



Chapter 3:

Laying the foundations

Contents

A new Anti-Discrimination Act	76
Introducing new legislation	76
Objectives of the Act	77
Should an objects clause be included?	77
What should the objectives be?.....	78
Other interpretive provisions	80
The preamble.....	81
Should the name of the Act change?	82

A new Anti-Discrimination Act

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

The Review recommends five key reforms:

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

Introducing new legislation

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

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

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

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

The Review's position

The Review considers that:

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

Recommendation 1

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

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

Objectives of the Act

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

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

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

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

Should an objects clause be included?

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

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

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

Interpretative provisions can also help to:

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

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

Benefits of an objects clause

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

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

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

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

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

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

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

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

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

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

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

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

Comparative approaches

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

Those provisions refer to the following concepts:

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

What should the objectives be?

Feedback on draft provisions

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

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

7 Queensland Law Society submission, 3.

8 Queensland Catholic Education Commission submission, 6.

9 Queensland Law Society submission, 3.

10 Assoc Prof Dominique Allen submission, 3.

11 Queensland Civil and Administrative Tribunal submission, 13.

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

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

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

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

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

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

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

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

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

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

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

Should other concepts be included?

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

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

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

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

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

21 Queensland Law Society submission.

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

23 Queensland Law Society submission, 6-7.

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

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

26 Queensland Nurses and Midwives Union submission, 7.

27 Caxton Legal Centre submission, 17.

28 Australian Discrimination Law Experts Group submission, 39.

Concept of religious freedom

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

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

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

The Review's position

The Review considers that:

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

Other interpretive provisions

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

Beneficial interpretation

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

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

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

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

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

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

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

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

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

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

Other interpretive provisions

The Act currently includes provisions that assist with interpretation.³⁹

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

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

The preamble

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

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

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

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

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

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

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

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

38 Australian Discrimination Law Experts Group submission, 39.

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

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

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

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

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

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

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

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

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

Should the name of the Act change?

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

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

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

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

The Review's position

The Review considers that:

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

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

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

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

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

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

49 Queensland Council for Civil Liberties submission, 10.

50 Legal Aid Queensland submission, 58.

51 Legal Aid Queensland submission, 58.

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

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

Recommendation 2

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

