



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 LGBTIQ 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

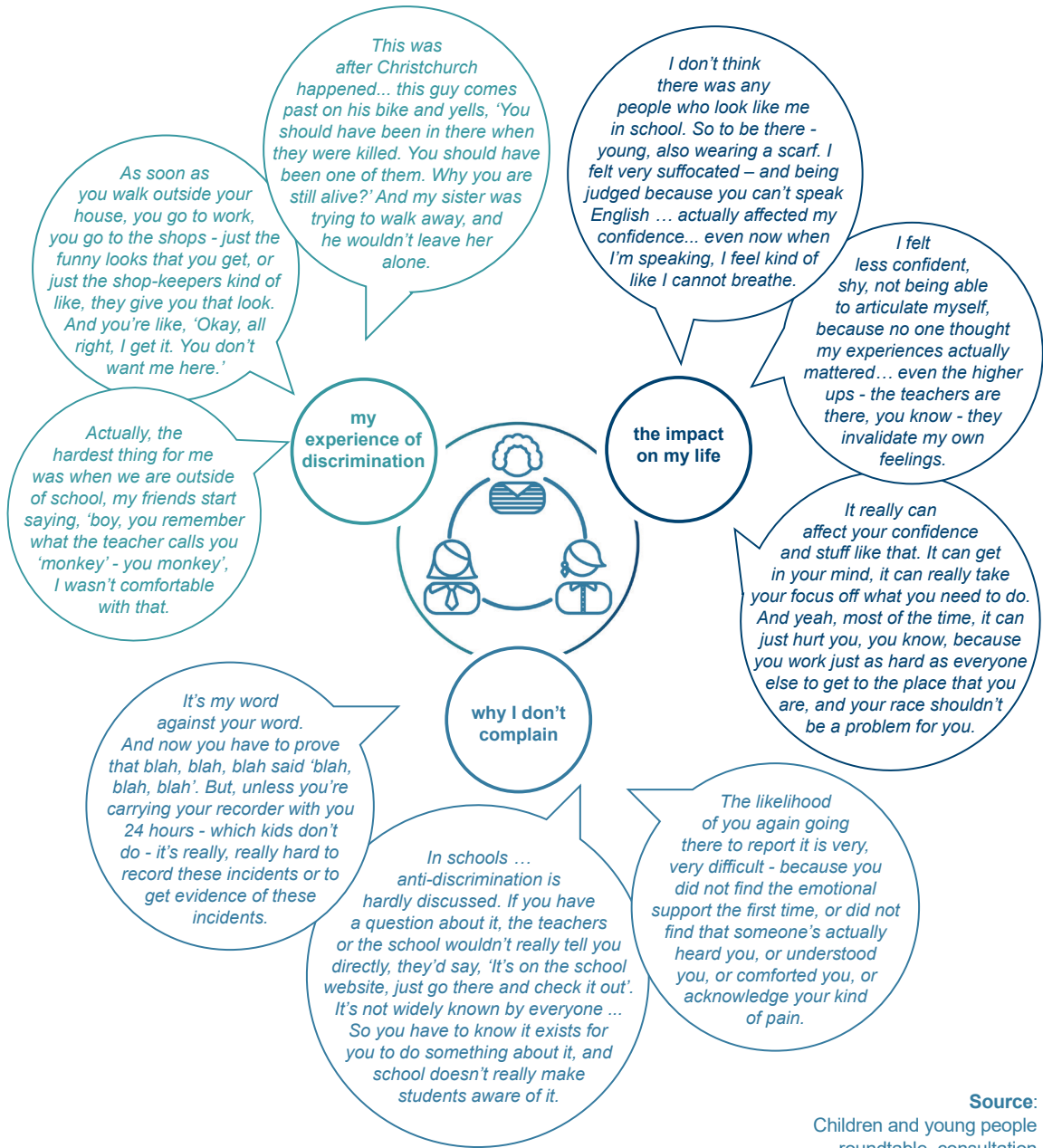
80 The Terms of Reference ask us to consider whether there is a need for any reform to enhance and update the *Anti-Discrimination Act 1991* (Qld) to best protect and promote equality and non-discrimination and the realisation of human rights.

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

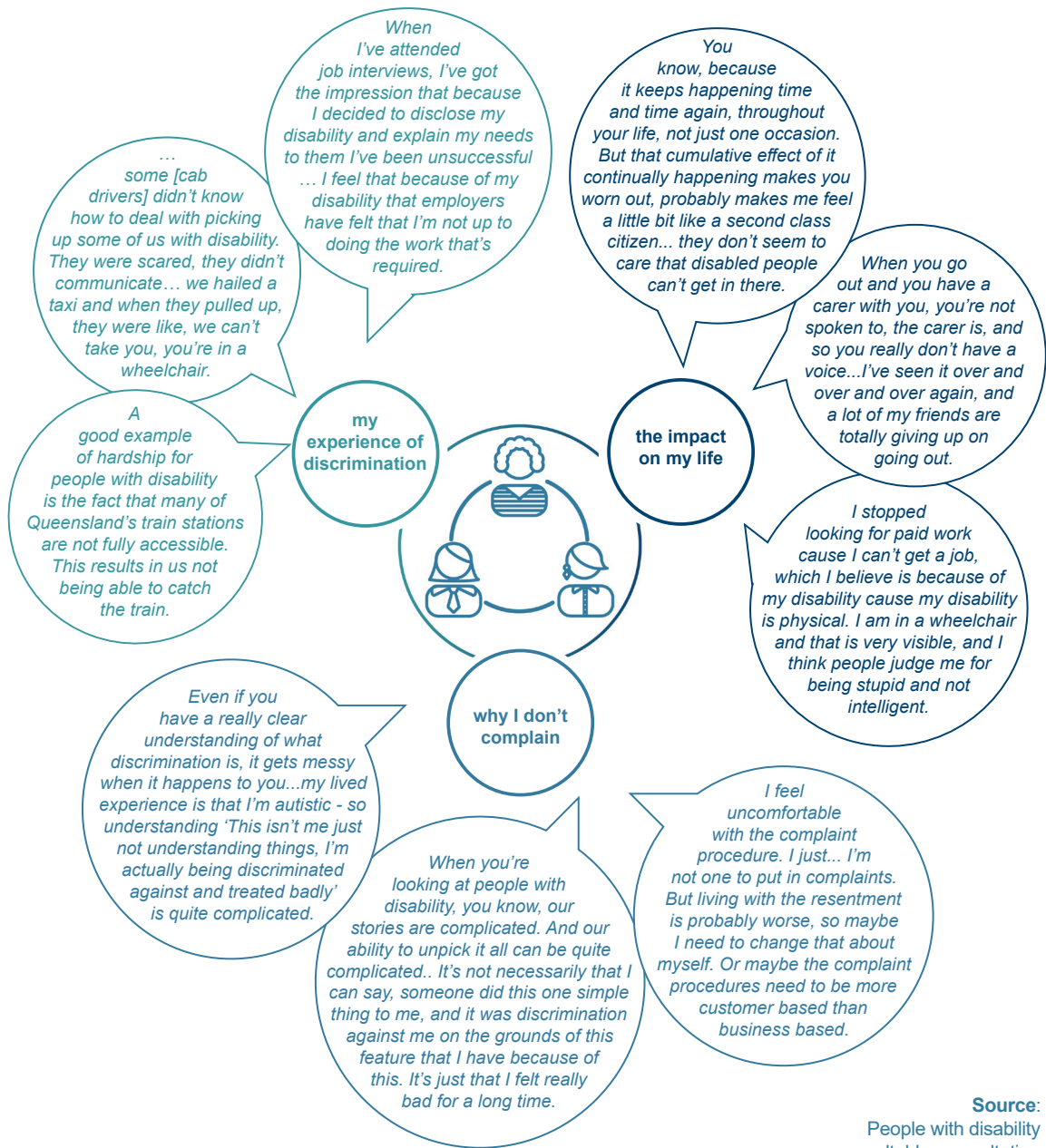
The Review frequently heard that people do not report incidents of discrimination or sexual harassment because of multiple overlapping barriers to making a complaint.

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.

