Lawyers for Human Rights submission; Pride in Law submission; Legal Aid Queensland submission; Queensland Law Society submission; Queensland Council for LGBTI Health submission; Intersex Human Rights Australia submission; Australian Discrimination Law Experts group submission; Public Advocate (Qld) submission; Queensland Council for Civil Liberties submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission.

390 See for example: LGBTI Legal Service Inc submission, 7; Just.Equal Australia submission, 10.

391 See for example: Rainbow Families Queensland submission, 2 and 7–8; Australian Lawyers for Human Rights submission, 18; Diversity Queensland submission, 5.

392 Pride in Law submission, 4.

393 See for example: Rainbow Families Queensland submission, 7; Legal Aid Queensland submission, 93; Queensland Law Society submission, 19.

394 Queensland Council for LGBTI Health submission, 70–71.

395 Survey participant (6), Queensland Council for LGBTI Health submission, 71.

396 *Sex Discrimination Act 1984* (Cth) s 22.

397 Equality Australia submission, 22; Queensland Law Society submission, 19.

398 Maurice Blackburn Lawyers submission, 16; Australian Discrimination Law Experts Group submission, 65; Equality Australia submission, 22; Queensland Law Society submission, 19. These cases are *Pearce v SA* [1996] SASC 6233, *McBain v State of Victoria* [2000] FCA 1009, and *EHT18 v Melbourne IVF* (2018) 263 FCR.

399 *McBain v Victoria* (2000) 99 FCR 116.

Human rights considerations

The assisted reproductive technology services exception limits human rights protected by the Human Rights Act including the:

- right to equality before the law⁴⁰⁰
- right to access health services without discrimination⁴⁰¹
- right to protection of families (the fundamental group unit of society) and children.⁴⁰²

While human rights may be subject to reasonable limitations,⁴⁰³ the Review did not identify any justification for such a significant limitation on human rights, and we consider the provision may be incompatible with the Human Rights Act.

The Review's position

The Review considers that:

- there is no justification to retain the assisted reproductive technology services provision because it:
 - is redundant
 - does not meet current community standards
 - may be invalid under the *Constitution*
 - may be incompatible with the Human Rights Act.

Recommendation 44

44.1 The Act should repeal the assisted reproductive technology provision which allows discrimination on the basis of sexuality or relationship status in the area of goods and services.

Tribunal exemptions

In addition to general exceptions and exceptions that are specific to some of the areas of activity where discrimination is unlawful, a person may apply to the tribunal for a temporary exemption from the operation of specific provisions of the Act for a period of up to five years. For work-related matters, the tribunal is the Queensland Industrial Relations Commission, and for all other matters the tribunal is the Queensland Civil and Administrative Tribunal.

If granted by the tribunal, an exemption provides a complete defence to discrimination for the duration of the exemption.⁴⁰⁴

Examples of exemptions granted by a tribunal may include allowing a health and fitness club to operate exclusively for women, restricting accommodation in a residential unit complex to single people and allowing a regional council to recruit Aboriginal or Torres Strait Islander candidates to an identified traineeship position.

400 *Human Rights Act 2019* (Qld) s 15(3).

401 *Human Rights Act 2019* (Qld) s 37(1).

402 *Human Rights Act 2019* (Qld) s 26. As we discuss in further detail in chapter 7 – family, carer and kinship responsibilities, international human rights law has broadly interpreted the concept of 'family'.

403 *Human Rights Act 2019* (Qld) s 13.

404 *Anti-Discrimination Act 1991* (Qld) s 113.

Some submissions identified issues with the current process for applying for a tribunal exemption, including that:

- The Commission could have a more active role in consultation with relevant groups affected by the exemption.⁴⁰⁵
- The tribunal exemption process is too onerous, costly, and lengthy.⁴⁰⁶
- Longer periods for exemptions (beyond the current 5 year maximum) or permanent exemptions should be available.⁴⁰⁷

The Australian Industry Group suggested that there be an alternative process for organisations to verify that planned affirmative measures are lawful, which would be to vest the Commission with powers to certify such measures, instead of through an application to the tribunal.⁴⁰⁸

During the initial consultation phase, the process of seeking Tribunal exemptions was not identified as a priority issue that the Review should consider. The Review makes the general observation that further guidance materials could be provided to encourage private and non-government organisations to rely on affirmative measures in low-risk cases.

405 LGBTI Legal Service Inc submission, 7–8; Rainbow Families Queensland submission, 3–4.

406 Australian Industry Group submission, 11; Aboriginal and Torres Strait Islander Legal Service submission, 7.

407 Urban Development Institute of Australia submission, 2 – endorsed by Associated Residential Parks Queensland submission, 1.

408 Australian Industry Group submission, 11.



Chapter 9:

Implementing reforms

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Building capacity for change

This report sets out a suite of recommendations to reform and enhance the Anti-Discrimination Act, including a recommendation for a new, rather than revised, Act.

However, legislative change alone will not eliminate discrimination and sexual harassment to the greatest extent possible, or better protect and promote equality – only people can do that.

In the Discussion Paper, we asked what non-legislative measures would be required to ensure that protections under the Act are available to everyone. Our analysis of submissions, consultations, and research has identified three strategies that are required to make changes to the law effective:

- **Awareness and education:** The Commission should work to improve awareness of the Anti-Discrimination Act and protection available, and changes to the law should be communicated effectively. People and organisations who have new obligations should be supported to make positive change.
- **Resourcing reforms:** Key stakeholders that play a role in enforcing the Act or providing legal and advocacy services to support people to access protections require adequate funding to ensure the law is effective for people who experience discrimination and sexual harassment.
- **Monitoring the changes:** Reforms are more likely to succeed if an oversight committee is tasked with implementing reforms and evaluating the effectiveness of the changes over time.

This section sets out ways to ensure that a change to the law results in a change in practice, and that fewer people experience discrimination and sexual harassment.

Awareness and education

Increasing awareness of the Anti-Discrimination Act and providing education about the law is essential to ensuring the law is effective, and has two aspects:

- increasing general awareness about the Act and the role of the Commission
- ensuring changes to the law are communicated effectively.

Increasing awareness of the Act

We were told in submissions that more needs to be done so people understand discrimination is a legal issue and they can make a complaint about it.¹

In emphasising the need for increased awareness and community legal education about the Act, stakeholders referred to the barriers to making a complaint explored in chapter 2. These barriers include the complexity of the Act and the difficulty of aligning complex legal tests with people's experiences of unfair treatment.

Community understanding

The Review identified a relationship between levels of awareness and education about the Act and the extent of community understanding of the nature and impact of discrimination and sexual harassment.

¹ See for example Legal Aid Queensland submission, 55; Caxton Legal Centre submission, 15; Queensland Mental Health Commission submission, 9.

As the Queensland Mental Health Commission told us:

Whilst legislative change is required to make the process of making a complaint about discrimination easier for people with a mental illness, shifts in whole-of-community understanding and de-stigmatisation of mental illness is required.²

Awareness about Queensland's discrimination law is not separate from, but intimately connected with, broader public awareness about discrimination in all its forms – including racism, ableism, ageism, sexism, and other prejudices. This sentiment was expressed by the Ethnic Communities Council of Queensland (ECCQ), who told the Review:

ECCQ, our members and staff believe that there needs to be a shift in culture and attitudes. This will be strengthened through a proactive and preventative Anti-Discrimination Act.³

We heard that by increasing community understanding about the ways in which discrimination and sexual harassment can occur, what causes it, and the impact it has on people, the number of complaints made to the Commission may be reduced. In turn, this has the potential to enhance efficiencies for duty holders, organisations, the Commission and tribunals.⁴

This discussion about increasing education and awareness to enhance the effectiveness of the Act ties in with our recommendation to introduce a positive duty to take reasonable and proportionate steps to eliminate discrimination and sexual harassment. In chapter 6 we explore the need for education to support compliance with the duty, and to realise its ultimate aims.

Targeted engagement

The Review also identified the importance of targeting community legal education to people with protected attributes, including First Nations people,⁵ culturally and linguistically diverse communities – particularly newly settled migrant populations,⁶ young people,⁷ people who experience psychosocial disability,⁸ sex workers,⁹ and others.

Legal Aid Queensland told us that First Nations people have commented on the lack of general understanding about discrimination in their community, including not understanding that discrimination is a legal issue for which a person can bring a formal complaint, or not knowing where to go for information and advice.¹⁰

Legal Aid Queensland also told us that community legal education delivered to the Queensland African Communities Council received very positive feedback, but continued demand for education and resources outstrips current funding.¹¹

Respect Inc and DecrimQLD told us that anti-discrimination laws need to be understood by the broader community if sex workers are to be ensured protection, and that broad public education campaigns are required. They gave the example of a 2011 campaign by the Irish sex worker organisation, Turn Off the Blue Light, that features a poster series aimed at changing the public's perception and awareness of sex workers.¹²

2 Queensland Mental Health Commission submission, 9.

3 Ethnic Communities Council of Queensland submission, 1.

4 Queensland Mental Health Commission submission, 13.

5 See for example: Queensland Indigenous Family Violence Legal Service consultation, 25 August 2021; Caxton Legal Service submission.

6 See for example: Ethnic Communities Council of Queensland submission.

7 See for example: Youth Advocacy Centre submission; Young peoples' roundtable 17 February 2022.

8 See for example: Queensland Mental Health Commission submission; Australian Psychological Society submission.

9 See for example: Respect Inc and DecrimQLD submission, Scarlet Alliance submission.

10 Legal Aid Queensland submission, 55.

11 Legal Aid Queensland submission, 55.

12 Respect Inc and DecrimQLD submission, 32.

We were also told that stakeholders want the Commission to conduct targeted engagement with communities to ensure that those people understand the protection available to them in particular, and feel comfortable making a complaint. For example, The Islamic Council of Queensland told us that for the Commission to be trusted, they would need to partner with community leaders who are trusted by the community.

Communicating the changes

To deliver on the objectives of the reform, putting the new Act in place will require a period of change for stakeholders, including the public sector, the private sector and industry, the community sector, and for the Commission itself.

Changes will require shifting the focus of duty holders to prevention, as required by a positive duty. An educational program designed to communicate changes in the Act's coverage will be required, including about reforms to attributes included in the Act and the scope of exceptions. To ensure education and training is meaningful, community engagement will need to be tailored to the audience.

The Commission will have a significant role in communicating the changes to the law and should partner with stakeholders to support and enhance an understanding of the nature and purpose of the changes. A strategic plan to provide education and awareness of these changes should be considered, including to communicate the phases of change to the public.

Resourcing reforms

Additional resourcing will be required to ensure the Act can meet its core objectives and new focus, and to support the Commission's expanded role.

The resourcing implications that flow from the report's recommendations will be closely considered by government. While the Terms of Reference for the Review do not ask us to assess the costs and benefits of recommendations, or to quantify the cost of discrimination and sexual harassment, we have developed recommendations that promote cost-effectiveness of the overall system.

We consider that the considerable individual, social, and economic costs of discrimination and sexual harassment are important factors to be weighed up in determining the costs and benefits of the reforms.

One of the core recommendations is that the Commission and organisations with legal obligations under the Act take a more proactive role in eliminating discrimination and sexual harassment to the greatest extent possible. We consider that prioritising prevention through the mechanism outlined in chapter 6 can achieve financial efficiencies by reducing the need for complaints to be made and creating positive systemic outcomes.

With those considerations in mind, we have identified that adequate financial investment is required for stakeholders that play a key role in eliminating discrimination and ensuring enforcement of the Act.

Legal advice and assistance

Legal service providers and other advocacy services that currently advise people about the Act and represent them in proceedings require increased funding. This will enable them to play a role in broader legal education, provide timely legal advice that supports the filtering of complaints that reach the Commission, and ensure all complainants have access to appropriate legal advice and representation.

Through submissions, we were told that Legal Aid Queensland and community legal centres require additional funding to:

- provide legal advice and representation to complainants¹³
- assist complainants who wish to bring representative proceedings under the Act.¹⁴

Caxton Legal Centre said that:

Urgent action is needed to address chronic underfunding of legal services in this area of law... There are only two community legal centres with funding specifically for disability discrimination (we believe both roles are part time). Most of us who do this work, including Caxton, do so as an internal priority within our generalist programs and there is overwhelming competition for the small allocation of resources for 'generalist' law in Queensland.¹⁵

This message was also emphasised by non-legal stakeholders, such as Equality Australia that said:

There should be support for people bringing claims, including additional earmarked funding granted to Legal Aid or community legal centres to provide advice and representation for complainants who are financially disadvantaged.¹⁶

We also identified that First Nations community legal and advocacy centres require a specific funding stream to ensure that people who experience discrimination have access to free and appropriate legal advice and representation.

Individual and system advocates

Individual advocacy and systemic advocacy play a key role in ensuring the protection afforded by the Act are accessible to everyone. Individual advocacy includes helping people to become aware of the law, supporting them to make a complaint, and supporting them through the process. Systemic advocacy includes advocacy at a systems level to advance the interests of a particular group.

Both forms of advocacy support people to connect with the system and legal services, to make complaints, and to advocate for broader, systemic change. This includes an expanded role for organisations to bring complaints, including representative complaints, that aim to achieve a broader systemic impact.

Legal Aid Queensland noted that resourcing of community groups capable of assisting people to make complaints and/or bring representative complaints is necessary and cost-effective.¹⁷

The Review observed that community organisations that support groups with specific attributes are indispensable for ensuring the right support is provided.

For example, Queenslanders with Disability Network told us that accessible advice and support is critical for people with disability, and that improving accessibility can range from creating resources in alternative formats (such as plain text or Auslan), providing adequate disability support and client assistance in buildings, and using correct language.¹⁸

¹³ Legal Aid Queensland submission, 5, 65; Caxton Legal Centre submission, 12.

¹⁴ Legal Aid Queensland submission, 41.

¹⁵ Caxton Legal Centre submission, 22.

¹⁶ Equality Australia submission, 40.

¹⁷ Legal Aid Queensland submission, 65.

¹⁸ Queenslanders with Disability submission, 1.

The Commission

Additional resourcing of the Commission will ensure the objectives of the new Act and expanded functions of the Commission, including in relation to enforcement of a positive duty, can be achieved.

During the Review, we repeatedly heard that adequate resourcing of the Commission is required to ensure the law is effective. This feedback was particularly focused on ensuring that the Commission has the resources to undertake work to prevent and address systemic discrimination, including having a greater role in enforcing the Act in areas in which people face insurmountable barriers to individual enforcement.

We were told that adequate resourcing is required for the Commission to ensure it can:

- provide appropriate guidance on what a positive duty is, how it is discharged, and to support organisations to meet their obligations¹⁹
- collect and publish rigorous, de-identified case studies and data about the prevalence and nature of discrimination, and the outcomes negotiated when complaints are settled²⁰
- become a more proactive statutory body with a role in enforcement, including by conducting systemic investigations²¹
- continue current dispute resolution services, education, training, and monitoring functions without depleting resources for these services to support additional enforcement initiatives.

Tribunals

The Review considered the benefits and drawbacks of complainants having a direct right of access to the tribunals, and ultimately our recommendations do not include a direct right of access, but instead retain a filtering role for the Commission.

Notwithstanding that conclusion, our recommendations may have resourcing implications for the tribunals.

In their submission to the Review, the Queensland Civil and Administrative Tribunal (QCAT) commented that while matters of policy are a matter for government, increased workload can flow from additional jurisdiction and any ambiguity in legislation. Their submission also observed that:

...changes to any legislation which has the potential to increase QCAT work load in any respect will need to carry with it additional funding which meets, at least, the Registry and Tribunal costs of that additional workload.²²

The Review's position

The Review considers that:

- Appropriate resourcing is required to ensure that changes to the law are effective, and to achieve the objectives of the law. Shifting the focus to prevention may reduce instances of discrimination and sexual harassment and achieve long-term efficiencies and reductions in costs for duty holders, the Commission, and the tribunals.

19 Queensland Law Society submission, 13.

20 Assoc Prof Dominique Allen submission, 5; Legal Aid Queensland submission, 61.

21 For example: Community Legal Centers Queensland submission, 3; Queensland Advocacy Incorporated submission.

22 Queensland Civil and Administrative Tribunal submission, 7.

Recommendation 45

45.1 The Queensland Government should ensure adequate resourcing is provided to:

- legal and advocacy services, including Legal Aid Queensland, community legal centres, and Aboriginal and Torres Strait Islander legal services
- community groups that undertake individual and systemic advocacy about the Anti-Discrimination Act
- tribunals to ensure that any expansion of their jurisdiction is properly resourced
- the Commission to ensure that it can give effect to its expanded role and functions.

Monitoring the changes

If a new Act is introduced, key stakeholders will need to work together to implement the changes required to give effect to the new Act.

Given the potential intersections with other areas of reform, including protections under the Work Health and Safety laws, the Queensland government's implementation of the Respect@Work recommendations, and changes under consideration that may introduce other positive obligations on employers to enhance diversity, this would benefit from a whole-of-government approach.

Monitoring progress to establish whether changes to the law are effective should start after the Queensland Government's response to the report and continue for up to two years after the Act is passed to ensure that the changes are embedded in workplace culture, places of education, the Queensland's public service, and the broader community.

The Review's position

The Review considers that:

- Creating a time-limited oversight committee to coordinate and oversee implementation of the reforms will help to ensure the objectives of the new Act are achieved in practice.
- This approach will enhance consistency with the ongoing efforts of the Queensland Government to implement reforms of the Respect@Work report and other related reforms.
- The Committee will be well placed to identify, manage, and address any limitations identified in the early stages of implementation.

Recommendation 46

46.1 The Queensland Government should issue a formal response to this Report within three months of being tabled indicating whether the recommendations are accepted, accepted in principle, rejected, or subject to further consideration.

46.2 A Parliamentary Committee should oversee implementation of the new Act.

46.3 The Attorney-General should establish an interdepartmental 'Building Belonging' working group to oversee the reforms contemplated by this report. The working group should include representation from the Queensland Government, the Queensland Human Rights Commission, and may include representatives from key stakeholder streams.

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Appendix A:

Consultations

Stakeholder consultations

2Spirits

Aboriginal and Torres Strait
Islander Legal Service

Aboriginal and Torres Strait Islander Women's
Legal Service North Queensland

Aged and Disability Advocacy Australia

AMPARO Advocacy Inc

Associated Christian Schools

Australian Christian Higher Education Alliance

Australian Discrimination Law Experts Group

Australian Human Rights Commission

Australian Industry Group

Australian Transgender Support
Association Queensland Inc

Bangladeshi Community Queensland

Basic Rights Queensland

Brisbane Bahá'í Community

Caxton Legal Centre

Christian Schools Australia

Clubs Queensland

Coalition for Biological Reality - Australia and NZ

Cosmos Community Services

Council on the Ageing

Crown Law

Department of Housing and Public Works

Fair Go for Queensland Women

First Peoples Disability Network Australia

GLD Australia

Immigrant Women's Support Service

Independent Education Union Qld
& Northern Territory Branch

Independent Schools Queensland

Indigenous Consumer Assistance Network

Intersex Human Rights Australia

Intersex Peer Support Australia

Islamic College of Brisbane

Islamic Women's Association of Queensland

IWD Brisbane Meanjin

Just.Equal Australia

Kevin Cocks AM

Kingston East Neighbourhood Group

Legal Aid Queensland

Maternity Choices Australia

Maurice Blackburn Lawyers

Micah Projects

National Association of People with HIV Australia

Noosa Shire Council

Office of Industrial Relations (Qld)

Office of the Public Guardian (Qld)

One in Three Campaign

Open Doors Youth Service

Pride in Sport

Public Service Commission (Qld)	Queensland Program of Assistance for Survivors of Torture and Trauma
Q Shelter	
QSport	Queensland Rugby League
Queensland Aboriginal and Islander Health Council	Queensland Small Business Commissioner
Queensland Advocacy Incorporated	Queensland Transcultural Mental Health
Queensland African Community Council	Respect Inc
Queensland Catholic Education Council	Save Women's Sport Australasia
Queensland Churches Together – Christian Churches	Sikh Nishkam Society of Australia
Queensland Churches Together – Multi-Faith	Sisters Inside Inc
Queensland Civil and Administrative Tribunal	Supreme Court of Queensland
Queensland Collective for Inclusive Education	Tenants Queensland
Queensland Council for LGBTI Health	The Real Estate Institute of Queensland
Queensland Council of Unions	Townsville Community Law
Queensland Family and Child Commission	Trans Health Australia
Queensland Indigenous Family Violence Legal Service	United Nations Association of Australia – Queensland Chapter
Queensland Industrial Relations Tribunal	Victoria Legal Aid
Queensland Law Reform Commission	Victorian Civil and Administrative Tribunal
Queensland Mental Health Commission	Victorian Equal Opportunity and Human Rights Commission
Queensland Network of Alcohol and other Drug Agencies	Women's Legal Service
Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia	Youth Advocacy Centre Inc
	Youth Affairs Network Queensland
	YWCA Australia

Roundtables

Roundtable	Date
People with disability	4 February 2022
Legal practitioners	10 February 2022
Young people (under 18)	17 February 2022
Young people (over 18)	17 February 2022
Queensland Government departments	14 February 2022
Small business	7 March 2022

Public consultations

Location	Date
Rockhampton	23 November 2021
Townsville	25 November 2021
Yarrabah	2 December 2021
Cairns	3 December 2021

The background of the page is an abstract pattern of irregular, overlapping shapes in various shades of blue and white. The shapes are defined by thick, white, hand-painted lines that create a sense of depth and texture. The blue areas have a mottled, watercolor-like appearance. The overall effect is a modern, artistic, and somewhat organic geometric design.

Appendix B:

Submissions

Aboriginal and Torres Strait Islander Legal Service	Fair Go for Queensland Women
Aged and Disability Advocacy Australia	FamilyVoice Australia
Allen, Assoc Prof Dominique	Freedom for Faith
Associated Christian Schools	Fibromyalgia ME/CFS Gold Coast Support Group Inc
Associated Residential Parks Queensland	Foundation for Aboriginal and Islander Research Action
Australasian College for Emergency Medicine	Fowler, Adjunct Assoc Prof Mark
Australian Association of Christian Schools	Harrison, R
Australian Christian Higher Education Alliance	HUB Community Legal
Australian Christian Lobby	Human Rights Law Alliance
Australian Discrimination Law Experts Group	Independent Education Union - Queensland and Northern Territory Branch
Australian Industry Group	Independent Schools Queensland
Australian Lawyers Alliance	Intersex Human Rights Australia
Australian Lawyers for Human Rights	IWD Brisbane Meanjin
Australian Psychological Society	Jabri Markwell, Rita
Brolan, Dr Claire E	James Cook University
Carol, Dr Catherine	Joint Churches
Catalano, Dr Grazia	Jones, Dr Nicky
Cuthbert, Shane	Jones, Jesse
Caxton Legal Centre	Just.Equal Australia
Cewburn, Elizabeth	King, Jenny
Chamber of Commerce and Industry Queensland	LawRight
Charles, Sienna	Legal Aid Queensland
Christian Schools Australia	LGBTI Legal Service Inc
Clubs Queensland	Life Without Barriers
Community Legal Centres Queensland	Love, Jenna
Corrin, Abigail	Lowry, Daniel
Council on the Ageing	Magenta
Department of Education (Qld)	Marrie AM, Prof Henrietta and Adrian Marrie
Department of Transport and Main Roads (Qld)	Maternity Choices Australia
Diversity Queensland Incorporated	Maurice Blackburn Lawyers
Equality Australia	Medical Insurance Group Australia
Eros Association	Multicultural Australia
Ethnic Communities Council of Queensland	

Multicultural Queensland Advisory Council	Queensland Baptists
Name withheld (Sub.004)	Queensland Catholic Education Commission
Name withheld (Sub.006)	Queensland Civil and Administrative Tribunal
Name withheld (Sub.008)	Queensland Council for Civil Liberties
Name withheld (Sub.009)	Queensland Council for LGBTI Health
Name withheld (Sub.010)	Queensland Council of Social Service
Name withheld (Sub.022)	Queensland Council of Unions
Name withheld (Sub.026)	Queensland Family and Child Commission
Name withheld (Sub.031)	Queensland Law Society
Name withheld (Sub.043)	Queensland Mental Health Commission
Name withheld (Sub.059)	Queensland Network of Alcohol and Other Drug Agencies Ltd
Name withheld (Sub.060)	Queensland Nurses and Midwives Union
Name withheld (Sub.062)	Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia
Name withheld (Sub.064)	
Name withheld (Sub.066)	
Name withheld (Sub.088)	Queensland Rugby League
Name withheld (Sub.069)	Queenslanders with Disability Network
Name withheld (Sub.089)	Rainbow Families Queensland
Name withheld (Sub.116)	Respect Inc and DecrimQLD
Name withheld (Sub.118)	Royal Australian & New Zealand College of Psychiatrists
Name withheld (Sub.135)	
Name withheld (Sub.160)	Russell, Jake
Natasha	Scarlett Alliance, Australian Sex Workers Association
Neami National	Scott, Prof John
Office of the Public Advocate (Qld)	Scripture Union Queensland
Office of the Public Guardian	Sex Work Law Reform Victoria Inc
Office of the Special Commissioner, Equity and Diversity (Qld)	Sex Workers Outreach Program (NT) and Sex Workers Reference Group
One in Three Campaign	Sex Workers Outreach Project Inc NSW
PeakCare Queensland Inc	Sikh Nishkam Society of Australia
Petrus	SIN (South Australia)
Pride in Law	Sisters Inside Inc
Queensland Advocacy Incorporated	Social Responsibilities Committee of the Anglican Church Southern Queensland (Diocese of Brisbane)
Queensland Alliance for Mental Health	

Souyet, Maria Teresa Santelices
Stardust, Dr Zahra
Stonewall Medical Centre
Suncoast Community Legal Service Inc
TASC National Limited
Tenants Queensland
The People's Revolution
Touching Base Inc
Townsville Lot Owners Group
Transcultural Mental Health
Turni, Dr Conny
United Nations Association of
Australia, Queensland chapter
Urban Development Institute of
Australia Queensland
Vision Australia
Wickham, Marianne
Witt, Alistair
Women's Legal Service Qld
Youth Advocacy Centre Inc



Queensland
Human Rights
Commission