QCAT

Queensland Civil and Administrative Tribunal

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4 May 2022

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Human Rights Commissioner
Queensland Human Rights Commission
PO Box 15565
City East QLD 4002
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Dear Mr McDougall,

REVIEW OF THE *ANTI-DISCRIMINATION ACT 1991* (Qld)

Introduction

1. On 23 April 2021, the Attorney-General requested that the Queensland Human Rights Commission (QHRC) undertake a review of the *Anti-Discrimination Act* 1991 (Qld). The President of the Queensland Civil and Administrative Review Tribunal, The Honourable Justice Mellifont, and other representatives from the Tribunal met with the QHRC on 21 February 2022 to have a preliminary discussion about the Terms of Reference of the review.

2. This submission addresses the Terms of Reference and considers, where relevant, the Discussion Questions raised by the QHRC in the Discussion Paper released by it in November 2021.[1] This submission should be read together with those matters raised in our meeting of 21 February 2022.

3. To recap on some of the points discussed during the consultation, I note the following:

   - **CONSISTENCY:** The Discussion Paper, at page 89, states that "with a split jurisdiction, there will inevitably be inconsistencies between the approaches of the two tribunals, which are dealing with similar matters in different 'areas of activity' (work or non-work). A uniform set of rules and procedures in the form of a handbook may be one way to alleviate this issue." As discussed, I am not in favour of a requirement to this effect. QCAT handles multiple jurisdictions and in order to seek to promote consistency and efficiencies throughout QCAT, we need to be able to develop and alter our own procedural manuals and documents as needed.

   - It would not be best practice to seek to impose identical procedures as the QIRC and QCAT. Under such an approach, QCAT's best practice position will inevitably,

[1] Queensland Human Rights Commission's ('QHRC') Review of Queensland's Anti-Discrimination Act: Discussion Paper.

ultimately be compromised in order to have the same procedures as between the two organisations. This is not ideal.

- While I well understand and am in favour of good communication between the QIRC and QCAT to see what each of us are doing in this particular space so that we can learn from each other, this should be by way of informal arrangement as opposed to a requirement of uniformity in terms of procedural documents. Homogeneity for the sake of homogeneity will inevitably lead to unnecessary compromise to the best functioning of QCAT.

Data

4. It is difficult to provide any meaningful feedback with respect to the suggestion as the data. The discussion paper states, "more recently, reasons for decisions are not being published regularly in favour of oral reasons." I am not sure this is entirely correct. Reasons for decisions are still being published. When oral decisions are given, they are sometimes converted into written reasons and published. It is acknowledged that this is not always the case. A reason for this is lack of resources. QCAT has limited resources to ensure that decisions are then put into a publishable format. This all takes time. With more resources directed specifically to more oral reasons being converted into publishable form, more can be published.

5. The Discussion Paper also states that:

> Further data on the outcomes of matters that proceed to the tribunal might be helpful to identify systemic themes and trends including in relation to the number of complaints settled or withdrawn prior to hearing. Improving data sharing between the two tribunals and the Commission may support greater visibility of outcomes and improve overall transparency at all stages of the process.

6. The Discussion Paper does not set out what the baseline is, against which "further data" and "improving data sharing" can be assessed. Without knowing this, and precisely what data is sought, and the reason for which it is sought (beyond a generalised notion of greater visibility of outcomes and improving overall transparency – greater visibility of what aspect of outcomes? Overall transparency as to what?), it is not possible for QCAT to indicate whether or not that type of data is able to be captured and provided. As you might imagine, QCAT's computer systems are legacies systems and have extremely low functionality and flexibility with respect to many, many things, including the ability to capture, record and analysis data. This should change with the digitisation process which is occurring across the Courts – but this will take a significant period of time and we are

yet to see how the functionality of those new systems will play out. If specific data is sought by the HRC, then it is imperative that that is precisely specified so that QCAT, and other justice agencies, are able to take that into account in providing input into the digitisation process. It will be likely much harder to retrofit the new digitised system to seek to capture specific data. These things have to be front end inputs into design.

7. Those comments having been made, if QCAT is advised precisely what data is being sought, and for what reason/s, we can then advise whether or not that type of information is able to be captured and provided by QCAT in a meaningful way (ie. a way which marries with the reasons for the data being sought). We could also advise about resources implications to QCAT for capturing and providing that data, that is, an estimate of what it will cost. Any work in this respect will not, I would expect, be cost neutral nor able to be absorbed within existing QCAT budget.

Substantive Law – general observations

8. Precisely what the substantive law is, is of course a matter for policy and thus not something which I will comment on.

9. What I can observe is that a legislative regime which is readily capable of clear interpretation can be expected to involve less of QCAT's hearing time, and thus leads to a less resource intensive process.

10. It is clear that any amendment to legislation which has the capacity to increase the types and thus numbers of matters for which a person can make application in QCAT will have significant resource implications for QCAT because it will increase the numbers of such matters. As such, any model which proposes amendments in this respect will require proper funding to QCAT to deal with those additional matters, and for those matters to be properly costed, and funded up front.

Specialisation

11. The Discussion paper states that "We heard that since the QADT ceased, there may have been a reduction in the extent of specialisation in anti-discrimination law and this may not be beneficial for the development of case law." No specifics are provided in respect of this, so I shall proceed from the premise that what is being asserted is that at the QADT, the permanent members only dealt with anti-discrimination matters. Presumably sessional members dealt with various other types of law in the course of their work, with sitting on anti-discrimination matters being only one part.

12. The Discussion Paper states that discrimination law is complex and technical. QCAT agrees. The Discussion Paper also states that it includes 'sensitive subject matter quite

distinct from that of other disputes that come before the tribunals'. Without specificity, it is hard to respond to that assertion, and it is noted that QCAT deals with a great deal of matters which are complex, technical and concern very sensitive subject matter. I shall proceed, however, on the basis that the point being made is that in a technical and complex area such as discrimination, there is great value in a member having subject matter expertise.

13. The suggestion made is that "there may be some benefit in introducing specialist lists in the tribunals", and the example given is the requirement in section 99H of the *Child Protection Act 1999* (Qld).

14. While child protection has a specialisation clause, it is readily distinguishable from anti-discrimination law, given that child protection calls for a specific experience in terms of contextual experience of how the child protection systems work in practice.

15. This is different from anti-discrimination law which, at its heart involves the application of legal test to facts, and those facts can be across an extremely broad spectrum of context. It is not amenable to appointing a specialist of the nature contemplated by the CPA, given the breadth of the ADA's operation across human experience.

16. What I apprehend to be the real issue under underpinning this suggestion and the discussion paper is the desire that those decision makers deciding anti-discrimination matters have particular expertise and experience in anti-discrimination matters. It is certainly the case that in allocating members to matters, their particular experience is taken into account and QCAT does all that it can within existing resources to allocate members who have particular subject matter expertise, and will continue to do so. I note also that there is a "specialist list" already, of a sort, within QCAT. The anti-discrimination matters have a designated list manager member.

17. So, anti-discrimination like a number of other areas within QCAT have their own lists with a list manager and in constituting the Tribunal for any given matter, the nature of the matter together with the experience and expertise of the members who have availability and capacity to sit on the matters whether it be in person or on the papers is considered.

18. The other difficulty in suggesting a legislative requirement the persons who sit on anti-discrimination matters have a particular additional qualification is that it can significantly negatively impact on the overall capacity of the Tribunal to service the very broad scope of what we have to do at QCAT. QCAT has a limited number of permanent members, and tens of thousands of matters to deal with each year. QCAT does use sessional members for matters, as you are aware, and in choosing which sessional member should

deal with any given matter, regard is had to their particular expertise; however the sessional member budget within QCAT is vastly inadequate, and care must be taken on each occasion a decision is made to engage a sessional member to conduct a matter because it involves expenditure. The long and the short of this is that if one or more of the permanent members must have some statutory expertise in any given area, then that, in turn can have a limiting effect on servicing other matters. If the government policy ends up being that there should be a dedicated specialist member for ADA matters, within specific legislated qualifications, then that member should be the subject of specific funding.

19. While it would be beneficial overall in the administration of justice for QCAT members to be remunerated at a level commensurate with Magistrates, for example,[2] care would need to be taken in creating a model where there is an ADA model who is remunerated at a higher level than other permanent members.

20. Whilst of course anti-discrimination is an extremely important area of the law, it cannot be said to be more so than some of our other complex matters which we deal with in QCAT. For example, you might have a person sitting in a low-level anti-discrimination dispute in one hearing room, and someone making an end-of-life decision in the hearing room right next to them.

21. If, however, government takes the policy view that there should be a designated ADA member, whose role is to manage the ADA list, and sit on the most complex ADA matters, then, from an operational perspective, it would be better that that person is designated as a permanent, and separately funded, Senior Member, rather than a permanent, and separately funded, Ordinary Member.

Whether the anti-discrimination act should be amended so as to permit the Commissioner to intervene, consistent with the Human Rights Act provisions

22. This is a matter of policy and not one on which it is appropriate for me to comment.

23. Clearly when the Commissioner intervenes in a matter it gives the Tribunal the significant benefit of a subject matter expert assisting the Tribunal in coming to the correct decision. It can have the impact of perhaps increasing the time somewhat for a matter to be heard given that it involves an additional person in the mix, however one would think that the valuable input of the Commissioner in these matters would be outweighed by that extra

[2] QCAT members are remunerated at a significantly lower level than Magistrates, despite the amount of work the members perform, and the complexity of many of those matters.

time taken nonetheless we must consider the resource implications and make sure that is taken into account in allocation of resources.

Reversal of onus

24. If government policy is to reverse the onus in respect of ADA matters, then we take this opportunity to observe that anecdotal experience has shown, in the *Fair Work Act* space, the reversal of onus means that once an employee raises on the evidence that he/she was fired for a prescribed reason, the employer has to prove this was not the reason. This process of proving the negative has, we understand, made cases longer and more difficult, including, from time to time, complex questions of the privilege against self-incrimination and penalty privilege.[3]

25. Thus, if there is to be a reversal of onus, QCAT will need funding to seek to cover the additional time and complexity matters will take.

Other matters – some additional matters not discussed in our meeting: some general observations before turning to some specifics

26. As observed above, we are conscious that a number of the issues for discussion involve matters of policy. Matters of policy are of course a matter for government. The observations in this document are directed towards potential operational consequences to QCAT.

27. Increased work load can:

    (a) Flow from additional jurisdiction on QCAT; and

    (b) Also flow from ambiguity in legislation/absence of express clarity in legislation: these features create the potential for statutory interpretation fights which occupies QCAT resources and time.

28. As such, this submission does touch on some areas in category (b).

29. As you are aware, QCAT is significantly under resourced, and changes to any legislation which has the potential to increase QCAT work load in any respect will need to carry with it additional funding which meets, at least, the Registry and Tribunal costs of that additional workload.

COMPATIBILITY OF THE ADA WITH THE *HUMAN RIGHTS ACT 2019* (Qld)

30. Section 15 of the *Human Rights Act 2019* (Qld) (HRA) provides:

[3] Which can be particularly complex in the context of a corporation who does not carry such privileges, but, where not claiming privilege has the effect that an individua loses the effect of his/her claim.

> **15 RECOGNITION AND EQUALITY BEFORE THE LAW**
>
> (1) Every person has the right to recognition as a person before the law.
>
> (2) Every person has the right to enjoy the person's human rights without discrimination.
>
> (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.
>
> (4) Every person has the right to equal and effective protection against discrimination.
>
> (5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination. (emphasis added)

31. "Discrimination" for the purposes of the HRA is defined to include direct and indirect discrimination within the meaning of the *Anti-Discrimination Act* (AD Act), on the basis of an attribute stated in s 7 of that Act.[4] Accordingly, the extent of the protection of the right to be treated equally and without discrimination in the HRA is defined by reference to the meaning of discrimination in the AD Act.

32. The AD Act, on the other hand, makes no reference to the HRA (which postdates the AD Act) or to concepts, for example, of proportionality, that underpin the HRA. This is so even though the HRA has a significant impact on the AD Act, both in terms of how it is interpreted and on how the Tribunal exercises its functions in relation to the processes and procedures for hearings of referred complaints.

The impact of the HRA on the AD Act

33. To summarise, the effect of the HRA on the AD Act, as I understand it, is that the Tribunal must:

    a. interpret provisions of the AD Act to the extent possible, consistent with their purpose, in a way that is compatible with human rights (s 48 HRA); and

    b. to the extent that the Tribunal is performing a function of a public nature (s10 HRA) and is acting in an administrative capacity (s 4(b), s 9(4)(b) HRA):

        i. act and make decisions in a way compatible with human rights (s 8, s 13, s 58(1)(a) HRA; and

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4 HRA, Schedule 1.

ii. apply the HRA when exercising functions under Part 2 (Human Rights) and Part 3, Division 3 (Interpretation of Laws) (s5(2) HRA).

Granting exemptions under s 113 of the ADA

34. The Tribunal has power under s 113 of the AD Act to exempt a person, people or class of people from the operation of a specified provision of the Act. Section 103 of the AD Act provides that it is not unlawful to discriminate with respect to a matter that is otherwise prohibited under Part 4 if an exemption in ss 104 to 113 applies.

35. The Tribunal has held that, for the purpose of granting an exemption under s 113 of the AD Act, the Tribunal is acting as a public entity (*Fernwood Womens Health Clubs (Australia) Pty Ltd* [2021] QCAT 164 at [29], relying on *Re Ipswich City Council* [2020] QIRC 194). Accordingly, in deciding whether to grant an exemption, s 58 of the HRA must be applied. Section 58 of the HRA requires the Tribunal to conduct itself in a way that is compatible with human rights, for example in the processes applied and, ultimately, in how the matter is determined. For example, in determining whether a hearing based only on the written submissions of the applicant and the QHRC is appropriate. Section 58 also requires the Tribunal to identify any human rights it considers may be relevant to the proposed exemption and to consider whether its decision would be compatible with human rights.

36. A decision is defined in s 8(b) of the HRA to be compatible with human rights if it limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13.

37. Section 13 of the HRA provides:

> **13. Human rights may be limited**
>
> (1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.
>
> (2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant-
>
> (a) the nature of the human right;
>
> (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose;

(e) the importance of the purpose of the limitation;

(f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;

(g) the balance between the matters mentioned in paragraphs (e) and (f).

38. The discretion in granting an exemption under the AD Act must therefore be considered not only in the context of the AD Act but also in view of whether any limitation on human rights which would result from granting the exemption is "reasonable and justifiable" within the meaning of s 13 of the HRA.

39. For example, in *Fernwood*, the proprietor of a gym exclusively for women sought exemption from the provisions in the AD Act which prohibit discrimination on the basis of sex. The human right to equal and effective protection against discrimination (s 15 HRA) was *prima facie* limited by the exclusion of men from the gym on the basis of their sex. However, a decision is defined in s 8(b) of the HRA to be compatible with human rights if it limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13. Accordingly, the exercise of discretion involved asking whether the exemption decision was a reasonable limit on the human right in s 15, which in turn required analysis of the factors in s 13(2). This process of analysis is required now in respect of all exemption applications under the AD Act.

For consideration:

If the government policy position is one of compatibility, then it may be that less QCAT hearing time would be taken up if there is an express statement in the AD Act that any exemption must be allowed only to the extent the exemption is a "reasonable and justifiable" interference with a human right in accordance with s 13 of the HRA". Once again, policy and how it is to be enacted is, of course, a matter for government; but the clearer the law can be in seeking to implement that policy, the less QCAT hearing resources will likely be occupied.

The defence of "reasonableness" in indirect discrimination

40. The AD Act definition of "indirect discrimination" is set out in s 11. It includes that the discriminatory term imposed is not "reasonable". The test of "reasonableness" operates as a defence to a complaint of indirect discrimination.

41. Section 48 of the HRA requires the Tribunal to interpret statutory provisions to the extent possible, consistent with their purpose, in a way that is compatible with human rights.

42. It follows that s 11 of the AD Act, including the element of "reasonableness", must be interpreted by the Tribunal in a way compatible with human rights.

43. Section 8(b) of the HRA defines "compatible with human rights" so that, relevantly, a statutory provision is compatible if it limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13.

44. Section 13 of the HRA has been said to incorporate the "proportionality test", that is, that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

45. Applying the proportionality test to the defence of "reasonableness" in indirect discrimination complaints means asking whether the term was a "proportionate means of achieving a legitimate aim".

46. Whether or not the AD Act and the HRA should be amended to integrate them, and if so in what manner, may involve broader policy considerations. Policy considerations are of course for government, not QCAT. I raise the issue because wherever legislation is enacted which gives rise to questions of compatibility between different Acts, there are operational consequences for QCAT because more hearing time is likely to be consumed in hearing and determining such questions.

Balancing the competing human rights of both parties

47. Other jurisdictions have faced circumstances where the rights of a complainant needed to be balanced against those of the respondent.

48. In a case where a bakery refused to provide a cake to a gay man iced with a message in support of gay marriage, the UK Court of Appeal held that the issues were: first, whether the bakery discriminated on the grounds of political opinion by refusing to supply a cake iced with the particular message; and secondly, if it did, whether the discrimination provision should be read down (under s 3 of the HRA 1998 (UK), (the equivalent of our s 13) because it was incompatible with the rights of freedom of religion and freedom of

expression: see *Lee v Ashers Baking Co Ltd* [2020] AC 413; cf *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission* (2018) 201 L Ed 2d 35.

49. Cases such as this show that anti-discrimination legislation may in some circumstances need to be reconciled with the competing human rights of the alleged discriminator.

50. We note that, at the complaint stage, it is routine for the QHRC to identify the potential human rights of the complainant in the complaint, but not those of the respondent. In order to achieve compatibility between the AD Act and the HRA, insofar as they are relevant, the human rights of both parties need to be identified at the complaint stage. This practice would assist in making parties focus on relevant issues earlier. This could then be addressed in any conciliation conducted by the QHRC. Identifying all potential discrimination and human right issues at the outset will increase efficiencies by reducing time spent by the Tribunal in directing parties to file contentions addressing the potential application of the HRA and any necessary applications and submissions to amend the complaint.

For consideration:

Thus, in terms of QCAT operational efficiency, it would be beneficial for QHRC to clearly identify, in considering whether to accept the complaint, which human rights of the complainant/s and the respondent/s are potentially impacted.

THE PREAMBLE AND PRELIMINARY PROVISIONS (INCLUDING WHETHER TO ADOPT A MORE POSITIVE APPROACH)

51. The Preamble of the AD Act provides:

> *An Act to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct*

52. Given the significance of the HRA to the application of the AD Act, you may consider appropriate to indicate the relevance of the application of the HRA to the interpretation of the AD Act (and to the Tribunal's role) in a preamble to the AD Act or in the objects provision, namely in s 6, Chapter 2, Part 1 of the AD Act.

53. This is more so in view of the principle that in construing remedial legislation, like the AD Act, the courts have a special responsibility to take account of and give effect to the objects and purposes of such legislation: *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359.

For consideration:

If the government's intended policy position is that the provisions of the AD Act are to be read in a way that is compatible with the human rights under the HRA, then, it is suggested this could be made plain in a way which would carry into effect the statement of principle set out in *Waters* (as extracted above. Again, this observation is made from an operational perspective: greater clarity in the legislation as to its intended operation assists in limiting hearing time and time determining such matters.

So too would inclusion of a clear legislative statement about how the HRA affects the role of the Tribunal in the exercise of its jurisdiction under the HRA. Further, if the government policy position is that the aim of the AD Act is to prevent discrimination, harassment, vilification or victimisation and to achieve substantive equality, then a clear legislative statement of that intended goal upfront assists from a QCAT operational perspective as it limits hearing and decision time in determining the meaning of the legislation.

ATTRIBUTES OF DISCRIMINATION

54. Replacing "impairment" with "disability" would make the attribute consistent with its description in the *Disability Discrimination Act 1992* (Cth).

55. We simply note that the term "disability" is defined more narrowly in s 6 of the *Equality Act 2010* (UK) which provides:

> *(1) A person (P) has a disability if –*
>
> *(a) P has a physical or mental impairment; and*
>
> *(b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day-to-day activities (emphasis added).*

56. We have no comment, though, as to whether this is a preferable approach; nor as to whether any additional attributes of discrimination should be introduced.

For consideration:

Whether "impairment" should be replaced with "disability" to promote equivalence of terms across State and Commonwealth legislation. Again, in so far as this is a matter of policy, it is a matter for government; and not QCAT. In so far as operational consequences are concerned, consistency across legislation *can* (but I acknowledge, does not always) lead to less litigation in seeking to determine the correct statutory interpretation.

AREAS OF ACTIVITY IN WHICH DISCRIMINATION IS PROHIBITED

57. It is relevant to note that the reach of the AD Act has been expanded considerably, albeit indirectly, by the introduction of the HRA. That is particularly so in view of the fact that under the HRA any public entity acting administratively must ensure that its decisions are made in a way that is compatible with human rights, which includes that the effect of the decision is not to discriminate against one person, or group of people: *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33.

For consideration:

Again, how to achieve compatibility between the AD Act and the HRA is a matter of policy for government: but in so far as operational consequences are concerned, the greater clarity as to the interplay of the two Acts, the better.

DEFINITIONS IN THE AD ACT

Definition of direct discrimination

58. The current definition of "direct discrimination", which now includes the "characteristic attribute extension" in s 8, is complex and not easily and effectively applied. It should be noted that complainants are often not legally represented. The complexity of the definition in turn causes delays in matters coming before the Tribunal, because parties are unable to properly formulate their claim or to respond to a claim, in a manner that addresses the statutory requirements. These matters become resource intensive.

59. Section 10 defines "direct discrimination" as follows:

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

60. The application of the direct discrimination test should be straightforward: the idea is a simple one, to determine whether one person was treated less favourably than another person (without their attribute) in the same or materially similar circumstances.

61. Section 8 provides that discrimination on the basis of an attribute includes discrimination on the basis of (a) a characteristic that a person with any of the attributes generally has; or (b) a characteristic that is often imputed to a person with any of the attributes.

62. A difficulty that arises in considering how *one person with an attribute* is treated compared with a *person without the attribute* is identifying the common "material

circumstances" to be taken into account on both sides of the equation as opposed to characteristics or features of the attribute which are not.

63. Cases frequently turn on whether a factor is classified as a material circumstance or as a characteristic of the attribute. This is because, if a matter is a characteristic of an attribute it must (by virtue of s 8 of the ADA) form part of the attribute and accordingly cannot be a feature or element of the comparator.

64. Self-represented litigants are often not able to properly define what the comparator should be for the purposes of the definition of direct discrimination in s 10. The issue is often left undetermined until the hearing. Moreover, in cases where the issue has arisen at an interlocutory stage, for example, in determining an application to strike out the proceedings or part of the proceedings, the problem has arisen in the Tribunal where the Member presiding over the final hearing has not had the same view of the comparator and therefore of the respective merits of the different components of the claim as the Member at the interlocutory stage. These inconsistencies are highly undesirable for a variety of reasons, not least of which is the resource intensive nature of determining the matters: the complexity and nuanced differences of approach associated with the comparator question add to the cost and uncertainty of litigation in the Tribunal and means matters are more likely to be appealed.

65. It is clear that some protection needs to be extended to the characteristics associated with an attribute, otherwise a respondent could possibly argue, for example, that it only objected to the use of a walking stick on an aeroplane, not to the blind person. If the statute did not extend the protection of an attribute to its associated characteristics or features, it could lead to uncertainty (as was the case in *Purvis v New South Wales* (2003) 217 CLR 92) and thus, more litigation. In *Purvis* a student with bad behaviour associated with his disability was excluded from school because of his behaviour. The majority decided that the comparator was someone without the attribute but who had behaved in the same way as the student, which meant he had not been discriminated against. Following *Purvis* the definition of "disability" in the *Disability Discrimination Act* 1992 (Cth) was amended by the insertion of the following:

> *To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.*

66. We note that the UK includes a "characteristic extension" for only certain attributes. This is the case in the *Equality Act* (UK) where it is applied only for disability; pregnancy; parental status; breastfeeding; and family responsibilities. We do not comment as to whether the UK approach is preferable.

For consideration:

Greater clarity can only be beneficial in respect of operational consequences for QCAT. The broader the potential application of direct discrimination, the greater the potential for an increased work load on QCAT. Again, we do not comment on whether it should be broad or narrow; but we do observe that the broader the application, the more resourcing QCAT will need.

Should the Act clarify that direct and indirect discrimination are not mutually exclusive?

67. The QHRC Discussion Paper states that despite High Court authority that direct and indirect discrimination are mutually exclusive, tribunals have found otherwise, referring to *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249. The Discussion Paper refers to the equivalent AD legislation in the ACT which makes clear they are not mutually exclusive by providing:

> when a person discriminates either directly or indirectly, *or both*, against someone else. [5]

68. The reason the same facts can give rise to both direct and indirect discrimination in Queensland is due to the characteristic extension provision in s 8, which was not a feature of the legislation considered at the time by the High Court cases referred to in the QHRC Discussion Paper. The High Court authorities are distinguishable because they were based on legislation different from the Queensland AD Act.

69. In *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249 the relevant attribute was "race". There, a student's failure to comply with the school's hair policy was said to be a "characteristic" of his race because it was customary for young boys of that race to have their hair cut for the first time at a "coming of age" ceremony (in the case of the boy, yet to occur). Because it was a characteristic of his race, the comparator was a student who did not have that characteristic and who therefore *could* comply with the hair policy. This gave rise to a case of direct discrimination and also to indirect discrimination on the basis the uniform policy imposed without exception was unreasonable.

For consideration:

If the intention is that AD Act claims should arise in both direct and indirect discrimination based on the same facts, then the legislation should make clear that claims based on s

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

10 and s 11 are not mutually exclusive so that that point does not need to be litigated in QCAT.

Move away from a comparator focussed test to one based on working out the reason for the treatment

70. The test in the UK legislation (s 13) is as follows:

> *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

71. This is supplemented in s 23 by a requirement that "on a comparison of cases…there must be no material difference between the circumstances relating to each case".

72. The UK test focuses on the real reason for the conduct: namely, why was the complainant treated unfavourably? Was the treatment because of an attribute?

73. The UK test frames the legislative test in such a way that the focus is on the reason why the treatment occurred, rather than on defining an appropriate comparator. As I understand the position in the UK, once the reason is identified then the focus can shift to identifying how a relevant comparator would have been treated.

For consideration:

Again, we do not comment as to whether the UK approach is preferable. This is a matter of policy. If, though, it is considered that is a preferable approach, then any enacting legislation should, of course, be as clear as possible so as to seek to limit statutory interpretation litigation in QCAT which can be resource intensive.

Remove uncertainty surrounding relevance of "motive"

74. Section 10(2), (3) and (4) provides:

> (2) It is not necessary that the person who discriminates considers the treatment is less favourable.
>
> (3) The person's motive for discriminating is irrelevant.
>
> Example—
>
> R refuses to employ C, who is Chinese, not because R dislikes Chinese people, but because R knows that C would be treated badly by other staff, some of whom are prejudiced against Asian people. R's conduct amounts to discrimination against C.

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

75. On the one hand s 10 requires that the real reason for the treatment be determined. On the other, s 10(3) states that a person's motive is irrelevant. This creates uncertainty.

76. It is settled that a person does not have to intend to discriminate for actions to constitute discrimination. In other words, intention to discriminate is not necessary. This means there is a difference between motive and the factual criteria used to make the decision. is made clear in *R v Birmingham* [1989] AC 1155 (a case about sex discrimination based on the nature of entrance exams to selective grammar schools) where Lord Goff said:

> There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned… is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did discriminate on the ground of sex.

77. The difference between motive and factual criteria was also considered in *James v Eastleigh BC* [1990] 2 AC 751 (a case involving different entrance fees for men and women at a local swimming pool) where Lord Bridge said:

> Lord Goff's test [in *R v Birmingham*], it will be observed, is not subjective but objective. Adopting it here the question becomes "Would the plaintiff, a man of 61, have received the same treatment as his wife but for his sex?". The answer is inescapable.

78. Lord Phillips in *Regina (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2010] 2 AC, [2009] UKSC 15 put it this way:

> Whether there has been discrimination on the ground of sex or race depends upon whether sex or race was the criterion applied as the basis for discrimination. The motive for discriminating according to that criterion is not relevant.
>
> The observations of Lord Nicholls of Birkenhead in *Nagarajan v London Regional Transport* [2000] 1 AC 501 and *Chief Constable of West Yorkshire Police v Khan* [2001] 1 WLR 1947, cited by Lord Hope of Craighead DPSC

> at paras 193 and 194 of his judgment, throw no doubt on those principles. Those observations address the situation where the factual criteria that influenced the discriminator to act as he did are not plain. In those circumstances it is necessary to explore the mental processes of the discriminator in order to discover what facts led him to discriminate. This can be illustrated by a simple example.
>
> A fat black man goes into a shop to make a purchase. The shopkeeper says, "I do not serve people like you". To appraise his conduct it is necessary to know what was the fact that determined his refusal. Was it the fact that the man was fat or the fact that the man was black? In the former case the ground of his refusal was not racial; in the latter it was. The reason why the particular fact triggered his reaction is not relevant to the question of the ground upon which he discriminated.
>
> In the *Nagarajan* case… Lord Nicholls approved the reasoning in both the *Birmingham* case… and the *James* case [1990] 2 AC 751. At p 511 he identified two separate questions. The first was the question of the factual basis of the discrimination. Was it because of race or was it because of lack of qualification? He then pointed out that there was a second and different question. If the discriminator discriminated on the ground of race, what was his motive for so doing? That question was irrelevant.
>
> When, at para 29 in the *Khan* case… Lord Nicholls spoke of a "subjective test" he was speaking of the exercise of determining the facts that operated on the mind of the discriminator, not his motive for discriminating. The subjective test described by Lord Nicholls, is only necessary as a seminal step where there is doubt as to the factual criteria that have caused the discriminator to discriminate. There is no need for that step in this case, for the factual criteria that governed the refusal to admit M to JFS are clear.

79. It is clear from UK case law that if the factual criteria is clear there is no need to go further. For example, where a uniform policy or admissions policy is applied where there is no suggestion that the discriminator reached their decision on anything other than the published criteria of the relevant policy.

80. However, where there is doubt as to what operated on the mind of the discriminator, further examination of the facts is required. This is not to ascertain the intention or motive of the discriminator, but to work out why he or she did what they did (what facts were operating on his or her mind): to use the example referred to above, was the customer

refused service because he was black or fat? If it was because he was black, there is no need to enquire further to ask what his or her motive was for treating the person in that way.

81. The distinctions discussed above between the *reason* for less favourable treatment and the *motive* of a discriminator are not understood by many litigants in discrimination matters.

82. There are two sorts of "why" questions: one relevant and one irrelevant. The irrelevant one is the discriminator's motive, intention, reason or purpose. The relevant one is *what caused him or her to act as he did*. The reason for the treatment in *Birmingham* where girls were denied grammar school places, when boys with the same marks got them, was *because they were girls*. The reason the husband in *James* was charged admission to the pool when his wife was not, was *because he was a man*.

For consideration:

Greater precision in s 10 to make the relevant questions in the analysis of an alleged discriminator's reason for treatment clearer would hopefully reduce QCAT hearing time and points to be litigated. If the government policy position is that the crucial questions are: "why was the complainant treated less favourably?" What caused the alleged discriminator to act as they did? Was it on grounds of race? Or for some other reason – like the person was not qualified?" then greater clarity in section 10 would have potentially beneficial operational consequences to QCAT in terms of hearing time.

Definition of indirect discrimination

Can the term be complied with?

83. Section 11 requires identification of a term or practice with which a person must comply and whether the person can comply.

84. The requirement has been interpreted liberally, so that a person will be held unable to comply if, although technically the person could comply, he or she would be compromising their race or religious beliefs to do so: see *Mandla v Dowell Lee* [1983] 2 AC 548 where a student of Sikh faith who could physically remove his turban, was held not to be able to do so in practice, and therefore to be unable to comply with the term imposed by the school's uniform policy.

For consideration:

Amending s 11 to focus on whether a complainant has suffered a particular disadvantage in complying with the term or, whether "in practice" the term could be complied with,

rather than on whether a complainant can comply might have the consequence of the issues before QCAT being clearer, and more capable of objective determination, and thus, potentially less QCAT time in hearing and decision-making. Again, it is a matter for government policy as to what the approach should be: I comment only on the potential impacts on QCAT operationally.

Reasonableness

85. The test for "reasonableness" operates, in effect, as a defence to a claim of indirect discrimination. The operation of the HRA (see discussion about compatibility with the HRA above) requires "reasonableness" to be interpreted in a way compatible with human rights (s 48 HRA). Compatibility is defined in s8(b) of the HRA to mean that the human right can only be limited to the extent that is 'reasonable and demonstrably justifiable in accordance with s 13'.

For consideration:

Taking into account s 13 (which is said to incorporate a proportionality test), including the factors in s 13(2) of the HRA, when applied to the "reasonableness" element in s 11, consideration might be given to bringing the test in the ADA in line with the proportionality test in the HRA.

Again, the test to be adopted is a matter for government policy. I comment only from the perspective that greater clarity, and streamlining, has potential for operational advantage to QCAT in terms of less time at hearing and decision-making.

J AND K: FUNCTIONS, PROCESSES, POWERS AND OUTCOMES OF THE QHRC AND QCAT

86. The current functions and powers of the QHRC and the Tribunal are set out in the following provisions.

87. There is no definition of "complaint" in the AD Act, but s 136 prescribes how a complaint is made. It provides:

> **136 Making a complaint**
>
> A complaint must—
>
> (a) be in writing; and
>
> (b) set out reasonably sufficient details to indicate an alleged contravention of the Act; and
>
> (c) state the complainant's address for service; and

(d) be lodged with, or sent by post to, the commissioner. (emphasis added)

138 Time limit on making complaints

(1) Subject to subsection (2), a person is only entitled to make a complaint within 1 year of the alleged contravention of the Act.

(2) The commissioner has a discretion to accept a complaint after 1 year has expired if the complainant shows good cause.

88. Section 138 achieves two things. First, it provides a time limit within which a complaint may be made as of right. Secondly, it confers a discretion upon the Commissioner to accept a complaint beyond the time limit. Therefore, any complainant making a complaint beyond the time limit has no right to have the complaint accepted but must rely upon a favourable exercise of discretion.

89. Section 139 provides for the regulation of complaints that are frivolous or otherwise lacking in substance. It provides:

139 Commissioner must reject frivolous, trivial etc. complaints

The commissioner must reject a complaint if the commissioner is of the reasonable opinion that the complaint is—

(a) frivolous, trivial or vexatious; or

(b) misconceived or lacking in substance. (footnote omitted)

90. Section 141 provides as follows:

141 Time limit on acceptance or rejection of complaints

(1) The commissioner must decide whether to accept or reject a complaint within 28 days of receiving the complaint.

(2) The commissioner must promptly notify the complainant of the decision.

91. Section 142 obliges the Commissioner to give reasons for rejecting a complaint. It provides:

142 Reasons for rejected complaints

(1) If a complaint is rejected, it lapses and the complainant is not entitled to make a further complaint relating to the act or omission that was the subject of the complaint.

(2) If a complaint is rejected, the complainant may, within 28 days of receiving notice of the rejection, ask the commissioner for written reasons.

(3) If requested, the commissioner must promptly give the complainant written reasons for the rejection.

92. Division 2 of Part 7 concerns "the investigative process". Section 154A provides:

154A Investigation of complaint

The commissioner may investigate a complaint at any time after the complaint is by the commissioner.

93. Section 155 obliges the Commissioner to conduct an inquiry in some circumstances. Various investigative powers are bestowed upon the Commissioner by s 156.

94. Division 3 of Part 7 concerns "the conciliation process". Section 158 provides:

158 Conciliation of complaints

If the commissioner believes that a complaint may be resolved by conciliation, the must try to resolve it in that way.

175 Time limit on referred complaints

(1) The tribunal must accept a complaint that is referred to it by the commissioner, unless the complaint was made to the commissioner more than 1 year after the alleged contravention of the Act.

(2) If the complaint was made more than 1 year after the alleged contravention, the tribunal may deal with the complaint if the tribunal considers that, on the balance of fairness between the parties, it would be reasonable to do so.

95. Section 178 allows amendment to "complaints". It provides:

178 Complaints may be amended

(1) The tribunal may allow a complainant to amend a complaint.

(2) Subsection (1) applies even if the amendment concerns matter not included in the complaint.

96. Sections 175 and 178 provide another level of discretion. An out of time complaint can only be referred to a tribunal if the complaint has been accepted under s 138. It is only a

complaint which has been accepted which proceeds and can ultimately be referred to a tribunal under s 164A. However, by s 175, a discretion exists in the tribunal to refuse to deal with a complaint which was not made within the time prescribed by s 138(1).

97. Section 178 may authorise the amendment of a complaint to include a matter which may have been excluded under s 138(2). However, whether such a course is open depends upon the proper construction of s 142(1).

98. As to the hearing process, ss 204 to 208 provide as follows:

> **204 Burden of proof—general principle**
>
> It is for the complainant to prove, on the balance of probabilities, that the respondent contravened the Act, subject to the requirements in sections 205 and 206.
>
> **205 Burden of proof—indirect discrimination**
>
> In a case involving an allegation of indirect discrimination, the respondent must prove, on the balance of probabilities, that a term complained of is reasonable.
>
> **206 Burden of proof—exemptions**
>
> If the respondent wishes to rely on an exemption, the respondent must raise the issue and prove, on the balance of probabilities, that it applies.
>
> **207 Commissioner may provide investigation reports**
>
> (1) The commissioner may give the tribunal a report relating to the investigation of a complaint which the tribunal is hearing.
>
> (2) The report must not contain a record of oral statements made by any person in the course of conciliation.
>
> (3) The tribunal must give a copy of the report to the complainant and the respondent.
>
> **208 Evaluation of evidence**
>
> (1) The tribunal is not bound by the rules of evidence and—
>
> (a) must have regard to the reasons for the enactment of this Act as stated in the preamble; and
>
> (b) may draw conclusions of fact from any proceeding before a court or tribunal; and

(c) may adopt any findings or decisions of a court or tribunal that may be relevant to the hearing; and

(d) may receive in evidence a report of the commissioner, but only if each party to the hearing has a copy of the report; and

(e) may permit any person with an interest in the proceeding to give evidence; and

(f) may permit the commissioner to give evidence on any issue arising in the course of a proceeding that relates to the administration of the Act.

(2) Nothing said or done in the course of conciliation can be admitted as evidence in a hearing before the tribunal.

99. Section 209 concerns orders which may be made by the Tribunal. It provides, relevantly:

209 Orders the tribunal may make if complaint is proven

(1) If the tribunal decides that the respondent contravened the Act, the tribunal may make 1 or more of the following orders—

(a) an order requiring the respondent not to commit a further contravention of the Act against the complainant or another person specified in the order;

(b) an order requiring the respondent to pay to the complainant or another person, within a specified period, an amount the tribunal considers appropriate as compensation for loss or damage caused by the contravention;

(c) an order requiring the respondent to do specified things to redress loss or damage suffered by the complainant and another person because of the contravention;

(d) an order requiring the respondent to make a private apology or retraction;

(e) an order requiring the respondent to make a public apology or retraction by publishing the apology or retraction in the way, and in the form, stated in the order;

(f) an order requiring the respondent to implement programs to eliminate unlawful discrimination;

(g) an order requiring a party to pay interest on an amount of compensation;

(h) an order declaring void all or part of an agreement made in connection with a contravention of this Act, either from the time the agreement was made or subsequently ...

Improving processes

100. In practice the parties in an AD Act complaint referred to QCAT by the QHRC go through a similar process for a second time. This can cause parties to become frustrated and disillusioned with the proceedings. From their perspective parties are 'duplicating' material by being asked to file material in the Tribunal that they have already submitted to the QHRC.

101. Parties also feel that because conciliation at the QHRC was unsuccessful, they should not be made to participate in another 'compulsory conference' at the Tribunal; that this is unnecessary and causes further delay to the finalisation of their complaint.

102. As we discussed in our meeting, it would be worthwhile for the QHRC and QCAT to discuss further the ways in which the procedures before both could be streamlined and duplication avoided. The examples below are just that: no doubt the QHRC would have views about the examples raised, and its own suggestions on the QHRC and QCAT processes.

103. Looking broadly at the issues, it would seem preferable if matters were referred from the QHRC process in a form more ready to proceed to determination. At least for simpler, more straightforward matters, there could be an expedited process which requires that before referral:

a. The parties are identified (dealing also with whether any other parties should be joined to the complaint);

b. agreed and disputed facts be set out;

c. important witnesses be identified;

d. the issues for determination be clearly articulated; and

e. the nature of the remedy sought be outlined, including the heads of claim under which compensation is sought.

104. In these cases, the Tribunal could 'take off where the matter was left', rather than effectively starting the process all over again. The matter would simply be referred to the

Tribunal in the manner set out above. The referral could also include statements by the parties and any witnesses, prepared for the processes at the QHRC and able to be used at the Tribunal.

105. If the QHRC, in considering and conciliating the complaint, considers a particular witness is critical to the determination of the complaint, that witness could be identified for the Tribunal. This would enable the Tribunal to consider, early in the process, whether a decision should be made under s 98, requiring that person to attend the Hearing. Self-represented litigants may be unaware of the relevance of a particular witness or unaware that the Tribunal has the power to require them to attend: see *Davis v Metro North Hospital and Health Service* [2019] QCAT 18, where an important witness was not called by either party and the Tribunal called the witness at a very late stage of the proceedings. This intervention should ideally occur much earlier so that the parties can properly consider and prepare for the evidence to be adduced.

106. The Tribunal could then, shortly after referral at a short Directions Hearing specifically for those matters identified as 'expedited matters', make any directions for the filing of further evidence if required, and set the matter down for a hearing on a date to be advised.

107. For matters identified as 'complex' the List Manager could have the matter listed for a compulsory conference or long directions before a Member with expertise in the area of discrimination law.

108. In either type of matter, whether on the 'expedited list' or 'complex list' it would be helpful if the QHRC could give the Tribunal a more comprehensive complaint which identifies the basis for the complaint and the events or incidents relied upon as constituting the less favourable treatment. Equally a comprehensive response setting out the respondent's version of events and what he or she says was the reason for the treatment, would ideally be provided.

109. The legislation contemplates that it is the complaint that is amended, not anything filed by way of directions from the Tribunal (that is, the 'contentions'). However, the practice has developed which has resulted in the complaint being superseded by the contentions and it is the contentions that are sought to be amended.

110. Further, the QHRC plays an important role in filtering vexatious and unmeritorious complaints. We suggest, respectfully, that there may be room for a more robust approach in asking for proof of a *prima facie* complaint or background material to support the

allegations. Equally, if the QHRC forms the view the matter is 'trivial', though potentially discriminatory, it should, in line with the AD Act, reject the complaint.

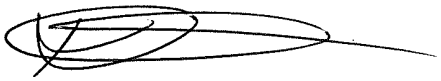
111. As discussed, QCAT is very willing to work with the QHRC towards streamlining their processes to avoid duplication and improve efficiencies, and we are grateful for your indication that the QHRC are content to further discuss same.

112. With QHRC be empowered to play a more active role in the important 'filtering' process, that would allow limited resources to be allocated to more substantive matters.

Conclusion

113. It is hoped that our meeting, and this submission, is of some assistance in your review of the ADA. If there is anything that requires clarification, or supplementation, please do not hesitate to ask.

Yours faithfully,



Hon Justice Kerri Mellifont
President, QCAT