

Building belonging

Review of Queensland's
Anti-Discrimination Act 1991

July 2022



Queensland
Human Rights
Commission





Queensland
**Human Rights
Commission**

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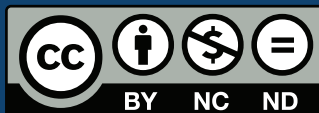
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Scott McDougall

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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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.



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