Chapter 5:

Improving the complaints system

Contents

The complaints process

The Terms of Reference ask us to consider:

- whether the Anti-Discrimination Act should reflect protections, processes and enforcement mechanisms that exist in other Australian discrimination laws[1]
- legislative barriers that apply to the prohibition on discrimination[2]
- ways to improve the process and accessibility for bringing and defending a complaint of discrimination, including how the complaints process should be enhanced to improve access to justice for victims of discrimination[3]
- options for more tailored approaches towards, or alternatives to existing frameworks for, dispute resolution that enable systemic discrimination to be addressed as well as discrimination complaints that raise public interest issues.[4]

Under the current legislation, one of the main roles of the Commission is to resolve complaints that are within the jurisdiction of the Act.

The Commission attempts to resolve complaints through conciliation, a process of alternative dispute resolution that aims to resolve a dispute without litigation. The Commission has a 'filtering role' in relation to complaints, which has two elements:

- deciding whether a complaint should be accepted
- holding a conciliation conference.

If a complaint is assessed by the Commission as within its jurisdiction, involvement in conciliation is compulsory for all parties. All parties, including each individual respondent alleged to have contravened the Act, must attend the conciliation conference.[5]

The Commission does not have the role of deciding whether unlawful discrimination or sexual harassment has or has not occurred. Therefore, the focus is on helping parties to reach an agreement, rather than on fact finding and determination.

If the matter does not resolve by conciliation, the complainant may elect to have their complaint referred to the relevant tribunal.[6] Around one in three complaints that do not resolve by conciliation request referral to a tribunal. Of those, a very small proportion of complaints proceed to a hearing and decision.[7]

A complainant does not have a right of direct access to the tribunal. This is consistent with other jurisdictions in Australia, except for Victoria.[8]

In considering whether this process remains the most effective approach to resolving complaints, the Discussion Paper explored whether:

- the process should allow direct access to courts and tribunals, which would bypass the Commission at first instance

1 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(g).
2 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(h).
3 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(l).
4 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(m).
5 Sometimes parties resolve their complaint prior to the conciliation conference, but this is uncommon.
6 *Anti-Discrimination Act 1991* (Qld) ss 164A and 165.
7 In the 2020 calendar year, the Review identified 26 decisions that had been published by the tribunals, many of which were about procedural matters.
8 *Equal Opportunity Act 2010* (Vic) s 122.

- terminology used to describe the Commission's functions and processes should change
- improvements to make the process more efficient and flexible could be implemented
- the time limit to make a complaint should be extended
- the requirement for a written complaint is needed.

A total of 55 submissions responded to specific questions about dispute resolution.[9] We also discussed these topics in consultations and roundtables conducted as part of the Review, consulted with federal and Victorian human rights agencies about their processes and examined the recommendations of past inquiries and reports in those jurisdictions.

Through this process, we have identified the federal and Victorian legislation provides a more flexible process that allows dispute resolution to be tailored to the needs of each complaint. This can make the process more efficient and provide a better outcome for both parties.

Ultimately, we conclude that the Anti-Discrimination Act should provide more flexibility to resolve disputes. We also recommend changes to make the process more efficient and accessible.

Human rights considerations

The right to a fair hearing is engaged by the complaints and tribunal hearing process. The Human Rights Act requires that all parties to a civil proceeding have a right to a decision by a competent, independent and impartial court or tribunal after a fair and public hearing.[10]

This right may not be confined to the hearing process in courts and tribunals, and may extend to the initial decision-making procedures of administrative decision-makers.[11] As complaints made under the Anti-Discrimination Act may proceed to a hearing and decision in a tribunal, both complainants and respondents must be afforded a fair process while the Commission is providing dispute resolution.

In this chapter, we have properly considered the right to a fair hearing when making recommendations about:

- access to the dispute resolution process for a complainant
- respondents' rights to understand and respond to the allegations made against them
- processes regarding time limitations
- the rights of all parties to a reasonably expedient process
- the need for the Commission to remain impartial when attempting to resolve disputes
- the requirement for all judgements or decisions made by a court or tribunal to be publicly available.[12]

Making a complaint

Throughout the Review, we asked stakeholders if the current complaints process under the Anti-Discrimination Act is effective, and whether the law needs to change.

9 The relevant questions in the Discussion Paper, November 2021, were questions 10, 11, 12, 13, 14 and 23.
10 *Human Rights Act 2019* (Qld) s 31(1).
11 See *Kracke v Mental Health Review Board* (2009) VCAT 66 at [370] – [419]; *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221.
12 See *Human Rights Act 2019* (Qld) s 31(3).

The current system largely relies on complaints to enforce the Anti-Discrimination Act. Throughout the Review, we heard that further mechanisms are required to ensure a more proactive approach to supporting and enforcing compliance. During our consultations, stakeholders suggested that a person should be able to tell the Commission about alleged discrimination or sexual harassment, without instigating a formal complaint. This information could inform the Commission's proactive and preventative role, which we discuss in chapter 6. This section will focus on what happens when a person does want to go through an individual process.

Once a person decides to make a complaint, we heard that people face significant barriers in bringing those complaints to the Commission. We also heard that the process can be long and complex. There are other practical barriers such the need to have a high standard of literacy in English, and being able to provide an address for service to make a complaint. Other people feared that making a complaint would have negative repercussions. There were also specific legislative barriers that may reduce access to justice for some people.

In the next section, we focus on three legislative barriers identified through submissions, consultations and research as priority issues for the review - terminology, written complaints, and time limits.

Terminology

The terms 'complaint', 'conciliation', 'complainant', and 'respondent' are used throughout the Anti-Discrimination Act. The Human Rights Act also uses the word 'complaint'.[13]

In response to the Discussion Paper, we received 18 submissions about this terminology and whether it should be changed.[14] Of those, 13 said that, in their view, the current terminology is not appropriate.[15]

These submissions told us that the word 'complaint':

- is legalistic[16]
- may create a perception that the Commission takes the side of the complainant[17]
- keeps the emphasis on complaining and responding, instead of focusing on resolution[18]
- has pejorative connotations[19] including where the person making the complaint is seen as a troublemaker.[20]

13 A person making a complaint to the Commission is not required to identify under which Act they are making their complaint – and the Commission uses a single form for both.

14 Public Advocate (Qld) submission; PeakCare Queensland Inc submission; Australian Lawyers Alliance submission; Fibromyalgia ME/CFS Gold Coast Support Group submission; Joint Churches submission; Sikh Nishkam Society of Australia submission; Australian Psychological Society submission; Vision Australia submission; Women's Legal Service submission; Anti-Discrimination Law Experts Group submission; Jenny King submission; Queensland Council for Civil Liberties submission; Queensland Catholic Education Commission submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Caxton Legal Centre submission; Youth Advocacy Centre Inc submission.

15 Public Advocate (Qld) submission; PeakCare Queensland Inc submission; Australian Lawyers Alliance submission; Joint Churches submission; Sikh Nishkam Society of Australia submission; Australian Psychological Society submission; Vision Australia submission; Women's Legal Service submission; Queensland Catholic Education Commission submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Youth Advocacy Centre Inc submission.

16 Public Advocate (Qld) submission, 3.

17 Joint Churches submission, 17.

18 Queensland Catholic Education Commission submission, 6.

19 Australian Psychological Society submission, 4.

20 Sikh Nishkam Society of Australia submission, 4.

Of the 13 submissions that were in favour of changing the terminology, nine suggested moving towards the word 'dispute' and language used in the Victorian legislation, which includes 'bringing a dispute' and 'dispute resolution'.[21]

While most submissions preferred the word 'dispute', two others pointed out that this language may also be problematic because 'dispute' may suggest that the process is aggressive and argumentative, or there may be negative connotations associated with family relationship dispute processes.[22]

We also heard that for some people, the word 'dispute' may be associated with less serious allegations between parties.[23] These submissions were of the view that terminology should be appropriate to the gravity of the allegations, rather than softening the language for any reason.[24]

Building on these concerns, the word 'dispute' may suggest a disagreement between two parties in circumstances where person who has experienced discrimination or sexual harassment or would consider that 'grievance' is a more appropriate term.

Legal Aid Queensland noted that changing the words alone may not be enough to overcome barriers to making a complaint.[25]

There were therefore mixed views about terminology, and it was hard to identify any one term that was an accurate description of the process, and that also meets diverse community expectations.

The Review's position

The Review considers that:

- The new Act should re-orientate the Commission's role from a complaint handling approach to a focus on dispute resolution.
- The terminology in the Act should retain the word 'complaint' to refer to a matter lodged with the Commission based on an alleged contravention/s of the Act, but refer to 'dispute resolution' to describe the process undertaken to resolve the complaint.
- The Commission should continue to work with relevant stakeholders to improve understanding of the Commission's processes, specifically to help overcome reluctance to bringing a complaint.

Written complaints

The complaints process requires a means to make an allegation of a contravention of the Act ('a complaint').

Organisations and people against whom complaints are made ('respondents') are entitled to procedural fairness.[26] Therefore they must be informed of the allegations against them, have the right to respond to the allegations, and the decision-maker must be unbiased.

21 See *Equal Opportunity Act 2010* (Vic) Part 8.
22 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 8; Legal Aid Queensland submission, 32.
23 Institute for Collaborative Race Research, consultation, 12 May 2022.
24 Caxton Legal Centre submission, 13; Anti-Discrimination Law Experts Group submission, 30.
25 Legal Aid Queensland submission, 32.
26 The duty to provide procedural fairness (or natural justice) requires that a person whose rights, interests or legitimate expectations could be affected will be given a right to be heard (the hearing rule); and that the applicant is entitled to an impartial hearing, that is, that the decision-maker is not biased (the bias rule). This information is taken from Barry Dunphy and Michelle Hutchinson, *Advanced Government Decision-Making* (Clayton Utz, 2008).

We received 29 submissions[27] about whether the requirement for the complainant to make a complaint in writing should be retained.

21 submissions[28] supported assistance being given to complainants to lodge a complaint, with six[29] of these suggesting that assistance should be given to respondents as well. Later in this section, we discuss what type of assistance may be provided. 16 submissions suggested assistance should be given by the Commission, one did not express a preference and the others suggesting an outside agency should give this support.

Several submissions highlighted that there is benefit to respondents in being able to readily understand the allegations against them.[30] In fact, there is potential benefit to all parties, the Commission, and the tribunals if complaints are readily understood at the earliest opportunity, because it makes the whole process fairer and more expedient.

The main concern about the Commission providing assistance to a complainant to lodge a complaint, as opposed to another agency, was maintaining independence (including avoiding a perception of bias) when offering an impartial dispute resolution service.[31] As contemplated in the Discussion Paper, impartiality could be maintained by an outside agency providing the assistance, or by the Commission having separate staff for intake and complaint-handling functions and being transparent about what assistance was given.

Current approach

The Anti-Discrimination Act requires complaints to be made in writing.[32] Unlike the Human Rights Act,[33] there is no provision in the Act to allow the Commission to help complainants put their complaint in writing.

The Act also requires the Commission to promptly notify the respondent 'in writing' of the substance of the complaint if a complaint is accepted.[34] This is done by sending an electronic copy of the written complaint form by email to the respondent, or a hard copy to a postal address if necessary.

27 Public Advocate (Qld) submission; Australian Lawyers Alliance submission; PeakCare Queensland Inc submission; Independent Education Union submission; Women's Legal Service submission; Queensland Network of Alcohol and Other Drug Agencies submission; Name withheld (Sub.026) submission; Anti-Discrimination Law Experts Group submission; Christian Schools Australia submission; Sikh Nishkam Society of Australia submission; Vision Australia submission; Multicultural Australia submission; Queensland Family and Child Commission submission; Jenny King submission; Ethnic Communities Council of Queensland submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Australian Industry Group submission; Caxton Legal Centre submission; Aged and Disability Advocacy Australia submission; Human Rights Law Alliance submission; Department of Transport and Main Roads submission; Respect Inc and DecrimQLD submission; Queensland Law Society submission; Australian Association of Christian Schools submission.

28 Public Advocate (Qld) submission; Australian Lawyers Alliance submission; PeakCare Queensland Inc submission; Women's Legal Service submission; Queensland Network of Alcohol and Other Drug Agencies submission; Name withheld (Sub.026) submission; Australian Discrimination Law Experts Group submission; Christian Schools Australia submission; Vision Australia submission; Jenny King submission; Ethnic Communities Council of Queensland submission; Queensland Catholic Education Commission submission; Queensland Council for Civil Liberties submission; Equality Australia submission; Legal Aid Queensland submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Law Society submission; Australian Association of Christian Schools submission; Department of Transport and Main Roads submission; James Cook University submission (only supportive of pure transcription service).

29 PeakCare Queensland Inc submission; Christian Schools Australia submission; Equality Australia submission; Aged and Disability Advocacy Australia submission; Queensland Law Society submission; Australian Association of Christian Schools submission.

30 See for example: Public Advocate (Qld) submission, 3; Australian Discrimination Law Experts Group submission, 31; Department of Transport and Main Roads submission, 1.

31 See for example, Queensland Law Society submission, 14; Queensland Council of Civil Liberties submission, 6.

32 *Anti-Discrimination Act 1991* (Qld) s 136(a).

33 *Human Rights Act 2019* (Qld) s 67(2).

34 *Anti-Discrimination Act 1991* (Qld) s 143(1).

Respondents are not required to give a written response but can do so if they choose.[35] Some submissions suggested that assistance should be also given to respondents. The Commission is required to provide reasonable accommodations to parties if they require assistance because of a disability or if they have difficulty communicating in English because it is not their first language.[36]

Limitations of written complaints

Of the 29 submissions that touched on these issues, 24 submissions[37] supported non-written[38] complaints being permitted. A number of these submissions framed their support in terms of the Commission making reasonable accommodations to accommodate communication preferences.[39]

The Review heard that the requirement for a written complaint can deter many people from accessing the complaints process.[40] We also heard that most people who experience unlawful discrimination also experience significant barriers to access to justice.[41]

This was identified in our consultations with First Nations community-controlled organisations, or organisations that support First Nations communities. For example, we heard from people engaged with 2Spirts, an organisation that supports Aboriginal and Torres Strait Islander peoples who identify as Lesbian, Gay, Bisexual, Transgender, Intersex, Sistergirls, and Brotherboys across Queensland. We were told that it would be helpful to have someone assist people with making a written complaint particularly because:

> *You know, it may not be the incident that causes… a massive impact on your mental health, but it could be past traumas and PTSD. And so when you're functioning in that space, writing is not, it just doesn't happen, because you're not thinking straight.*[42]

The First Nations Employee Network at Community Legal Centres Queensland also told us that:

> Many people do not want to make a complaint, or experience barriers to accessing the process due to the lack of cultural safety. This is true of the requirement of a written complaint…[43]

35 *Anti-Discrimination Act 1991* (Qld) s 143(2)(c).
36 In this report, we recommend changes the current approach for providing reasonable accommodations. See chapter 5.
37 Public Advocate (Qld) submission; Australian Lawyers Alliance submission; PeakCare Queensland Inc submission; Independent Education Union submission; Women's Legal Service submission; Queensland Network of Alcohol and Other Drug Agencies submission; Australian Discrimination Law Experts Group submission; Sikh Nishkam Society of Australia submission; Vision Australia submission; Multicultural Australia submission; Queensland Family and Child Commission submission; Ethnic Communities Council of Queensland submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Aged and Disability Advocacy Australia submission; Department of Transport and Main Roads submission; Respect Inc and DecrimQLD submission; Queensland Law Society submission; Australian Association of Christian Schools submission.
38 The submissions suggested audio and/or video as had been outlined in the Discussion Paper, but overall did not contain a strong preference or identify any particular issues with either format.
39 See for example: Queensland Family and Child Commission submission, 6; Public Advocate (Qld) submission, 3.
40 See for example: Public Advocate (Qld) submission; PeakCare Queensland Inc submission, Independent Education Union submission; Queensland Network of Alcohol and Other Drug Agencies submission; Sikh Nishkam Society of Australia submission; Queensland Family and Child Commission submission; Ethnic Communities Council of Queensland submission; Legal Aid Queensland submission; Queensland Advocacy Incorporated consultation, 12 August 2021; Bangladeshi Community consultation, 15 August 2021; Queensland Indigenous Family Violence Legal Service consultation, 25 August 2021; 2Spirits consultation, 13 September 2021.
41 Law Council of Australia, *The Justice Project Final Report* (2018), as cited by Australian Discrimination Law Experts Group submission, 30.
42 2Spirits consultation, 13 September 2021.
43 Community Legal Centres Queensland submission, 5.

The Ethnic Communities Council of Queensland similarly told us that the complaint system is not culturally responsive or supportive, and the most significant hurdle is that all complaints must be written.[44]

PeakCare Queensland noted they support measures that promote participation and increase accessibility for people with a diverse range of abilities and from culturally and linguistically diverse backgrounds.[45]

The Commission currently provides accommodations that are necessary for parties, to both complainants and respondents, to participate in the complaints process in a way that ensures procedural fairness. For example, the Commission translates complaints made in languages other than English and translates letters or information into other languages as necessary. This does not, however, overcome the difficulty that some complainants have in providing a written complaint, particularly where the issue is a low level of literacy or disability.

These issues could be addressed by complainants being given assistance to lodge a written complaint. In practical terms, this would mean a person could speak with a staff member of the Commission, who would put their words in writing.

Comparative approaches

ACT approach – oral complaints

Of the Australian jurisdictions, only in the ACT can a complaint be made orally, and only if the Commission is satisfied on reasonable grounds that exceptional circumstances justify action without a written complaint.[46] The example of 'exceptional circumstances' provided in the Human Rights Act is if waiting until the complaint is put in writing would make action in response to the complaint impossible or impractical.

Queensland's Human Rights Act

In Queensland, the Human Rights Act allows the Commission to provide 'reasonable help' to a complainant where satisfied that the complainant needs help to put the complaint in writing.[47]

The Commission has a single form for all complaints, whether they be under the Human Rights Act or the Anti-Discrimination Act. Given that a person making a complaint may not be aware of which Act they are invoking, having two different standards can be problematic.

Other jurisdictions

Under the discrimination legislation federally[48] and in New South Wales,[49] Tasmania[50] and the ACT,[51] the relevant commissions can give assistance to a person to make a complaint.

The Review's position

The Review considers that:

- The requirement that complaints be made in writing is a barrier to complaints being made.
- There is benefit to parties, the Commission and the tribunals in ensuring complaints and responses are easily understood.

44 Ethnic Communities Council of Queensland submission, 2.
45 PeakCare Queensland Inc submission, 7.
46 *Human Rights Commission Act 2005* (ACT) s 44(4).
47 *Human Rights Act 2019* (Qld) s 67.
48 *Australian Human Rights Commission Act 1986* (Cth) s 46P(4).
49 *Anti-Discrimination Act 1977* (NSW) s 88A.
50 *Anti-Discrimination Act 1998* (Tas) s 62(2).
51 *Human Rights Commission Act 2005* (ACT) s 44(3).

- Maintaining impartiality of the Commission's dispute resolution service is important.
- Providing reasonable assistance to people to record their complaint in writing would improve access to justice for people who experience discrimination and sexual harassment, such as over the assistance by phone to complete the Commission's complaint form.
- A written record of a complaint is required in order to afford procedural fairness to the respondent and to facilitate the potential escalation of the complaint to a tribunal if it cannot be resolved at the Commission.
- Ideally, a person wanting to make a complaint would be provided with assistance by an external organisation or agency.
- If the Commission provides assistance, it should maintain the impartiality of its dispute resolution function by ensuring structural separation between staff who provide assistance to record a complaint, and those who resolve disputes.
- Reasonable accommodations are provided to both complaints and respondents under the current system.

Recommendation 7

7.1 The Act should provide that if the Commission is satisfied that the complainant needs help to put their complaint in writing, the Commission must give reasonable help to them to do so.

7.2 If the Commission is satisfied on reasonable grounds that exceptional circumstances justify the complaint being made orally, the Act should allow the Commission to receive the complaint orally and transcribe into written form.

7.3 The Commission should ensure that if help is given to a person to put their complaint in writing, it should be given by a staff member who will not be responsible for providing dispute resolution services to that party.

Time limits for making a complaint

Statutory provisions imposing time limits on initiating proceedings are a common feature of civil procedure.

On the one hand, they provide certainty to parties because action generally cannot be brought outside the time limit. On the other hand, they create a barrier to those who allege they have experienced discrimination or sexual harassment, so can result in otherwise unlawful behaviour remaining unchecked.

For tort or contract law, or for industrial law general protections,[52] the time limit for making a complaint is between three and six years.

As noted elsewhere in this report, consistency across equality legislation is important and can have benefits. However, there is already some inconsistency across the jurisdictions with respect to time limits, even within the federal protections, as outlined in the Discussion Paper.[53]

52 *Fair Work Act 2009* (Cth) s 544.
53 Queensland Human Rights Commission, Review of the *Anti-Discrimination Act 1991* (Discussion Paper, November 2021) 58.

The current time limitations and the process undertaken across Australia in discrimination laws are displayed in the following table.

Jurisdiction	Time limit	Considerations	Appeal options
QLD	1 year	'complainant has shown good cause'	Judicial review[54]
NSW	1 year	'may decline'	Judicial review[55]
TAS	1 year	'…if satisfied that it is reasonable to do so'	Judicial review[56]
NT	1 year	…if satisfied it is appropriate to do so	Judicial review[57]
VIC	1 year	'discretion to decline…'	Merits to tribunal, but direct access exists[58]
SA	1 year	'if 'there is good reason and it is just & equitable to do so'	Merits to tribunal[59]
WA	1 year	'on good cause being shown'	Judicial review[60]
ACT	2 years	'may close a complaint…'	Merits to tribunal[61]
Federal	6mths – 2yrs	'may terminate…'	Merits to court (with leave in some)[62]

Table: Comparison of statutory provisions and appeal rights

Judicial review is the court process by which the administrative decisions of government can be reviewed, and generally focuses on legal errors in the decision-making process rather than the substance or merit of the decision.[63] Merits review can be done internally or through administrative tribunals (and sometimes courts) and generally tries to 'stand in the shoes' of the original decision-maker and decide if the substantively correct decision was made or not.[64]

Length of time

Current approach

Under the current Act, a person is only entitled to make a complaint within 1-year of the alleged contravention of the Act. This time limit is universal for all complainants. A complaint about conduct that occurred over one year ago can only be dealt with by the Commission if the complainant can show 'good cause.'

54 *Anti-Discrimination Act 1991* (Qld) s 138.
55 *Anti-Discrimination Act 1977* (NSW) s 89B(2)(b).
56 *Anti-Discrimination Act 1998* (Tas) s 63.
57 *Anti-Discrimination Act 1992* (NT) s 65.
58 *Equal Opportunity Act 2010* (Vic) s 115.
59 *Equal Opportunity Act 1984* (SA) ss 93, 96B.
60 *Equal Opportunity Act 1984* (WA) s 83.
61 *Human Rights Commission Act 2005* (ACT) s 78.
62 *Australian Human Rights Commission Act* (Cth) ss 46PH(1)(b), 46PO.
63 Robin Creyke, Matthew Groves, John McMillan and Mark Smyth, *Control of Government Action*, (LexisNexis Butterworths, 5th ed, 2019) 375-385.
64 Robin Creyke, Matthew Groves, John McMillan and Mark Smyth, *Control of Government Action*, (LexisNexis Butterworths, 5th ed, 2019) 185-198.

In the Discussion Paper, we asked if the 1-year time frame is appropriate, or if it should be increased. We received 27 submissions[65] on this topic, 18[66] of which thought that there should be an increase in the time limit.[67]

Should the time limitation be longer?

Stakeholders who thought the time limitation should be longer said that this would give complainants:

- A better opportunity to identify their issue as falling under the Act and to obtain advice[68]
- A chance to move away from the setting in which the alleged incidents occurred[69] (for example, a tenancy[70] or workplace[71])
- Time to fully utilise internal complaint mechanisms[72]
- Relief from the time pressure that can increase the mental burden of bringing a complaint[73]
- A chance to try to resolve matters directly with the other party, which is beneficial to respondents too[74]

We also heard that for some people, discrimination or sexual harassment can cause trauma or psychological distress which can mean it takes a longer time to disclose. In these circumstances, time limits may expire before a person is ready to bring a claim.[75]

Discussing how a 1-year time limit can largely be used up by delay in internal processes, Queensland Advocacy Incorporated gave the following example:

> Ruby* started prep at her local school in 2020. Ruby's mother first started to raise concerns about the appropriate supports and adjustments in relation to Ruby's diagnosis of Autism Spectrum Disorder in 2020 without receiving an adequate response. The lack of communication and supports from the school escalated in year one. Ruby's mother attempted to raise these concerns with the school and regional office. The regional office suggested that Ruby's mother contact the Education Advocacy Service (EAS) at Queensland Advocacy Incorporated for assistance. The EAS Advocate attempted to resolve the concerns with the regional office without success. The EAS Advocate drafted

65 Name withheld (Sub.026) submission; Vision Australia submission; Ethnic Communities Council Queensland submission; Queensland Council for Civil Liberties submission; James Cook University submission; Australian Industry Group submission; Australian Association of Christian Schools submission; Australian Lawyers Alliance submission; Neami National submission; Tenants Queensland submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Community Legal Centres Queensland submission; Equality Australia submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Multicultural Advisory Council submission; Christian Schools Australia submission; Maurice Blackburn Lawyers submission; Women's Legal Service submission; Australian Discrimination Law Experts Group submission; Jenny King submission; Respect Inc and DecrimQLD submission; Queensland Law Society submission; Life Without Barriers submission; TASC National Limited submission; Youth Advocacy Centre Inc submission.

66 Australian Lawyers Alliance submission; Neami National submission; Tenants Queensland submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Community Legal Centres Queensland submission; Equality Australia submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Multicultural Advisory Council submission; Maurice Blackburn Lawyers submission; Women's Legal Service submission; Australian Discrimination Law Experts Group submission; Jenny King submission; Respect Inc and DecrimQLD submission; Queensland Law Society submission; Life Without Barriers submission; TASC National Limited submission.

67 There was variability in the proposed increases – ranged from 18 months to indefinite.

68 Equality Australia submission, 35.

69 Queensland Nurses and Midwives Union submission, 28.

70 Tenants Queensland submission, 4.

71 Legal Aid Queensland submission, 38.

72 Queensland Advocacy Incorporated submission, 22.

73 Australian Discrimination Law Experts Group submission, 33.

74 Queensland Advocacy Incorporated submission, 22.

75 Legal Aid Queensland submission, 38.

and sent a formal complaint on behalf of Ruby to the Department of Education, requesting a separate regional office review the complaint due to the region's previous involvement. The Department decided to send the complaint back to the same regional office for an outcome. Despite numerous attempts to follow up the complaint and seek an outcome, it took 15 weeks for the regional office to provide a response.[76]

Seven submissions[77] preferred the time limit to remain at 1-year and one[78] suggested that an additional interim step be introduced requiring early notification of the potential complaint. Reasons given were:

- Giving individuals and organisations certainty sooner[79]
- Parties would have a better chance of compiling necessary evidence (both internal records and witness accounts)[80]
- There is already a reasonable process available for out-of-time complaints[81]

One stakeholder raised the issue of 'creep' – if complaints outside the time limit are accepted now, then if a longer time limit is instituted, complaints that are outside that longer time limit will potentially also be accepted under similar rationale.[82]

Comparative approaches

In most Australian jurisdictions, a discrimination complaint must be made within 1- year. Northern Territory legislation and federal age, race, and disability laws have a 6-month time limit.[83] Discrimination complaints in the Australian Capital Territory and some complaints under the federal legislation have two-year time limits.[84]

The Respect@Work report detailed the impacts of a 1-year time limit for people who have experienced sex discrimination at work.[85] In response to that report, sexual harassment and certain attributes[86] for discrimination complaints now have a two-year time limit under the Sex Discrimination Act.

The 1-year timeframe in Queensland[87] is much shorter than the limitations for the tort of personal injury (three years), other torts or contract (six years), or the general protections breaches under the *Fair Work Act 2009* (six years).[88] However, complaints to the Queensland Ombudsman have a time limit of one year.[89]

76 Queensland Advocacy Incorporated submission, 22. Note that names have been changed and that we have edited this example.
77 Name withheld (Sub.026) submission; Vision Australia submission; Ethnic Communities Council of Queensland submission; Queensland Council for Civil Liberties submission; James Cook University submission; Australian Industry submission; Australian Association of Christian Schools submission.
78 Christian Schools Australia submission, 11.
79 Australian Association of Christian Schools submission, 10.
80 Australian Industry Group submission, 10.
81 James Cook University submission, 2.
82 Legal practitioners' roundtable, 10 February 2022.
83 *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1)(b).
84 The Sex Discrimination and Fair Work (Respect at Work) Amendment Bill amends the *Australian Human Rights Commission Act 1986* s 46PH(1). This means that sexual harassment, sex, sexuality, gender identity and intersex status discrimination have a 2-year time limit but all other matters are subject to a 6-month timeframe.
85 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020), 493.
86 Sex, sexuality, gender identity and sex characteristics.
87 *Anti-Discrimination Act 1991* (Qld) s 138.
88 *Fair Work Act 2009* (Cth) s 544.
89 *Ombudsman Act 2001* (Qld) s 20(1)(c); *Information Privacy Act 2009* (Qld) s 168(f).

‘Out of time’ process

Current approach

Currently, a complaint can be accepted outside the 1-year time limit if the Commissioner is satisfied the complainant has shown ‘good cause.’[90] We will refer to complaints that include incidents that are alleged to have occurred more than 1 year before bringing the complaint to the Commission as ‘out-of-time’.

In practice, the ‘good cause’ process involves the Commission seeking submissions from the complainant and the respondent and then making an administrative decision about whether or not to accept the out-of-time portion of the complaint.

However, if a person makes a complaint that involves allegations within that 1-year period but also allegations outside that period, the Commission will do a conciliation in an effort to resolve the whole complaint. Only if it does not resolve, the Commission will then engage parties in the ‘good cause’ process.[91]

If a complaint contains only allegations older than 1-year, the Commission undertakes the ‘good cause’ process at the outset and only if good cause is shown will a conciliation conference occur.

Some reasons accepted by the Commission as being good cause are the complainant being a child at the time of the alleged incidents, or the complainant having mental health issues that meant making a complaint earlier was not possible.

The ‘good cause’ process is onerous for parties and uses significant Commission resources. Layering on this additional process further delays an already delayed matter – this may cause more unfairness to the parties as memories of the alleged conduct may fade further over time.

This is in contrast to the approach in many other jurisdictions where the onus is not on the complainant to show ‘good cause’ but timeliness is one of the discretionary factors to consider when accepting a matter to proceed to dispute resolution. We discuss this further below.

Of the number of out-of-time decisions made at the Commission in the last two financial years, around 50% are brought within two years.[92]

Either party can ask for an internal review of any out-of-time decision. If they remain dissatisfied after internal review, the only step available is judicial review in the Supreme Court. As can also be seen in the table earlier in this section, ‘Comparison of statutory provisions and appeal rights,’ there are different approaches across Australia, with some being similar to Queensland and others allowing merits review to a tribunal or court.

In 2021, no applications for judicial review were made regarding Commissioner decisions on out-of-time complaints.[93] In 2020, one application for judicial review was made.[94]

If a complaint that contains out-of-time allegations is referred to the tribunal, the tribunal can deal with the complaint if it considers that, on the balance of fairness between the parties, it is reasonable to do so.[95] This means that under the current system, parties potentially address the out-of-time issue twice. This results in a lack of certainty for the parties as to whether the complaint will continue past the preliminary stages at the relevant tribunal.

90 *Anti-Discrimination Act 1991* (Qld) s 138.
91 *Anti-Discrimination Act 1991* (Qld) s 141A.
92 The Queensland Human Rights Commission keeps internal data on these decisions.
93 The only decision that was reviewed under the *Judicial Review Act 1991* in 2019 was in relation to whether or not to accept or reject a complaint under section 139 of the Anti-Discrimination Act.
94 *Ryle v Venables and Ors* [2021] QSC 60.
95 *Anti-Discrimination Act 1991* (Qld) s 175.

Comparative approaches – out-of-time decisions at Commission stage

The current Victorian approach is that 'the Commission can decline to resolve complaints…more than 12 months old, although in practice we almost never use this discretion.'[96] They see 'a key strength of the Commission's dispute resolution service is the capacity to offer a restorative and non-adversarial…process…reflected in broad discretion to accept complaints, low evidentiary threshold, practice of accepting complaints that may have occurred more than 12 months before the dispute was brought and victim-centric processes.'[97]

There is little publicly available information about how other human rights agencies exercise this discretion.

The process set out in the Human Rights Act is also more flexible - the Commission 'may refuse' to deal with a human rights complaint if the complaint was not made within one year.[98] There may be some benefit in alignment with this process, considering most accepted human rights complaints are 'piggyback' complaints where a discrimination element is also present.

Comparative approaches - appeal options

As noted in the table above, 'Comparison of statutory provisions and appeal rights', in South Australia, Victoria, the ACT and federally, judicial review is not the avenue of appeal for these out-of-time type decisions.

In South Australia the appeal lies to the tribunal.

In Victoria and the ACT, the complainant can refer to the relevant tribunal regardless of any view held by the human rights agency that the complaint is out-of-time.

At a federal level, the complainant can proceed to court but needs to seek the court's leave in out-of-time situations. Once at court, there may be legal costs awarded against an unsuccessful party.[99]

Eight submissions[100] commented on this issue, with all agreeing that the current Supreme Court judicial review process is not preferable. The main reasons given were cost and complexity.[101]

However, Legal Aid Queensland note that if this sort of decision were to be reviewable in the relevant tribunal, current delays in QCAT would be problematic.[102]

Children and people with impaired capacity

Complaints from children

Although children can make a complaint under the Act, they very rarely do so. In addition, the Commission can authorise a person to act on behalf of the complainant if they are unable to make or authorise a complaint.[103]

96 Victorian Equal Opportunity and Human Rights Commission submission to the National Inquiry into Sexual Harassment in Australian Workplaces (February 2019), 39.
97 Victorian Equal Opportunity and Human Rights Commission submission to the National Inquiry into Sexual Harassment in Australian Workplaces (February 2019), 31.
98 *Human Rights Act 2019* (Qld) s 70(d).
99 See *Australian Human Rights Commission Act 1986* (Cth) ss 46PH(1)(b), 46PO and *Federal Court of Australia Act 1976* (Cth) s 43.
100 Australian Discrimination Law Experts Group submission; Equality Australia submission; Aged and Disability Advocacy Australia submission; Australian Industry submission; Queensland Law Society submission; Australian Lawyers Alliance submission; Queensland Council for Civil Liberties submission; Legal Aid Queensland submission.
101 Aged and Disability Advocacy Australia submission, Australian Discrimination Law Experts Group submission, Equality Australia submission, Australian Lawyers Alliance submission, Queensland Council for Civil Liberties submission, Australian Industry Group submission, Queensland Law Society submission, Legal Aid Queensland submission.
102 Legal Aid Queensland submission, 38.
103 *Anti-Discrimination Act 1991* (Qld) s 134(1)(c).

Whether or not a particular child is willing or able to make a complaint is a separate issue from whether or not they have a right to do so. Most submissions commented on whether children are willing and able to make a complaint.

12 submissions[104] recommended that the time limit for children to make a complaint should only commence when they turn 18. During the Young people's roundtable, we heard from 37 young people aged between 18 and 25 years old and 11 young people under 18 years. Most indicated that an increase in the 1-year time limit was preferable. One participant noted:

> *I didn't know about discrimination, and I was around 14 years old - there's no way I would be able to make a complaint, I wouldn't even know how to do that - though even at 15, even maybe at 16. So you certainly need to think about some time - young kids, for people with disabilities, or mental health systems, who are in detention, for example. There's lots of different impacts, 12 months is a very short period of time.*[105]

The most vulnerable children are less likely to have an adult assisting them in many aspects of life, including if they may have been discriminated against. Even if a child does have a supportive adult, that adult may or may not have the resources or ability to assist them in making a complaint. These issues mean that the Commission does not receive a large number of complaints from young people, despite them being a group which is likely to experience discrimination.

The Queensland Family and Child Commission submission refers to the Act as being 'adult-centric'.[106]

One participant at the Young people's roundtable told us that:

> *…when you feel like you're being discriminated against by the police, or by a system, it kind of deters you from going up and being like, 'Hey, you know…', because if they're sometimes that ones that are also causing the discrimination, it can really deter you from going up. And you feel like you're not going to be taken seriously.*[107]

Legal Aid Queensland suggests[108] that applying a human rights approach to children's issues requires consideration of the reduced capacity of a child to bring a civil legal action and that this engages the right to recognition and equality before the law[109] and the protection of families and children.[110]

People with impaired decision-making capacity

Several submissions pointed out that those with impaired decision-making capacity have an extra barrier to being able to make a complaint and so should be given extra time to complain.[111]

104 Vision Australia submission; Maurice Blackburn Lawyers submission; Women's Legal Service submission; Australian Discrimination Law Experts Group submission; TASC National Inc submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Legal Aid Queensland submission; Caxton Legal Centre submission; Youth Advocacy Centre Inc submission; Multicultural Advisory Council submission; Queensland Law Society submission.
105 Young peoples' roundtable, 17 February 2022.
106 Queensland Family and Child Commission submission, 3.
107 Young peoples' roundtable, 17 February 2022.
108 Legal Aid Queensland submission, 40.
109 *Human Rights Act 2019* (Qld) s 15.
110 *Human Rights Act 2019* (Qld) s 26(2).
111 See for example, Vision Australia submission; Queensland Advocacy Inc submission.

However, we note that a key reason often proffered to substantiate good cause is the incapacity of a complainant to make a complaint for a certain period due to mental or physical illness. In fact, this is one of the most common grounds on which the Commission has previously accepted there is 'good cause' to accept an out-of-time complaint.

Some submissions talked about particular barriers for people who are under financial administration orders with the Public Trustee as administrator.[112] As the basis of these issues fall outside out Terms of Reference, we have not considered this issue in this review.

Comparative approaches

None of the discrimination or human rights legislation in Australia has explicit dispensation from time limits for those who have impaired capacity.

In Tasmania, a litigation guardian[113] can be appointed for a child or another person who is unable to make a complaint due to disability, age or other incapacity.[114] Victoria deals with complaints by children and people with a disability in a similar way.[115] A similar process already exists in Queensland.[116] For these people, the time limit under the relevant Acts is not increased.

Certain time limits for those under a disability is extended by the Limitations of Actions Act.[117] The idea of extended time limits in those instances is not new or novel.

Delays created by current backlog

The previous sections explored ways to alleviate some of the barriers to making a complaint. An obvious barrier to the early and effective resolution of disputes, and therefore access to justice, is the current wait times in matters being dealt with by the Commission.

Since 2020 the Commission has experienced a significant increase in the number of complaints it receives, in part because of complaints related to the COVID-19 pandemic. This has resulted in a backlog of complaints, with a delay of approximately six months between lodgement of complaints and their assessment by Commission staff.[118]

Legal Aid Queensland provided two case studies which demonstrate the difficulties their clients face with the current delays, one of which we include below:

An Aboriginal man from a remote community was diagnosed with potentially life-threatening cancer while in custody and his application for special circumstances parole was rejected. He made a complaint to the Commission, alleging indirect race discrimination and a breach of his cultural rights under the Human Rights Act. His complaint took 6 months to be allocated for assessment and then was initially rejected by the Commission. After requesting internal review, his discrimination complaint rejection was upheld, and he has applied for judicial review of that decision in the Supreme Court.[119]

The Review notes the Commission has obtained additional funding to reduce the backlog as soon as possible and has adapted its complaints handling processes to the extent permitted by the existing legislative requirements. We also note that the recommendations made by this report are, in part, designed to create a more efficient process.

112 Office of the Public Guardian submission, 2.
113 Someone who acts on behalf of a party when that party is unable to conduct their own litigation due to mental or physical incapacity.
114 *Anti-Discrimination Act 1998* (Tas) s 60A.
115 *Equal Opportunity Act 2010* (Vic) ss 113(1)(b) and (c).
116 *Anti-Discrimination Act 1991* (Qld) s 134.
117 *Limitations of Actions Act 1974* (Qld) s29.
118 Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 2021) 13.
119 Legal Aid Queensland submission, 31 and 37. Note: this case study has been edited.

The Review's position

The Review considers that:

- Having a one-year time limit is a barrier to complaints being brought to the Commission.
- The current out-of-time process undertaken by the Commission to determine 'good cause' under s138 of the Act is unduly onerous.
- Canvassing of the out of time issue at the Commission stage and again at the tribunal is not beneficial because it adds a further point of contention and reduces certainty for the parties.
- Judicial review of a Commission decision to exercise discretion on the basis of 'good cause', is generally not an accessible review process.
- The time limit issue can best be dealt with by the Commission exercising discretion in whether or not to offer dispute resolution in a particular complaint.
- There should be special provisions for exercising discretion with respect to children.
- Time limits for people with impaired decision-making capacity can be adequately catered for by the Commission exercising discretion in whether or not to offer dispute resolution in a complaint that has been brought outside the ordinary time limit.

Recommendation 8

8.1 The Commission should have discretion to decline to provide or continue to provide dispute resolution if the alleged contravention occurred more than 2 years before the complaint was lodged. The Act should frame the time limit by way of giving the Commissioner discretion to provide dispute resolution.

8.2 The Act should explicitly provide that a child can bring a complaint. If a complaint is brought in relation to allegations that occurred when the person was a child, the Act should allow that the 2 years referred to in the discretion only starts once the child turns 18, unless the respondent can show substantial prejudice.

8.3 The Act should give the Tribunal the jurisdiction to make a merits review of decisions by the Commission in relation to the discretion to provide dispute resolution, and discretion to be able to award costs if an application is frivolous or vexatious.

8.4 The Act should require that an application for review must not be made unless the tribunal has granted leave to make the application.

Filtering complaints

Current approach

Currently, the Commission undertakes an assessment to identify the priority of a matter, including if it is urgent, for example, if education or accommodation is at imminent risk.[120]

- The Commission then considers whether:
- there are reasonably sufficient details to indicate an alleged contravention of the Act[121]
- the complaint has been made in time[122]
- to reject the complaint because it is frivolous, trivial or vexatious; or misconceived or lacking in substance[123]
- to reject or stay the complaint because it is being or should be dealt with elsewhere[124]
- the complaint would be more appropriately dealt with under the Human Rights Act.[125]

The Commission ultimately decides whether to accept or reject a complaint within 28 days of receiving the complaint and must promptly notify the complainant of the decision.[126] If the complaint is accepted, the Commission must notify the respondent in writing of the substance of the complaint.[127]

If a complaint is rejected in the first instance, the complainant has the opportunity to provide more information to establish that it should be accepted. Once a complaint is ultimately rejected through the process above, the complaint lapses and a complainant cannot lodge their complaint with the tribunal.[128]

The Commission's filtering role

In the Discussion Paper we asked about whether the current system – in which a complaint is assessed by the Commission as to whether it falls under the Act, and then only if unresolved, the matter proceeds to tribunal, should be retained – or whether the Act should permit complainants to by-pass the Commission and proceed directly to the tribunals. We also asked whether there should be direct access to the Supreme Court in limited and defined circumstances.

We heard varying perspectives about the advantages and disadvantages of the Commission having a role in filtering out complaints through the assessment process. 12 submissions were in

120 The legislation does not expressly provide for this step.
121 *Anti-Discrimination Act 1991* (Qld) s 136. Note that sometimes the assessor may request further information from a complainant or may obtain information or documents under s 156 ADA to finalise this assessment.
122 *Anti-Discrimination Act 1991* (Qld) s 138.
123 *Anti-Discrimination Act 1991* (Qld) s 139.
124 *Anti-Discrimination Act 1991* (Qld) s 140.
125 *Anti-Discrimination Act 1991* (Qld) s 140A.
126 *Anti-Discrimination Act 1991* (Qld) s 141. Note that this section allows for a decision about whether to accept an out-of-time complaint to be made after conciliation has occurred if there are both in-time and out-of-time allegations in a complaint. Note also that the Commission has had a significant backlog of complaints since 2020 because of an increase in complaint numbers.
127 *Anti-Discrimination Act 1991* (Qld) s 143. Note that this section also stipulates other information which must be notified to the respondent, including a conciliation conference date which must be between 4 and 6 weeks from the date of notification.
128 *Anti-Discrimination Act 1991* (Qld) s 142. Note that a complainant can ask for internal review and then can make an application for judicial review of the Commission's decision under the *Judicial Review Act 1991* (Qld).

support of direct access as of right.[129] A further five submissions were in support of direct access in certain circumstances.[130] Eight submissions indicated direct access is not appropriate.[131]

Several submissions suggest that the tribunals risk being overwhelmed if the Commission no longer played a role and a direct right of access were granted.[132] However, on this point, the Australian Discrimination Law Experts Group submission indicates that in Victoria, direct access has not led to an overwhelming number of claims.[133]

The Queensland Civil and Administrative Tribunal sees benefit in the Commission identifying complaints that should not go further as it would 'allow limited resources to be allocated to more substantive matters.'[134] James Cook University identified that the process would become 'unnecessarily burdensome on all parties' if a direct right of access were given.[135]

In other submissions, the disadvantages identified in the Commission's role in filtering complaints were:

- length of time taken from complaint lodgement[136]
- potential that 'test cases' are not accepted because they do not fit within established jurisprudence[137]
- lack of easily accessible merits appeal options and judicial review processes being onerous.[138]

The Commission's data shows that, of the 3,152 complaints that were assessed between 1 July 2018 and 30 June 2021, the Commission accepted 1,536.[139]

While there was some support for direct access to the Supreme Court in public interest cases,[140] this seemed to be outweighed by hesitation in stepping into a potentially costly and invariably more legally complex arena.[141] The Youth Advocacy Centre told us:

> The Supreme court is not a realistic option for the general member of the public, and certainly not for children. The costs associated with it are a major barrier and it is highly legalistic.[142]

129 Queensland Council of Social Service submission; Public Advocate (Qld) submission; Australian Lawyers Alliance submission; Vision Australia submission; Women's Legal Service submission; Australian Discrimination Law Expert Group submission; Jenny King; Maternity Choices Australia submission; Queensland Council for Civil Liberties submission; Scarlet Alliance submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission.
130 Australian Association of Christian Schools submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Queensland Law Society submission.
131 Name withheld (Sub.026) submission; Medical Insurance Group Australia submission; Queensland Council of Unions submission; Queensland Catholic Education Commission; James Cook University submission; LawRight submission; Australian Industry submission; Queensland Civil and Administrative Tribunal submission.
132 See for example, Name withheld (Sub.026) submission, 4; James Cook University submission, 2.
133 Australian Discrimination Law Experts Group submission, 30.
134 Queensland Civil and Administrative Tribunal submission, 28.
135 James Cook University submission, 2.
136 Vision Australia submission, 4.
137 Caxton Legal Centre submission, 10.
138 Legal Aid Queensland submission, 31.
139 Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 2021) 33; Queensland Human Rights Commission, *Annual Report 2019-20* (Report, 2020) 31; Queensland Human Rights Commission, *Annual Report 2018-19* (Report, 2019) 25. Note that in 2020-21 the number of complaints received and the number assessed was significantly different because of a backlog of complaints.
140 See for example, Women's Legal Service submission, 6; Vision Australia submission, 4; Respect Inc and DecrimQLD submission, 21.
141 See for example, Legal Aid Queensland submission, 29.
142 Youth Advocacy Centre Inc submission, 5.

Comparative approaches

There are four different approaches across the Australian human rights agencies. Queensland and the Northern Territory bodies having the most rigorous filtering process.

The extent of the filtering role resting with the agency is set out in the table below:

Assessment role	Jurisdictions
None	Victoria
Complaint must be made to Commission but rejection does not deprive complainant of right to lodge in tribunal	NSW ACT South Australia Western Australia
Complaint must be made to Commission and seek review or leave in tribunal/court if rejected	Tasmania Federal
Complaint must be made to Commission and review is by judicial review only	Northern Territory Queensland

Table: Comparison of assessment roles

In summary, in every jurisdiction but the Northern Territory and Queensland there are some appeal rights available outside of judicial review. In all but the federal jurisdiction, this allows a complainant to appeal a decision of the Commission in what is generally a simplified process.

If decisions were reviewed by the tribunals, this may also provide guidance to the Commission about factors to be considered in whether or not a complaint should be accepted.

The Review's position

The Review considers that:

- All complaints should be assessed by the Commission as to whether there are reasonably sufficient details to indicate an alleged contravention of the Act, rather than having a direct right of access to a tribunal. This assessment should include rejecting disputes which are frivolous, trivial, vexatious, misconceived or lacking in substance. This ensures resources are used for complaints that are within the jurisdiction of the Act.
- However, as we discuss below, in certain circumstances the Commission may decide not to offer dispute resolution services.
- Judicial review of a Commission decision to accept or reject a complaint, is generally not an accessible review process.

Resolving disputes

Are complaints investigated?

During the Review, some stakeholders shared perspectives with the Review that suggested they expected that the Commission conducts an inquiry into each complaint and uses its powers to carry out an investigation.

This may be because the current functions of the Commission include to:

- inquire into complaints and, where possible, to effect conciliation[143]
- to carry out investigations relating to contraventions of the Act.[144]

The Anti-Discrimination Act also allows the Commission to investigate a complaint at any time after it is received[145] and to obtain information and documents.[146] However, even if information is obtained, under the current Act there is very little that the Commission can do with information obtained during any investigation. This is one of the reasons the Commission's current approach focuses on complaint-handling.

In practice, these powers are only used in very limited circumstances, often in undertaking preliminary inquiries. For example, the Commission may contact an entity to identify people who may need to be named as a respondent to a complaint.

There therefore appears to be a disconnect between the current legislation, which focuses on inquiring into and investigating complaints – and the current approach – which focuses on complaint handling.

Conferences and early dispute resolution

Once a complaint has been accepted, in the vast majority of cases, the Commission conducts a conciliation conference involving all parties.[147] This is, in part, due to rigid procedural timeframes and processes required by the Act, which limit flexibility for conciliators, who are left without the ability to decide which is the best way to resolve a dispute.

This means that with few exceptions, every complaint is treated in the same way, regardless of whether a conciliation conference is in fact the best way to deal with a particular complaint.

Current approach

The Act creates set timeframes for accepting/rejecting complaints,[148] and for holding conciliation conferences.[149] It also contains a detailed provision that specifically requires the Commission to notify the respondent of a number of matters, including the date for a conciliation conference.[150] This creates disharmony with another section of the Act which implies that there is discretion to hold a conference by stating that the Commissioner must attempt conciliation if they believe it may be resolved in that way.[151]

143 *Anti-Discrimination Act 1991* (Qld) s 235(a).
144 *Anti-Discrimination Act 1991* (Qld) s 235(b).
145 *Anti-Discrimination Act 1991* (Qld) s 154.
146 *Anti-Discrimination Act 1991* (Qld) s 156.
147 As outlined in the Discussion Paper, there is inconsistency within the provisions of the Act about whether a conciliation conference must be held but in practice one occurs in the vast majority of complaints.
148 *Anti-Discrimination Act 1991* (Qld) s 141.
149 *Anti-Discrimination Act 1991* (Qld) s 143.
150 *Anti-Discrimination Act 1991* (Qld) s 143.
151 *Anti-Discrimination Act 1991* (Qld) s 158.

The detailed notification and timeframes provisions were introduced through amendments to the Act in 2002. These amendments were an attempt to deal with the fact that the process had become 'unnecessarily protracted, and accordingly, expensive and frustrating for parties.'[152]

Within the constraints of the current framework, Commission staff are able to, and often do, respond flexibly to the needs of the parties during conciliation, such as whether to have all parties in the same room at the same time or instead to conduct shuttle negotiations where parties are separated. Shuttle negotiations may continue after a formal conciliation conference has ended, but that this can only occur once the legislative requirements for setting down the conciliation conference have been met. However, a more flexible legal framework may leave room for further improvements.

Benefits of dispute resolution

When commenting on this issue, there was general consensus amongst submissions that, for most complaints, there is benefit in having dispute resolution processes available.

Some of the identified benefits included that conciliation conferences can be truth-telling,[153] supportive and practical.[154] Legal Aid told us that:

> Queensland Human Rights Commission conciliators have specialist knowledge and skills which ensures that the conciliation process is generally conducted in a more sensitive and appropriate manner than in other forums… these specialist skills are valued and appreciated, particularly in cases where complainants have been traumatised or have other barriers which would make it difficult to engage in a more generalised mediation process.[155]

Australian Industry Group see value for employers in having access to a resolution process that 'does not entrench an adversarial approach or lead to excessive legal fees.'[156]

While there was general support for dispute resolution processes, some submissions agreed with comments by academics, which we included in the Discussion Paper,[157] that confidentiality clauses in conciliation agreements can lead to a lack of public exposure.[158]

Conciliation conferences are confidential in that nothing said or done in a conference can be included in documents from the Commission if referral to a tribunal occurs.[159] The Act also stipulates that they happen in private.[160] However, there is no legislative requirement regarding confidentiality clauses in agreements negotiated through conciliation at the Commission. The Commission templates used to have standard confidentiality clauses in them. In response to the Respect@Work report,[161] these clauses are now negotiable. In practice though, one of the advantages to respondents in resolving complaints through the Commission process is that they can avoid issues being made public, so confidentiality is often agreed to by complainants as part of the negotiation of an outcome.

152 Explanatory Notes, Discrimination Law Amendment Bill 2002 (Qld) 5-7.
153 Legal Aid Queensland submission, 27.
154 Queensland Catholic Education Commission submission, 5.
155 Legal Aid Queensland submission, 35.
156 Australian Industry Group submission, 8.
157 Queensland Human Rights Commission, Review of the *Anti-Discrimination Act 1991* (Discussion Paper, November 2021) 51.
158 Legal Aid submission, 28; Caxton Legal Centre submission, 11.
159 *Anti-Discrimination Act 1991* (Qld) s 208(2).
160 *Anti-Discrimination Act 1991* (Qld) s 161.
161 Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020) Recommendation 38.

More flexible processes

In the Discussion Paper, we asked how the law can be adapted to allow a more flexible approach to resolving complaints. The Review received 20 submissions on the questions of efficiency and flexibility of the process.[162] 19 of these supported more flexibility in the Commission's approach to resolving complaints though one suggested retaining current timeframes for complaints.[163]

The main reasons for supporting increased flexibility were that it could:

- better meet the needs of the parties
- preserve relationships where relevant
- reduce ongoing potential breaches of the Act
- deal with urgent situations.

Trauma-informed practice also requires processes to be adaptable, depending on the needs of parties, and may include having a liaison role in addition to that of the dispute resolution practitioner.[164] A submission from the Queensland Family and Child Commission discusses the concept of 'active efforts,' which includes taking a proactive approach to provide an appropriate environment for raising and resolving complaints.[165]

Some submissions indicated that it is problematic for the Commission to treats all matters alike – especially in systemic, public interest or test cases.[166]

Caxton Legal Centre's submission pointed out that there are times when significant time and energy has already been expended by parties in internal complaint processes so further dispute resolution through the Commission is not likely to advance the matter.[167]

The Associated Christian Schools submission noted that 'early intervention promotes a swift resolution of complaints, in which relationships would be preserved, and systemic discrimination addressed'.[168] Vision Australia supported being able to 'tailor the complaint process to the needs of the parties and the nature of the dispute, including matters of priority and urgency'.[169] Legal Aid identified that a human rights approach would offer triage or scaled level of support rather than the same level of service for all complaints and that the Commission should be able to 'respond proactively where there is a risk of ongoing discrimination or sexual harassment'.[170]

---

162 Legal Aid Queensland submission; Queensland Family and Child Commission submission; Queensland Network of Alcohol and Other Drug Agencies submission; Women's Legal Service submission; Australian Discrimination Law Experts Group submission; Maurice Blackburn Lawyers submission; Human Rights Law Alliance submission; Associated Christian Schools submission; Vision Australia submission; Jenny King submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; James Cook University submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission.

163 Legal Aid Queensland submission; Queensland Family and Child Commission submission; Queensland Network of Alcohol and Other Drug Agencies submission; Women's Legal Service submission; Australian Discrimination Law Experts Group submission; Maurice Blackburn Lawyers submission; Associated Christian Schools submission; Vision Australia submission; Jenny King submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Equality Australia submission; James Cook University submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission. Note that Associated Christian Schools submission supported retaining timeframes.

164 Community Legal Centres Queensland submission, 4.

165 Queensland Family and Child Commission submission, 6.

166 See for example, Caxton Legal Centre submission, 11; Equality Australia submission, 32.

167 Caxton Legal Centre submission, 10.

168 Associated Christian Schools submission, 1.

169 Vision Australia submission, 5

170 Legal Aid Queensland submission, 27 and 37.

Australian Discrimination Law Experts Group submission points out that the Commission should be able to deal with complaints in a timely and flexible manner and suggests that setting outer time limits can ensure that complaints are dealt with.[171] Queensland Council for Civil Liberties also highlight that people dealing with the Commission should be entitled to some level of certainty about how their complaints will be dealt with and that the Commission should publish policies, procedures and directions to achieve this.[172]

Who should attend a conference?

The Commission currently directs all parties, including each individually named respondent, to attend the conciliation conferences it convenes.

We were told that, for some people, this approach can be valuable for complainants in being able to air their allegations directly to the other party.[173] This may not be the case for all complainants.

However, the Department of Education submission indicates that the conciliation process is not necessarily enhanced when it involves individual employees.[174] This point was also raised in consultation with lawyers who act on behalf of respondents.[175]

We were also told that having a large number of respondents in a conciliation conference can feel unfair to complainants, even when the complainant is legally represented.[176]

Comparative approaches

Most jurisdictions provide discretion as to how a discrimination or sexual harassment complaint is handled by the human rights agency, and none provide the prescriptive timeframes for notification and conferencing that are contained in the Queensland Act.[177]

Human Rights Act approach

In Queensland, the Human Rights Act allows the Commission some discretion in dispute resolution service delivery, with indications of early success. In 2020-21, of the 47 complaints the Commission resolved under the Human Rights Act, 14 were by early intervention and 33 by conciliation.[178]

The Human Rights Act allows for a flexible approach to resolving dispute and gives the Commissioner broad discretion in how to try to resolve the complaint.[179] The Commissioner can do what is considered appropriate, including asking the respondent to make submissions in response to the complaint, asking either party to give information, making enquiries of and discussing the complaint with the parties or conciliating. This means that the Commission staff have a broad discretion, including to be able to conduct shuttle negotiations, where the staff member acts as the go-between, without ever convening a formal conciliation conference.

Victorian and federal approaches

In Victoria, the 2008 Gardner Review found that the statutory processes were complex and formal.[180] The processes at that time were similar to what currently exists in Queensland under

171 Australian Discrimination Law Experts Group submission, 32.
172 Queensland Council of Civil Liberties submission, 7.
173 Legal Aid Queensland submission, 27.
174 Department of Education submission, 8.
175 Crown Law, consultation, 21 October 2021.
176 Aboriginal and Torres Strait Islander Women's Legal Service (NQ) consultation, 15 September 2021.
177 *Anti-Discrimination Act 1991* (Qld) ss 141, 143.
178 Queensland Human Rights Commission, *Human Rights Annual Report 2020-21* (Report, 2021) 138.
179 *Human Rights Act 2019* (Qld) s77.
180 Julian Gardner, An Equality Act for a Fairer Victoria (Equal Opportunity Review Final Report, June 2008) 'Gardner Review'.

the Anti-Discrimination Act. The Review used legislation in New Zealand[181] as a model and made recommendations which were incorporated in the Equal Opportunity Act in 2010. Since then, the Victorian Commission has had a flexible process that allows it to select different dispute resolution processes, depending on the nature of the complaint and the needs of the parties.[182] This is similar to the approach in the Human Rights Act.

In practice, this means that early dispute resolution, including early intervention, is offered when a complaint involves one attribute and one area (mainly in goods and services). Early intervention can include asking any party to give the commissioner information relevant to the complaint, making enquiries of or discussing the complaint with either or both parties, and may include conducting shuttle negotiations where a complaint handler is the go-between and there is no direct meeting of the parties.

The Victorian Commission aims to finalise these disputes within 28 days of receipt.[183]

The Victorian Act also enshrines principles of dispute resolution. These include that dispute resolution should be voluntary, provided as early as possible, appropriate to the nature of the dispute, fair to all parties and consistent with the objectives of the Act.[184]

With a higher level of discretion, the Victorian Commission has indicated that the dispute resolution principles underpin their processes and guide and inform their approach.[185]

The Australian Human Rights Commission (AHRC) also has similar flexibility in what dispute resolution opportunities it provides to parties.[186] A key difference is that the AHRC can choose to either 'direct' or 'invite' a party to a conference – the person 'invited' rather than 'directed' can then elect whether to attend. While ensuring procedural fairness this allows flexible considerations about which parties need to be 'in the room' to resolve the dispute and may reduce the number of parties in attendance on the respondent's side who are not central to the matter. This may assist in reducing the impact of power imbalances during conciliation.

In our consultations with both the Victorian and Federal commissions, we identified that the flexible approach has had clear benefits for their complaint handling processes.[187] Increasing legislative discretion as to whether or not a conciliation conference is the best approach for resolving a dispute, means that, where the Commission has determined that there is benefit in offering dispute resolution, complaints can be resolved by a range of dispute resolution tools – including early dispute resolution, shuttle negotiations without any meeting of the parties, or conciliation conference.

Assoc Prof Dominique Allen has written about the Victorian dispute resolution services:

> Overall, the interviewees were very positive about the dispute resolution services that the VEOHRC provides, particularly the flexibility. Conciliation can take place in person, by phone, or by shuttle, depending on the nature of the complaint and the parties' wishes. There is no standard way of conducting a conciliation and the conciliators will respond to the parties' needs. For example, if the complainant does not want to be in the same room as the respondent, the conciliator will separate them or if they think that it will be conducive for the parties to meet, rather than negotiating 'by paper', then they will arrange for a conciliation to take place in person. A conciliator said that they encourage the parties

181 *Human Rights Act 1993* (NZ).
182 *Equal Opportunity Act 2010* (Vic) s 122.
183 Victorian Equal Opportunity and Human Rights Commission, consultation, 6 May 2022.
184 *Equal Opportunity Act 2010* (Vic) s 112.
185 Victorian Equal Opportunity and Human Rights Commission, consultation, 6 May 2022.
186 *Australian Human Rights Commission Act 1986* (Cth) ss 46PF, 46PH.
187 Victorian Equal Opportunity and Human Rights Commission, consultation, 6 May 2022; Australian Human Rights Commission, consultation, 2 February 2022.

to have a conversation about what happened, rather than just presenting their position on the events.[188]

Other jurisdictions

In Western Australia,[189] Tasmania,[190] and New South Wales,[191] the human rights agencies also have discretion whether or not to hold a conciliation conference and so have more flexibility compared with Queensland.

The Review's position

The Review considers that:

- In most disputes, there are benefits to all parties in participating in dispute resolution processes.
- Certain types of complaint may not always benefit from the Commission's dispute resolution processes, including if they are urgent, raise matters of public interest, are systemic in nature, or where other dispute resolution processes have already occurred.
- Balance could be achieved by providing the Commission with discretion about whether to undertake dispute resolution processes and what type of processes to offer.
- More flexibility in how the Commission deals with complaints, including allowing early intervention and removing any obligation on the Commission to provide a conference, would improve parties' experiences of the dispute process.
- Legislatively stipulating timeframes for interim steps during the dispute process is not beneficial in improving flexibility overall.
- Having principles of dispute resolution enshrined in the Act is beneficial.
- If dispute resolution processes at the Commission have finalised without an agreement between the parties, the person who brought the dispute should retain the option of referring the dispute to the tribunal.

Recommendation 9

9.1 The Commission's complaints process should remain compulsory but be reshaped into a more flexible and responsive dispute resolution process.

9.2 The Commission's function to inquire into complaints and, where possible, to effect conciliation should be replaced with a function to offer services designed to facilitate resolution of disputes.

9.3 Principles of dispute resolution should be enshrined in the Act. Those principles should include:

- Dispute resolution should be provided as early as possible.
- The type of dispute resolution offered should be appropriate to the nature of the complaint.
- The dispute resolution process should be fair to all parties.

188 Assoc Prof Dominique Allen, *Addressing Discrimination Through Individual Enforcement: A Case Study of Victoria* (2019) Monash Business School, Monash University, Victoria, 7.
189 *Equal Opportunity Act 1984* (WA) s 88.
190 *Anti-Discrimination Act 1998* (Tas) s 75.
191 *Anti-Discrimination Act 1977* (NSW) s 91A.

- Dispute resolution should be consistent with the objectives of the Act.

9.4 The Commission should have power to make preliminary enquiries about a complaint to decide whether or not to provide dispute resolution, or if necessary for dispute resolution processes.

9.5 The Commission must decline to provide dispute resolution if the Commissioner considers the complaint is frivolous, trivial, vexatious, misconceived or lacking in substance.

9.6 The Commission should have discretion to decline to provide or continue to provide dispute resolution for the following reasons:

- the alleged contravention occurred more than 2 years before the complaint was lodged
- there are insufficient details to indicate an alleged contravention of the Anti-Discrimination Act
- having regard to all the circumstances, the Commission considers it is not appropriate to provide or to continue to provide dispute resolution

9.7 The Act should give the tribunal:

- the jurisdiction to make a merits review of decisions by the Commissioner to decline to provide or continue to provide dispute resolution
- discretion to be able to award costs if an application is frivolous or vexatious.

9.8 The Act should require that an application for review must not be made unless the tribunal has granted leave to make the application.

9.9 Once the Commission has decided to offer dispute resolution to parties for a complaint, the Commission should be able to take reasonable and appropriate action to resolve the dispute, including:

- Asking any respondent to make written submissions to be shared with the person bringing the complaint
- Asking any party to give the Commission information relevant to the complaint
- Making enquiries or discussing the complaint with either or both parties
- Facilitating a conciliation conference

9.10 If a conciliation conference is convened, all parties must be given the opportunity to attend, but the Commission should have discretion to decide which parties are directed to attend.

9.11 The Act should not require the Commission to take certain steps within specified timeframes during the dispute resolution process. Instead, the Commission must use its best endeavours to finish dealing with a complaint within 12 months of its lodgement.

9.12 For matters that have met the threshold to proceed to dispute resolution, the Commission should give a notice to all parties to allow a complainant to elect to proceed to the tribunal once dispute resolution processes have finalised without an agreement, or if the Commission declines to provide, or continue to provide, dispute resolution.

9.13 Once the notice has been given to parties, the person bringing the complaint should retain the right to request referral to the tribunal for determination and this request must be made within the existing timeframe of 28 days.

9.14 If these recommendations are implemented, there should not be a direct right of access to the tribunal or court.

9.15 Once the new Act is in effect, the Commission should:

- develop a guideline to inform decision making about which dispute resolution actions to take in a particular complaint
- publish information at least annually about timeframes within which it has finalised complaints.

Increasing access to justice

Complaints brought by organisations

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

An organisation can only bring a complaint under the Act in relation to vilification, or if they are acting as agent for a named complainant.[192]

Benefits of complaints brought by organisations

During the Review, we asked whether an organisation should be able to make a complaint on behalf of a person who has experienced discrimination.

We received 47 submissions on this issue and of those, 43 submissions were in support of allowing organisations, including representative bodies or trade unions, to make a complaint of discrimination.[193]

Of those that supported the approach, one submission favoured allowing complaints to be made by organisations, but only for trade unions, not other representative organisations.[194]

Of the remaining submissions that addressed this issue:

- one was opposed to allowing complaints to be made by organisations, because it circumvents existing processes[195]
- the remaining three submissions were not opposed or did not express an opinion.[196]

In our initial consultations with organisations, the option for organisations to bring complaints as representative bodies was considered to have some merit, subject to resourcing constraints of organisations that represent groups protected by the Act.[197]

192 *Anti-Discrimination Act 1991* (Qld) s 134.

193 Name withheld (Sub.022) submission; Prof. John Scott submission; Name withheld (Sub.026) submission; Rainbow Families Queensland submission; Independent Education Union - Queensland and Northern Territory Branch submission; Office of the Special Commissioner, Equity and Diversity (Qld) submission; PeakCare Queensland Inc submission; Queensland Network of Alcohol and Other Drug Agencies submission; Name withheld (Sub.062) submission; Name withheld (Sub.064) submission; Name withheld (Sub.066) submission; Name withheld (Sub.069) submission; Dr Zahra Stardust submission; Australian Lawyers Alliance submission; Stonewall Medical Centre submission; Alistair Witt submission; SIN (South Australia) submission; Jenna Love submission; Vision Australia submission; Name withheld (Sub.089) submission; Women's Legal Service Qld submission; Australian Discrimination Law Experts Group submission; Tenants Queensland submission; Sienna Charles submission; Jenny King submission; Maternity Choices Australia submission; Queensland Council for Civil Liberties submission; Sex Workers Outreach Project (SWOP) NSW submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Equality Australia submission; Abigail Corrin submission; Human Rights Law Alliance submission; Natasha submission; Community Legal Centres Queensland submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia; Scarlett Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Council for LGBTI Health submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Sex Workers Outreach Program (SWOP NT) and Sex Workers Reference Group (SWRG) submission.

194 Independent Education Union - Queensland and Northern Territory Branch submission.

195 James Cook University submission.

196 Office of the Public Guardian submission; Christian Schools Australia submission; Australian Industry Group submission.

197 Queensland Program of Assistance to Survivors of Torture and Trauma consultation, 23 August 2021; Queensland Indigenous Family Violence Legal Service consultation, 25 August 2021; AMPARO Advocacy Inc consultation, 8 September 2021; Just.Equal Australia consultation, 17 September 2021; Open Doors Youth Service consultation, 10 September 2021.

We were told that groups who would particularly benefit from allowing complaints to be made by organisations include tenants, sex workers, the LGBTIQ+ community, First Nations people, people of faith, people accessing maternity care, young people under child protection orders, and people with disability.

We heard that the key benefits of allowing organisations to bring complaints were:

- reducing the burden on people who have experienced discrimination and sexual harassment
- boosting the capacity to address systemic issues, particularly where they are in the public interest.

Reducing the burden on individual complainants

Submissions noted that involving organisations that work with marginalised and disadvantaged groups in the complaint process can significantly reduce the burden on individual complainants to enforce their rights under the Act.[198] These submissions raised a range of issues concerning barriers that people face in accessing the complaints system, including those that we discussed in chapter 2.

We were told that people who experience significant social marginalisation are often not aware that they are also experiencing unlawful discrimination, or it may be low a priority because of more immediate issues they are facing, including access to housing and food security. This may mean that complaints received by the Commission do not include the experiences of people who are at greatest risk of discrimination, or who are subjected to the most egregious forms of discrimination.[199]

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

> *I think it's very difficult to put the onus on the person who feels discriminated, to put their case by themselves… people will probably struggle, or wouldn't think it is worth it.*[200]

Allowing organisations to make complaints can reduce some barriers individuals face in making a complaint, such as a lack of resources, ability, or confidence.[201] Organisations might also be more likely to secure pro bono legal support and funding to make a complaint.[202] Complaints by organisations can address power imbalances that commonly exist at a personal level between complainants and respondents, and protect people who are reluctant to speak up for fear of identification.[203]

198 Australian Discrimination Law Experts Group submission, 35; Equality Australia submission, 37; Tenants Queensland submission, 4; Queensland Advocacy Incorporated submission, 23; Legal Aid Queensland submission, 43; Office of the Special Commissioner, Equity and Diversity (Qld) submission, 3; PeakCare Queensland Inc submission, 8; Queensland Network of Alcohol and Other Drug Agencies submission, 4; Natasha submission, 2.

199 Australian Discrimination Law Experts Group submission, 35. This is also reflective of issues identified through consultations: Queensland Indigenous Family Violence Legal Service consultation, 25 August 2021; Respect Inc consultation, 12 August 2021; Immigrant Women's Support Service consultation, 19 August 2021; Micah Projects consultation, 12 August 2021.

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

201 Tenants Queensland submission, 4; Equality Australia submission, 37; Legal Aid Queensland submission, 43; Maternity Choices Australia submission, 8; Office of the Special Commissioner, Equity and Diversity (Qld), 3.

202 Equality Australia submission, 37.

203 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 8-9; Legal Aid Queensland submission, 45; Respect Inc and DecrimQLD submission, 26; People with disability roundtable, 4 February 2022.

Submissions told us that individuals fear victimisation if they make a complaint, and have concerns about their privacy during the process. Rainbow Families Queensland, a group that supports and advocates for LGBTIQ+ parents and their children, described the experience of systemic discrimination when completing the Census in 2021 in relation to many of the questions. However, families were hesitant to make a complaint, particularly where it involved putting a child forward as a complainant.[204]

Sex workers and people living with HIV alerted the Review to significant barriers to lodging a complaint. They said that disclosing their status brings with it a risk to personal safety, stigma, and potential for further discrimination.[205] Responses to our online survey revealed that the most frequently reported reason for not making a complaint was concern about negative consequences from complaining.[206]

Some of these issues were raised in the Review's roundtable consultation with people with disability, where one participant told us that:

> *People with disabilities, they are so scared of making any form of complaint. Because they're afraid they are going to lose the services.*[207]

We were told that reducing the individual burden of making a complaint by allowing an organisation to make the complaint instead should lead to more cases of unlawful discrimination being addressed. This is particularly important for matters involving the public interest.[208]

Sisters Inside endorsed this position, noting that:

> *Well, if we make a complaint on behalf of someone else, for example, for women who are in prison… that would be a great assistance because staff can do that. They're in the prison every day. Things happen immediately… And so women don't have to be worried about what's the payback going to be inside. And also how long it's going to take and if they're released in the meantime...*[209]

Submissions from sex workers identified benefits from allowing people to feel more united and supported by their peers, and improving their sense of safety during a legal process.[210]

Addressing systemic issues

Expanding the list of who may complain to include organisations may be particularly beneficial to addressing systemic discrimination.[211] The Australian Discrimination Law Experts Group submitted that:

---

204 Rainbow Families Queensland submission, 3.

205 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia, 8; Respect Inc and DecrimQLD, 24; Prof John Scott submission, 2; Name withheld (Sub.064) submission, 2-3; Stonewall Medical Centre submission, 1; Alistair Witt submission, 1; Jenna Love submission, 1; Name withheld (Sub.089) submission, 1-2; Sienna Charles submission, 8; Sex Workers Outreach Project Inc (SWOP) NSW, 4; Name withheld (Sub.066) submission; Dr Zahra Stardust submission, 3-4; Name withheld (Sub.062) submission, 5; Name withheld (Sub.069) submission, 5; Natasha submission, 2; Sex Workers Outreach Program and Sex Workers Reference Group submission, 9; Scarlet Alliance, Australian Sex Workers Association submission, 18.

206 Of the survey respondents, 869 had not reported their experience, and the main reason for doing so was 'worried about negative consequences' which accounted for 287 responses. See also Tenants Queensland submission, 4.

207 People with disability roundtable, 4 February 2022.

208 Queensland Law Society submission, 15.

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

210 Jenny King submission, 3; Sex Workers Outreach Program and Sex Workers Reference Group submission, 9; Scarlet Alliance, Australian Sex Workers Association submission, 18.

211 Tenants Queensland submission, 4; Legal Aid Queensland submission, 43; Queensland Network of Alcohol and Other Drug Agencies submission, 4; Name withheld (Sub.062) submission, 5; Queensland Advocacy Incorporated submission,

> Allowing advocacy bodies or trade unions to make complaints on behalf of affected people is an important way of improving the individual enforcement model adopted by discrimination laws, and better reflects the collective nature of inequality and discrimination.[212]

Organisations that provide front line services to people who are at risk of experiencing discrimination have a thorough and nuanced understanding of the types of discrimination that affect their communities and are often the first point of contact when people experience discrimination. They may also be more likely to pursue cases that have an impact on a whole class of people and are best placed to advocate for systemic and structural change for the benefit of their communities.[213]

The ability for organisations to make complaints would also facilitate use of representative complaint provisions, as we discuss below.[214]

Should organisation complaints be confined to dispute resolution?

We asked for submissions on whether complaints by organisations and representative bodies should be confined to the Commission's dispute resolution process, or should also be able to proceed to the tribunal.

There was strong support for organisational complaints to have access to both the Commission process and a tribunal hearing. Thirty-five submissions[215] expressly or implicitly supported complaints by organisations having the same options for resolution and determination as other complaints because:

- Mechanisms are unlikely to be utilised if complaints could not proceed to the tribunal when dispute resolution by the Commission does not resolve the matter.[216]
- Limiting organisational complaints to the dispute resolution process would not realise the benefits and purposes of the process, which is to address limitations of the individual complaints system.[217]
- The risks associated with being identified at a conciliation carry through to the tribunal stage, which would be one reason some people and their representative bodies may choose to make an organisational complaint, including sex workers.[218]

23; PeakCare Queensland Inc submission, 8.

212 Australian Discrimination Law Experts Group submission, 28.

213 Legal Aid Queensland submission, 44-45; Tenants Queensland submission, 4; Equality Australia submission, 37; Queensland Advocacy Incorporated submission, 23; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 9.

214 Queensland Council for Civil Liberties submission, 8.

215 Name withheld (Sub.022) submission; Prof John Scott submission; Office of the Special Commissioner, Equity and Diversity submission; PeakCare Queensland Inc submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Name withheld (Sub.062) submission; Name withheld (Sub.064) submission; Name withheld (Sub.066) submission; Name withheld (Sub.069) submission; Dr Zahra Stardust submission; Stonewall Medical Centre submission; Alistair Witt submission; SIN (South Australia) submission; Jenna Love submission; Vision Australia submission; Name withheld (Sub.089) submission; Australian Discrimination Law Experts Group submission; Tenants Queensland submission; Sienna Charles submission; Jenny King submission; Maternity Choices Australia submission; Queensland Council for Civil Liberties submission; Sex Workers Outreach Project (SWOP) NSW submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Equality Australia submission; Human Rights Law Alliance submission; Natasha submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Scarlett Alliance, Australian Sex Workers Association submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Council for LGBTI Health submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission.

216 Australian Discrimination Law Experts Group submission, 36.

217 Queensland Council for Civil Liberties submission, 9.

218 Eg. Prof John Scott submission, 2; Name withheld (Sub.069) submission, 5; Respect Inc and DecrimQLD submission, 24; Name withheld (Sub.064) submission, 3; Stonewall Medical Centre submission, 1; Alistair Witt submission, 1; Jenna Love submission, 1; Sienna Charles submission, 8; Natasha submission, 2; Sex Workers Outreach Program and Sex Workers Reference Group submission, 9; Dr Zahra Stardust submission, 3-4.

Two submissions suggested complaints by organisations only having access to the Commission's dispute resolution process, but not the tribunals.[219]

The Australian Industry Group preferred this approach because it is consistent with federal law, which does not allow organisations to commence proceedings in the Federal Court.[220]

Professor Therese MacDermott takes different position and has identified the benefit of consistency between Commission and court processes, whereas having two approaches may encourage respondents not to resolve complaints at conciliation, where they are brought by an organisation.[221]

Criteria for bringing an organisational complaint

Current approach

An organisation can make a complaint in relation to vilification,[222] but only if the organisation has a primary purpose to promote the interests or welfare of persons of a particular race, religion, sexuality, or gender identity. Under these provisions, the organisation is called a 'relevant entity.'

The Commission must also be satisfied that:

- the complaint is made in good faith; and
- the allegation is about conduct that has affected or is likely to affect people whose interests and welfare is a primary purpose of the organisation to promote; and
- it is in the interests of justice to accept the complaint.[223]

Relevant entity complaints were introduced through amendments to the Act in 2002 to allow access to protections for people who belong to an affected group, but may be reluctant to make a complaint for fear of being singled out for victimisation'.[224] As we discuss in chapter 2, the Review heard that these concerns also occur with experiences of discrimination and sexual harassment.

The Commission's complaints data indicates that only five relevant entity complaints have been accepted under the vilification protections of the Act in the last 10 years. Of those:

- Four were made by community legal centres in relation to sexuality or gender identity vilification. Two of these did not resolve, and the remaining two were referred to the Queensland Civil and Administrative Tribunal. The outcomes of the tribunal proceedings are unknown.
- One was made by a community advocacy organisation alleging religious vilification in relation to posts made on Facebook. As the respondent failed to attend the compulsory conference, the tribunal made orders in default that the respondent had engaged in unlawful vilification under the Act.[225]

Complaints run by an organisation on behalf of a named complainant are already provided for under the Act. An organisation may act as an agent of a person, or can be authorised in writing by the Commissioner to act on behalf of the person subjected to the alleged contravention and who is unable to make or authorise a complaint. In practice, it is more common for an organisation to simply seek permission to represent a person in the conciliation process.[226]

219 Name withheld (Sub.026) submission, 5; Australian Industry Group submission, 10.
220 Australian Industry Group submission, 10.
221 Therese MacDermott, 'The collective dimension of federal anti-discrimination proceedings in Australia: Shifting the burden from individual litigants' (2018) Vol 18(1) *International Journal of Discrimination and the Law* 22, 25.
222 *Anti-Discrimination Act 1991* (Qld) s 124A.
223 *Anti-Discrimination Act 1991* (Qld) s 134(3)-(5).
224 Explanatory Notes, Discrimination Law Amendment Bill 2002, 16.
225 *Australian Muslim Advocacy Network & Islamic Council of Queensland v Anning* [2021] QCAT 452.
226 *Anti-Discrimination Act 1991* (Qld) s 134(1)(b) and (c) and s 163.

Comparative approaches

Under federal legislation, a representative body or trade union may make a complaint on behalf of an 'aggrieved person'.[227] However, these bodies generally cannot proceed to the court, which requires applicants to be an 'affected person' in relation to the complaint, and for bodies to demonstrate a special interest in those matters.[228]

Victoria and NSW have similar models that allow a representative body to make an application on behalf of a named person or persons if the Commission or tribunal is satisfied that:

- Each person is entitled to bring a dispute and has consented to the making of the application.
- The representative body has sufficient interest in the application, meaning that the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects, or has the potential to adversely affect, the interests of the body or the interests or welfare of the persons it represents.
- If the organisation represents more than one person, the alleged contravention arises out of the same conduct.[229]

In Tasmania, a trade union may make a complaint representing a class of members of that union, if the Commissioner is satisfied that a majority of those members are likely to consent. An organisation may also bring a complaint for alleged unlawful conduct directed towards them, if the Commissioner is satisfied the majority of members of the organisation are likely to consent.[230]

In Western Australia, a trade union can make a complaint on behalf of a member or members.[231]

In the ACT a person with 'sufficient interest' can make a complaint. A person has 'sufficient interest' if the conduct complained about is a matter of genuine concern to the person and conduct of that kind adversely affects the interests of the person, or the interests or welfare of anyone the person represents.[232]

Consent and naming people involved

One potential drawback of allowing complaints by organisations is that the organisation may advocate for positions or outcomes not aligned with the best interests of individuals in the group of persons they purport to represent, or that the organisation may wish to proceed with a complaint when the people in the group don't want to continue.

To safeguard against this possibility, some stakeholders suggested that having the consent of individuals would be an appropriate requirement for an organisation to bring a complaint.[233] Some submissions supported the models from Victoria and NSW, which require that complainants be named and consent of each complainant given.[234]

227 *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(c).
228 *Australian Human Rights Commission Act 1986* (Cth) s 46PO(1). See for example *Access for All Alliance v Hervey Bay City Council* [2007] FCA 615; and *Executive Council of Australian Jewry v Scully* [1998] 79 FCR 537.
229 *Equal Opportunity Act 2010* (Vic) ss 114 and 124; *Anti-Discrimination Act 1977* (NSW) ss 87A and 87C.
230 *Anti-Discrimination Act 1998* (Tas) s 60 (1)(c)-(d).
231 *Equal Opportunity Act 1984* (WA) s 83(1)(c).
232 *Human Rights Commission Act 2005* (ACT) s 43(1)(f) and (2).
233 Queensland Council for Civil Liberties submission, 8-9; Community Legal Centres Queensland submission, 4; Australian Lawyers Alliance submission, 11; Scarlett Alliance, Australian Sex Workers Association submission, 18.
234 Vision Australia submission, 5; Queensland Council for Civil Liberties submission, 8-9; Tenants Queensland submission, 4; PeakCare Queensland Inc submission, 8.

However, requiring complainants to be named would not address the victimisation and privacy concerns.

Caxton Legal Centre provided an example of how an organisational complaint might work where a private school's uniform policy contained prohibitions on what was described as 'afro hair'. In that case, it should not be necessary for a child of African descent to attend the school and be refused or reprimanded for their hair before a complaint can be lodged. Instead, it would be appropriate for a community organisation established for the benefit of African communities to make a race discrimination complaint about that policy and clear a path to an enrolment process free from discrimination and distress. Because of the particular vulnerability of children and young people, requiring individual students to be identified would present particular difficulties and risks.[235]

Consent is not a requirement under the Western Australian and ACT laws. Tasmania requires the Commissioner to be satisfied that a majority of the organisation's members are likely to consent.

The Review's position

The Review considers that:

- Allowing organisations to bring complaints about discrimination and sexual harassment reduces the burden on individual complainants and creates opportunities to address systemic issues.
- There is no justification for confining complaints by organisations to the Commission's dispute resolution process. Doing so may limit the benefits and purpose of enabling organisations to make a complaint in the first place and would be inconsistent with current provisions that allow for vilification complaints by 'relevant entities' to be referred to the tribunal.
- The criteria for an organisation to be considered a 'relevant entity' in order to make a vilification complaint require consideration of good faith, the appropriateness of the organisation to make the complaint, and the interests of justice. These criteria are unique in Australia, as other jurisdictions require the organisation to demonstrate a 'sufficient interest' and/or that they have the consent of their members.
- We consider that 'sufficient interest' is already encompassed in the criteria that requires the Commission be satisfied that the alleged conduct has affected or is likely to affect people whose interests and welfare is a primary purpose of the organisation.
- Although 'consent' would ensure that the organisation only makes complaints supported by people who are affected, the practical difficulties this presents would undermine the purpose of organisation complaints. The criterion of 'good faith' sufficiently addresses this concern.

Recommendation 10

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

235 Caxton Legal Centre submission, 15.

Representative complaints

A representative complaint is one that is made on behalf of a 'class' or 'category' of people who are not named as complainants and are not parties to the proceeding, but may be entitled to the final remedy determined by the tribunal. This is different to the situation where a complaint is made by an agent on behalf of an individual, or by a person who has been authorised to act on behalf of an individual, such as a parent on behalf of a child.[236]

A well-known example of a representative complaint is the matter of *Cocks v State of Queensland*, which found that the failure to provide equal access for people with disability to the front entrance of the Convention Centre was unlawful discrimination and ordered the construction of a lift to allow access through the front entrance.[237] This is an example of a successful representative complaint under the current Act where the parties agreed that the matter proceed as a representative complaint.

While there are identifiable benefits to the overall approach in the Act, which we discuss below, there have been very few successful representative complaints since the introduction of the Anti-Discrimination Act.

In the Discussion Paper, we asked whether changes are needed to would improve the accessibility and utility of representative complaints, and what factors influence the capacity for affected people to assert their rights through a representative complainant.

The Review received 14 submissions about representative complaints.[238] All supported the continuation of a representative complaints process, but suggested changes to make the process more accessible and useful.

Current approach

The Act currently provides that if a complaint alleges that a number of people were subjected to discrimination or another contravention by the respondent, the Commissioner must determine whether to deal with the complaint as a representative complaint. The tribunal may subsequently make its own determination.[239]

The criteria for determining whether a complaint is a representative complaint are the same for the Commissioner and the tribunal, and are that:

- the complainant is a member of a class of people, the members of which have been affected, or are reasonably likely to be affected, by the respondent's conduct; and
- the complainant has been affected by the respondent's contact; and
- the class is so numerous that joinder of all of its members is impracticable; and
- there are questions of law or fact common to all members of the class; and
- the material allegations in the complaint are the same, similar or related to the material allegations in relation to the other members of the class; and
- the respondent has acted on grounds apparently applying to the class as a whole;

236 *Anti-Discrimination Act 1991* (Qld) s 134(1)(b) and (c).
237 *Cocks v State of Queensland* [1994] QADT 3.
238 Name withheld (Sub.026) submission; Public Advocate (Queensland) submission; Vision Australia submission; Women's Legal Service Qld submission; Australian Discrimination Law Experts Group submission; Tenants Queensland submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Equality Australia submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission.
239 Anti-Discrimination Act 1991 (Qld) ss 146, 194.

or alternatively, if the Commissioner or tribunal is satisfied that:

- the complaint is made in good faith as a representative complaint; and
- the justice of the case demands that the matter be dealt with by means of a representative complaint.[240]

To make a representative complaint, the named complainant (or complainants) must be eligible to make the complaint themselves, either as an affected person or an agent of the person, or a 'relevant entity' in relation to a vilification matter.[241]

Each complainant to a representative complaint must choose whether to proceed as a party to the representative complaint or make their own individual complaint. A representative complaint does not prevent another person from bringing their own non-representative complaint about the same situation or conduct.[242]

Benefits of representative complaints

All submissions supported the continuation of a representative complaints process, including because of the benefits of:

- dealing with one complaint rather than many separate complaints about the same issue
- creating efficiencies
- providing access to justice
- reducing the burden on individual complainants to take the complaint forward themselves
- addressing systemic discrimination.[243]

Have these benefits been achieved?

While supporting the continuation of representative complaints, submissions observed that under the current Act these benefits have not been realised in practice.

There were two main aspects to this issue:

- The legislative criteria for representative complaints are complex and create too high a threshold, which places a heavy burden and expense on individual complainants.
- Greater community awareness and education about representative complaints is needed.

We reviewed the last 10 years of Commission complaint data to determine how often representative complaints are made. This revealed that three matters during that time were considered as potential representative complaints.[244] Of those, only one matter was accepted by the Commission and proceeded as an individual complaint at the election of the complainant.

240 *Anti-Discrimination Act 1991* (Qld) ss 146-152, 194-200.
241 *Anti-Discrimination Act 1991* (Qld) s 134. Generally speaking, a complaint must be made by, or on behalf of, an individual complainant. However, sections 134(3)-(5) allow for a 'relevant entity' to make a complaint on its own behalf in relation to alleged vilification under section 124A, provided certain criteria are met.
242 *Anti-Discrimination Act 1991* (Qld) ss 151-152, 199-200.
243 Legal Aid Queensland submission, 40-41; Respect Inc and DecrimQLD submission, 24; Queensland Advocacy Incorporated submission, 22. See also Community Legal Centres Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>.
244 The Commission complaints database does not have a field to record whether complaints are dealt with as a representative complaint or not.

In contrast, data we obtained from the Australian Human Rights Commission indicated the federal Commission received 41 representative complaints over the last 10 years.[245] We were told that while disability discrimination complaints were initially the most common, in the past five years, most representative complaints have been made under the Racial Discrimination Act.[246]

The greater number of representative complaints in the federal jurisdiction could reflect differences in the legislative criteria for commencing representative complaints under Australian Human Rights Commission Act, or because in that jurisdiction, unresolved complaints are referred to the Federal Court, a costs jurisdiction, which may allow for greater access to litigation funding or no win no fee arrangements with legal representatives. Both of these potential barriers are discussed below.

The case of *Harris v Transit Australia Pty Ltd* demonstrates these issues.[247] In that case, a complaint had been brought by people unable to use Transit Australia's buses because they are dependent on wheelchairs for mobility because of their quadriplegia. They sought orders that would require Transit Australia to purchase new low floor ramp buses. As a preliminary issue, the tribunal considered the complainants' request to have the matter dealt with as a representative complaint, which was opposed by Transit Australia. The tribunal declined to deal with the matter as a representative complaint on the basis that the complainants had not identified the class of affected people 'with sufficient particularity'. For example, there were no particulars on how the class members would be affected by Transit Australia's conduct, and questions of law and fact that would be common to all members.

The legislative requirements

In the Discussion Paper, we asked for submissions on what changes would improve the accessibility and utility of representative complaint provisions.

Current complexity of legislative criteria

We were told that the current criteria under the Act are too complex, and nearly impossible to use effectively.[248]

Stakeholders emphasised that potential complainants do not have a clear understanding of the requirements that must be met for a complaint to be dealt with as a representative complaint. Submissions indicated that any changes to improve accessibility in this regard would be a positive.[249]

Comparative approaches

Some submissions[250] referred to the model found in Part IVA the Federal Court of Australia Act[251], which has been used with success in claims under the Racial Discrimination Act.[252]

A representative proceeding can be commenced in the Federal Court where:

245 Australian Human Rights Commission, consultation, 5 May 2022.
246 *Racial Discrimination Act 1975* (Cth).
247 *Harris v Transit Australia Pty Ltd* [1999] QADT 1.
248 Caxton Legal Centre submission, 15; Queensland Advocacy Incorporated submission, 22. See also Community Legal Centres Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>.
249 Public Advocate (Queensland) submission, 5; Community Legal Centres Queensland submission, 3; Equality Australia submission, 36.
250 Public Advocate (Queensland) submission, 4; Legal Aid Queensland submission, 41; Caxton Legal Centre submission, 15; Respect Inc and DecrimQLD submission, 24. See also Community Legal Centers Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>.
251 *Federal Court of Australia Act 1976* (Cth).
252 *Racial Discrimination Act 1975* (Cth). See eg, *Wotton v State of Qld (No 5)* [2016] FCA 1457 and *Pearson v State of Queensland (No 2)* [2020] FCA 619.

- seven or more persons have claims against the same person;
- the complaints of all those persons are in respect of, or arise out of, the same, similar or related circumstances;
- the claims of all those persons give rise to a substantial common issue of law or fact.[253]

With regard to standing, a person who has a sufficient interest to commence a proceeding on their own behalf against another person has a sufficient interest to commence representative proceedings on behalf of other persons. Consent is not required to be a group member, although group members may opt out of a representative proceeding. The final judgment binds all identified group members other than those who have opted out of the representative proceedings. [254]

Submissions also referred to Part 13A of the Civil Proceedings Act,[255] which is based on Part IVA of the Federal Court Act.[256]

Better alignment of the Anti-Discrimination Act's provisions with federal and Queensland civil procedure regimes would mean that court decisions could help to guide and develop the law on representative complaints under the Act, which in turn would provide better guidance to potential complainants, the Commission, and the tribunals.[257]

Before a person can commence a representative complaint for discrimination in the Federal Court, the person must first lodge a complaint with the Australian Human Rights Commission. The three criteria required to commence a representative proceeding in the Federal Court are also required are also required for a complaint with the Australian Human Rights Commission.[258]

The complaint must also:

- describe or otherwise identify the class members, although it is not necessary to name them or specify how many there are; and
- specify the nature of the complaints made on behalf of the class members; and
- specify the nature of the relief sought.[259]

Consent of the class members is not required, and a class member may withdraw from the representative complaint. However, a person who is a class member for a representative complaint is not entitled to lodge a separate complaint in respect of the same subject matter.[260]

Burden on individual complainants

Submissions also raised the practical challenges faced by a person seeking to bring a representative case on behalf of a class of affected people. We heard that many aspects make this an unattractive option, including the cost and complexity of the requirements, and this can reduce access to justice.

253 *Federal Court of Australia Act 1976* (Cth) s 33C.
254 *Federal Court of Australia Act 1976* (Cth) ss 33D, 33E, 33J, 33ZB.
255 *Civil Proceedings Act 2011* (Qld).
256 *Federal Court of Australia Act 1976* (Cth). Legal Aid Queensland submission, 41-42; Queensland Council for Civil Liberties submission, 8; Caxton Legal Centre submission, 15. See also Community Legal Centres Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>.
257 Legal Aid Queensland submission, 41; Caxton Legal Centre submission, 15.
258 *Australian Human Rights Commission Act 1986* (Cth) ss 46PB(1), 46PB(3). Note that in a complaint to the Australian Human Rights Commission, it is only necessary to demonstrate that the class members have complaints against the same person, not that seven or more persons have those complaints.
259 *Australian Human Rights Commission Act 1986* (Cth) s 46PB(2).
260 *Australian Human Rights Commission Act 1986* ss 46P(3), 46PB(4), 46PC.

One solution suggested was that standing be given to organisations to advocate on behalf of an affected group.[261] In the section above, we have recommended expanding the scope of complaints that can be brought by organisations. If implemented, this change would allow organisations to make complaints as a representative complaint, provided the necessary criteria have been met.

Legal representation and costs

While creating more flexible criteria for commencing representative complaints may improve accessibility, it does not address the overarching complexity inherent in pursuing these types of matters. Complainants require legal advice and representation[262] which increases costs for a complainant who is not entitled to, or cannot gain access to, the limited legal aid or community legal centre assistance available.

Some submissions noted that the prospect of recovering legal costs, which is possible in the federal jurisdiction, may increase accessibility to legal representation, as legal representatives could conduct these matters under 'no win no fee' arrangements or through litigation funding.[263] This could be achieved by allowing representative complaints to apply to the Supreme Court, using Part 13A of the Civil Proceedings Act.[264]

On the other hand, a costs jurisdiction is accompanied by a risk of a costs order, which can deter people from bringing a complaint. Retaining a no-costs jurisdiction therefore has merit, particularly where the remedy sought does not involve significant awards of monetary damages and the complainants are unable to attract litigation funding.[265]

Enhancing access

Community awareness and guidance

As well as discussing improvements to the legislative framework for representative complaints, submissions identified that greater community awareness of representative complaints is required to increase use of these provisions. We were also told that guidance on commencing and managing representative actions under the Act should be provided.[266]

Aligning the approach of the Act with the federal system and Queensland's civil procedure would also allow for cross-jurisdictional guidance, and increased knowledge of the law.

In chapter 6, we discuss the importance of education and awareness in the context of the introduction of a positive duty to the Act, as well as to increase the Commission's proactive role in monitoring compliance and eliminating discrimination, including systemic discrimination. In chapter 9 we consider the extent to which awareness of the law has an impact on how effective it is, and the resourcing required to ensure education keeps pace with legislative changes and the needs of stakeholders.

Joining complaints as a representative complaint

Legal Aid Queensland suggested that the Act should allow the Commission to join complaints as a representative matter where multiple complaints are made about the same respondent with similar facts and legal issues.[267]

261 Equality Australia submission, 36; Legal Aid Queensland submission, 43; Queensland Law Society submission, 15.
262 Legal Aid Queensland submission, 42-43; Equality Australia submission, 37; Name withheld (Sub.026) submission, 5.
263 Legal Aid Queensland submission, 42; Women's Legal Service Qld submission, 6; Caxton Legal Centre submission, 15.
264 *Civil Proceedings Act 2011* (Qld).
265 Legal Aid Queensland submission, 42.
266 Legal Aid Queensland submission, 41-42; Equality Australia submission, 36; Caxton Legal Centre submission, 15.
267 Legal Aid Queensland submission, 42.

The Commission's practice has been, in certain circumstances, to conciliate multiple complaints together with the agreement of all parties. The opportunity to do this is limited, as complaints must have the same respondent and be lodged with the Commission at a similar point in time. Privacy issues for the parties also adds to the complexity.

Identifying representative complaints for the Commission may not be straight forward, as classes of people and commonality of issues may only coalesce as a matter progresses.

Resolving representative complaints

Equality Australia's submission and our consultation with the Australian Human Rights Commission identified difficulties with representative complaints when there is not shared agreement about when and how to resolve a complaint.[268] This issue presents complexities for resolving matters that does not require legislative change. We have not taken this to mean the issue should or can be addressed through legislative amendment.

The Review's position

The Review considers that:

- The criteria for bringing a representative complaint to the Commission or tribunal should be replaced with criteria based on the Australian Human Rights Commission Act,[269] particularly section 46PB, because of its proven effectiveness and the benefits of aligning with federal and state civil procedure laws. However, a representative complaint should not prevent another person from commencing a non-representative complaint.
- Given the complexity and costs involved with bringing a representative complaint, and the benefits that flow from bringing an action to ensure systemic outcomes, organisations should be able to make representative complaints provided they meet the criteria to make a complaint as an organisation.
- Where the complaint cannot be resolved through the Commission's dispute resolution processes, the complainant in a representative complaint should be able to elect to lodge their complaint either in the tribunal, a no costs jurisdiction, or to the Supreme Court, a costs jurisdiction.
- The current requirement for the Commission to proactively identify representative complaints is unrealistic and, with recommended changes to the law and increased focus on community awareness, may be unnecessary. The Commission may refer possible representative complaints for legal advice.

Recommendation 11

11.1 The Act should replace the criteria for bringing a representative complaint to the Commission or tribunal with criteria similar to section 46PB of the *Australian Human Rights Commission Act 1986* (Cth).

11.2 The existence of a prior representative complaint should not prevent another person from commencing a non-representative complaint.

11.3 Organisations should be able to have their complaint dealt with as a representative complaint, provided they are able to bring the complaint on their own behalf.

---

268 Equality Australia submission, 37; Australian Human Rights Commission, consultation, 5 May 2022.
269 *Australian Human Rights Commission Act 1986* (Cth) s 46PB.

11.4 Where the complaint cannot be resolved through the Commission's dispute resolution processes, the complainant in a representative complaint may elect to lodge their complaint either in:

- the tribunal, a no costs jurisdiction, or
- the Supreme Court, a costs jurisdiction.

Complaints by prisoners

The Terms of Reference ask us to consider:

- ways to improve the process and accessibility for bringing discrimination complaints, including how the complaints process should be enhanced to improve access to justice for victims of discrimination.[270]

During the Review, we identified that people who are serving a term of imprisonment or on remand in prison can be at risk of experiencing discrimination, but face specific legislative barriers to making a complaint to the Commission.

In 2007, a Supreme Court decision affirmed a previous decision that failure to provide fresh halal meat in prison was unlawful discrimination.[271] In direct response to that case,[272] legislative amendments created a two-step internal complaint process in the Corrective Services Act[273] that required complaints to be made to the Chief Executive Officer and the Official Visitor where the respondent is a protected defendant, that is, Queensland Corrective Services (QCS) and service providers in prisons or community correction. [274] This section of the report will refer to this requirement as the 'Corrective Services Act internal process'.

We also discuss exceptions that apply to prisoners in chapter 8.

Current approach

Since 22 July 2022, a prisoner must comply only with the first step of the Corrective Services Act internal process, which involves writing to the Chief Executive Officer and waiting up to four months for a response.[275] There is no longer a requirement to raise the matter with the Official Visitor, which reduces the time for the internal process down from five to four months. [276]

In contrast, the Human Rights Act makes no distinction between prisoners and any other complainant. Under that Act, a prisoner is required to make an internal complaint and wait 45 days for a response from the relevant public entity before making a complaint to the Commission.[277] As

270 Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(l).
271 *State of Queensland v Mahommed* [2007] QSC 18. By the time of the hearing of this complaint, all Muslim prisoners in Queensland prisons were being provided with halal food and it has been observed in *Ali v State of Queensland* [2013] QCAT 319 that halal diets are now generally available in Queensland correctional centres.
272 Explanatory Notes, Corrective Services and Other Legislation Amendment Bill 2008 (Qld) 15-16. The Notes refer to difficulties with storing, preparing, and cooking kosher meals as causing 'administrative and operational burden'.
273 *Corrective Services Act 2006* (Qld)
274 *Corrective Services Act 2006* (Qld) ss 319G, 319E, 319F.
275 *Corrective Services Act 2006* (Qld) s 319E. Note - the waiting periods are reduced if the Chief Executive Officer notifies the prisoner in writing that they have finished dealing with the complaint earlier.
276 Now repealed s 319F required a prisoner to undertake a second step in bringing the matter to an Official Visitor if dissatisfied with the response of the Chief Executive Officer. Section 319F was repealed on 22 July 2022 because twelve months elapsed from the passing of the Corrective Services and Other Legislation Amendment Act 2020 which 'omits' this provision.
277 *Human Rights Act 2019* (Qld) s 65.

the subject matter of prisoners' human rights and discrimination complaints frequently overlaps, this creates an additional layer of complexity and confusion.[278]

In the Discussion Paper, we asked for submissions about whether these additional requirements imposed on prisoners since 2008 strike the right balance between ensuring access to justice while encouraging early resolution of complaints between prisoners and QCS and service providers. The Review received 14 submissions about this topic,[279] and all recommended the removal of this requirement.

In consultations with QCS, they preferred not to comment on substantive government policy issues but observed that any changes to the complaint model may have an operational impact.

The key reasons that stakeholders thought the Corrective Services Act's internal process should be removed were:

- There is insufficient justification for different processes that apply only to 'protected defendants' (the State of Queensland and its contractors).[280]
- The process creates an unjustifiable barrier to justice, compounded by the vulnerability of the cohort involved.[281]
- The process acts as a deterrent to making complaints,[282] which reduces transparency and removes an opportunity to identify issues and make improvements to policy and procedures on a systemic level.[283]
- Repeal of the provision would be a positive step in supporting prisoner's human rights.[284]
- The presumed benefits of early resolution are not being achieved and it is instead creating an administrative burden on the State, the parties, the tribunals, and the Commission.[285]
- To infer that a person is not entitled to access complaints processes because they have been convicted of a criminal offence or are on remand is inconsistent with Queensland's human rights obligations.[286]
- The lengthy delays required by the process are not feasible as most people are incarcerated for short periods.[287]

Seriousness and urgency

The blanket approach of requiring that all complaints first undergo an internal process may act as a barrier to complaining about serious conduct, such as sexual assault and sexual harassment. [288]

278 *Human Rights Act 2019* s 15 protects a prisoner from discrimination by a public entity, so will almost always apply where there is also a complaint which meets the threshold for acceptance under the *Anti-Discrimination Act 1991*.
279 Queensland Advocacy Incorporated submission; Sisters Inside Inc submission; Aged and Disability Advocacy Australia submission; Equality Australia submission; Legal Aid Queensland submission; Queensland Law Society submission; Queensland Council for Civil Liberties submission; PeakCare Queensland Inc submission; Australian Lawyers Alliance submission; Queensland Network of Alcohol and Other Drug Agencies Ltd submission; Australian Discrimination Law Experts Group submission; Respect Inc and DecrimQLD submission; Caxton Legal Centre submission; Youth Advocacy Centre Inc submission.
280 Queensland Advocacy Incorporated submission, 9.
281 Queensland Law Society submission, 15; Aged and Disability Advocacy Australia submission, 7; Equality Australia submission, 37; Queensland Advocacy Incorporated submission, 9
282 Caxton Legal Centre submission, 16.
283 Sisters Inside Inc submission, 4.
284 PeakCare Queensland Inc submission, 9.
285 Australian Lawyers Alliance submission, 11; Respect Inc and DecrimQLD submission, 25; Legal Aid Queensland submission, 49-50.
286 Legal Aid Queensland submission, 46.
287 Sisters Inside Inc submission, 4, referring to Queensland Productivity Commission, *Inquiry into imprisonment and recidivism* (Final Report, August 2019).
288 Sisters Inside Inc submission, 4.

If a prisoner does make a complaint using the prescribed process, they may continue to experience unlawful and potentially inhumane treatment in the care of the State while waiting for an outcome from their complaint. Like other complainants, many prisoners are concerned about making internal complaints because of fears of reprisal.[289]

Inflexible timeframes don't accommodate urgent situations in which a long delay would be detrimental. For example, if a complaint is about seeking to breastfeed a child in prison, a four-month delay in resolution is not feasible.[290]

Accessibility

Many stakeholders were concerned that the existing paper-based process is not suitable for the prison setting, because written records in prison are unreliable.[291] Preparing and storing paperwork while in prison is difficult, due to the lack of resources available to incarcerated people.[292] Inability to duplicate, store, and retrieve paperwork becomes a particular problem where the complainant is required to prove they have been through the internal process, but are often unable to make or retain a copy of their complaint.

In 2019, the Commission's *Women in Prison* report stated that:

> The Commission is aware of several cases in which a prisoner complainant says they have complied with these pre-conditions, but the respondent State says they cannot locate the relevant paperwork. On some occasions, the respondent State has conceded that forms may have been lost or misfiled.[293]

Practical challenges are present for prisoners trying to bring their complaint to the Commission in a 12-month timeframe, while engaging in the four-month internal process. Where people have been released from custody before bringing a complaint, additional challenges exist when engaging in processes essentially designed for internal resolution of complaints within the prison system.[294]

Several submissions noted the additional challenges for people with disability, low literacy, and/or Aboriginal and Torres Strait Islander people to comply with the requirements of the Corrective Services Act that are onerous and paper based.[295] These issues are magnified for people who experience intersectional discrimination. The impact of an inaccessible process is significant when considering that around half of prisoners have a disability[296] and 28% of prisoners are of Aboriginal or Torres Strait Islander descent.[297]

An additional burden on the State?

The original purpose of creating the Corrective Services Act's internal process was to avoid needlessly spending Queensland Corrective Services' finite resources on matters that might easily be resolved, or were seen as lacking in merit.[298]

289 Legal Aid Queensland submission, 49.
290 Sisters Inside Inc submission, 4.
291 Legal Aid Queensland submission, 49; Sisters Inside submission, 4.
292 Sisters Inside Inc submission, 5.
293 Anti-Discrimination Commission Queensland, *Women in prison 2019: a human rights consultation report* (2019) 186.
294 Caxton Legal Centre submission, 16; Legal Aid Queensland submission, 49.
295 Queensland Advocacy Incorporated submission, 9; Legal Aid Queensland submission, 48; Aged and Disability Advocacy submission, 7; Legal Aid Queensland submission, 48-49.
296 Aged and Disability Advocacy Australia submission, 7.
297 Legal Aid Queensland submission, 49.
298 Explanatory Notes, Corrective Services and Other Legislation Bill 2008, 7. The notes suggest that correctional authorities thought that complaints could have been resolved through internal processes with 'significantly less burden on public and correctional resources.'

However, the Anti-Discrimination Act requires the Commission to reject or lapse complaints that are frivolous, trivial, vexatious, misconceived, or lacking in substance.[299] Creating more flexible and responsive complaints processes at the Commission, as contemplated by this Review, may also mitigate the risk of increased use of prison resources.

We are unaware of the success rate of internal processes in resolving matters, and it may be that prisoners are receiving satisfactory outcomes in many cases which may not need to be escalated to the Commission.

On the other hand, the State and its contractors may be unnecessarily devoting resources to matters through the internal process that may not fall within the jurisdiction of the Act. With limited ability to access information in prison, a complainant may not understand what constitutes a breach of the Act, but must proceed through the internal process before the Commission can assess the complaint. In the ordinary course of events, the Commission filters out more than half of matters in the assessment phase.

Human rights considerations

Several submissions questioned whether the prerequisite internal complaint provisions are compatible with prisoners' human rights protected under the Human Rights Act.[300] Legal Aid Queensland pointed to key changes in the area of prison management since 2008, including:[301]

- **2017**: *Optional Protocol to the Convention against Torture* (OPCAT) was ratified by the Australian government, which requires creation of independent National Preventative Mechanisms (Article 17-18).
- **2018**: Taskforce Flaxton report, which recommended an independent inspector.
- **2019**: Introduction of the Human Rights Act.
- **2021**:Detention Services Bill 2021 (which establishes an independent inspector).

We observe that the internal process created by the Corrective Services Act internal process may be inconsistent with the right to equality before the law[302] under the Human Rights Act as prisoners, including those on remand, do not share an equal right of access to make complaints about serious conduct. Restricting access to an effective complaints process may also limit the right of prisoners to humane treatment when deprived of liberty[303] by reducing the ability, in practical terms, of prisoners to raise concerns about their treatment and lessening the opportunity for external oversight of discrimination and other unlawful conduct.

The Explanatory Notes to the Human Rights Bill 2018 states that the principle underlying humane treatment is:

> that a person's rights should only be curtailed to the extent necessary due to the confinement, reflecting that the punishment is intended to be limited to the deprivation of liberty.[304]

Consistent with this, the Queensland Supreme Court has found that the Human Rights Act 'mandates good conduct towards people who are incarcerated'.[305] Relying on Victorian authority, the court suggested that:

299 *Anti-Discrimination Act 1991* ss 139, 168.
300 Sisters Inside Inc submission, 5-6; Youth Advocacy Centre Inc submission, 4; Legal Aid Queensland submission, 47-48.
301 Legal Aid Queensland submission, 47.
302 *Human Rights Act 2019* (Qld) s 15.
303 *Human Rights Act 2019* (Qld) s 30.
304 Explanatory Notes, Human Rights Bill 2018, 25.
305 *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [18]. '*Owen-D'Arcy*'.

> The starting point for analysing the scope of this right should be that persons who are detained must not be subject to hardship or constraint other than that which results from the deprivation of their liberty.[306]

The Human Rights Act permits consideration of international instruments to assist in interpreting its provisions.[307] The 'Nelson Mandela rules' set out the minimum standards for treatment of prisoners. The most relevant rules being that:

- prisoners promptly be provided information on prison rules and procedures for making complaints (r 54)
- procedures for making complaints be in a form that prisoners can understand (r 55)
- prisoners can raise complaints internally and to relevant external authorities (r 56)
- any complaint should be promptly dealt with (r 57(1))
- prisoners should be able to raise complaints safely, confidentially, and without risk of 'retaliation, intimidation or other negative consequences' (r 57(2).[308]

As prisoners may be deterred by the current internal process, and face additional practical barriers to bringing a discrimination complaint, the Corrective Services Act internal process may not comply with rule 55. The Review also considers that limiting the right of a prisoner to raise concerns directly with the Commission may be in breach of rule 56, and the delays in dealing with complaints may infringe rule 57(1).

Human rights may only be limited in a reasonable way that can be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[309] Determining whether a limitation on rights is reasonable and justifiable involves considering various factors to strike the right balance between protecting human rights and achieving a lawful and legitimate purpose.[310]

The Review's position

The Review considers that:

- While the Corrective Services Act complaint process has been reduced to a single-step internal process, the Review is concerned about ongoing inefficiencies and barriers to equitable access that will continue unless the Corrective Services Act's internal process is removed.
- We consider that strategies to improve efficiency and encourage early resolution of complaints is a legitimate purpose the State may seek to achieve. However, that purpose is not being achieved by the current framework, at the expense of the most vulnerable individuals in the prison population.
- The capacity for continuous improvement of services and operations in prisons may be being undermined by the complexity and inaccessibility of the complaint framework.
- While removal of the internal complaint requirement is the best way to ensure compatibility with human rights, an alternative option in which the purpose can be achieved in a 'less restrictive' way has been suggested below.

306 *Owen-D'Arcy* [245].
307 See *Human Rights Act 2019* s 48(3).
308 General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 70th sess, UN Doc A/RES/70/175 (17 December 2015).
309 *Human Rights Act 2019* (Qld) s 13(1)
310 *Human Rights Act 2019* (Qld) s 13(2).

- If an internal complaint requirement is retained, it should be made more efficient and adaptable to exceptional and urgent situations, and consistent with the procedural requirements in the *Human Rights Act 2019*.

Recommendation 12

12.1 Section 319E of the *Corrective Services Act 2006* (Qld), that requires a person detained in a corrective services facility who is making a complaint against a 'protected defendant' to first make a complaint to the chief executive before lodging a complaint with the Commission, should be repealed.

12.2 If an internal complaint mechanism is retained for complaints about protected defendants, the process should be made consistent with the Human Rights Act by:

- requiring an internal complaint be made prior to complaining to the Commission
- allowing the complainant to lodge a complaint with the Commission after 45 days have elapsed
- providing the Commission with a discretion to defer dealing with a complaint if the protected defendant did not have an adequate opportunity to deal with the complaint
- providing the Commission with a discretion to waive the internal complaint requirement if there are exceptional circumstances.

The hearing process

Proving discrimination

The Terms of Reference ask us to consider:

- whether the Anti-Discrimination Act should reflect protections, processes and enforcement mechanisms that exist in other Australian discrimination laws[311]
- ways to improve the process and accessibility for bringing and defending a complaint of discrimination, including how the complaints process should be enhanced to improve access to justice for victims of discrimination.[312]

If a complaint cannot be resolved by the Commission, the complainant can elect to have the matter referred to the tribunal. The tribunal may attempt to resolve the matter early through a further conference. If not resolved in this way, the matter will proceed to a hearing where the tribunal will hear the evidence and determine the matter. The tribunal is not bound by the rules of evidence.[313] At the hearing, the Act determines which party is required to provide the matter, and to what standard.[314]

The Discussion Paper asked stakeholders to tell us whether the onus (or 'burden') of proof should shift at any point during the process of hearing a complaint, and if so, what would be the appropriate approach.

The Review received 34 submissions that responded to these questions,[315] of which most supported changing the current approach, six did not support any change or expressed reservations,[316] and two did not provide a settled opinion.

Overall, there was support for adjusting the current approach in order to reduce the burden on complainants to prove their case under the Act, while still ensuring the process is fair and balanced.

311 Queensland Human Rights Commission, Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(g).
312 Queensland Human Rights Commission, Review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference 3(l).
313 *Anti-Discrimination Act 1991* (Qld) s 208.
314 *Anti-Discrimination Act 1991* (Qld) ss 204-206.
315 Name withheld (sub.026) submission; Assoc Prof Dominque Allen submission; Vision Australia submission; Women's Legal Service submission; Australian Discrimination Law Experts Group submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission; Queensland Council for Civil Liberties submission; Equality Australia submission; James Cook University submission; Legal Aid Queensland submission; Respect Inc and DecrimQLD submission; Australian Industry Group submission; Caxton Legal Centre submission; Queensland Law Society submission; Public Advocate (Qld) submission; Medical Insurance Group Australia submission; Independent Education Union - Queensland and Northern Territory Branch submission; Sikh Nishkam Society of Australia submission; Human Rights Law Alliance submission; Multicultural Australia submission; Jenny King submission; Community Legal Centres Queensland submission; Queensland Catholic Education Commission submission; Aged and Disability Advocacy Australia submission; Scarlett Alliance, Australian Sex Workers Association submission; Name withheld (Sub.135) submission; FamilyVoice Australia submission; Queensland Advocacy Incorporated submission; Youth Advocacy Centre Inc submission; Australian Association of Christian Schools submission; Multicultural Queensland Advisory Council submission; Department of Education (Qld) submission; Queensland Civil and Administrative Tribunal submission.
316 FamilyVoice Australia submission; Medical Insurance Group Australia submission; Human Rights Law Alliance submission; Department of Education (Qld) submission; James Cook University submission; Australian Industry Group submission; Queensland Council for Civil Liberties.

Current approach

Under the current Act:

- the complainant has the responsibility of proving that the respondent contravened the Act (the onus or burden of proof).[317]
- in a case involving an allegation of indirect discrimination, the respondent must prove that a term complained of is reasonable (the reasonableness defence).
- if the respondent wishes to rely on an exemption, the respondent must raise the issue and prove that it applies (raising an exemption).[318]

The standard of proof is 'on the balance of probabilities.' This means it must be more probable than not that the conduct the subject of the allegations occurred. This contrasts with the more onerous criminal test of 'beyond reasonable doubt'.

Jurisdictions with reverse onus

Reverse onus is where the burden of proof shifts from the complainant to the respondent to prove that they did not contravene the Act. A reverse onus applies in legislation that regulates discriminatory conduct in the area of industry relations.

Since 1904, employers have been subject to a reverse onus of proof when defending a claim of dismissal on the basis of trade union activity. This approach is now incorporated in the Fair Work Act[319] in relation to general protections on the basis of all protected attributes. Significant overlap exists between the Anti-Discrimination Act and the Fair Work Act, in which discrimination is a form of unlawful 'adverse action', and many of the protected 'grounds' in the Fair Work Act are the same, or similar to, the protected attributes in the Anti-Discrimination Act.[320]

In the federal jurisdiction, the Work Health and Safety Act[321] also creates several offences to discourage discriminatory, coercive, and misleading conduct, which includes where a person is discriminated against because they have raised a work health and safety issue.[322] Under this Act, discrimination is presumed to be the reason for the conduct and the defendant has the burden of proving otherwise, on the balance of probabilities.[323] The Explanatory Memorandum justifies this reversal of the onus of proof because, 'it will often be extremely difficult, if not impossible, for the prosecution to prove that the person engaged in discriminatory conduct for a prohibited reason'. [324]

Reasons to change the approach

Stakeholders in favour of changing the onus of proof provided justifications including that:

- People from disadvantaged and marginalised groups find proving discrimination especially difficult.[325]

317 *Anti-Discrimination Act 1991* (Qld) s 204.
318 *Anti-Discrimination Act 1991* (Qld) s 205 and s 206.
319 *Fair Work Act 2009* (Cth) s 361.
320 The *Fair Work Act 2009* (Cth) s 351 prohibits adverse action on the following grounds, many of which are also protected attributes under the Anti-Discrimination Act – race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
321 *Work Health and Safety Act 2011* (Cth).
322 *Work Health and Safety Act 2011* (Cth) ss 104-108.
323 *Work Health and Safety Act 2011* (Cth) s 110.
324 Explanatory Memorandum, Work Health and Safety Bill 2011 (Cth), [408].
325 See for example: Public Advocate (Qld) submission 3; Queensland Nurses and Midwives Union submission, 13; Jenny King submission, 2.

- The current provisions, in effect, require the complainant to prove matters relating to the 'state of mind of the respondent', and often the complainant does not know whether 'discriminatory rationales' were part of the reason for the conduct.[326]
- Evidence about the reason for the treatment often resides only with the respondent.[327]
- Where the cause of discrimination is unconscious bias, the respondent themself may not have recognised or clearly articulated the reason for the treatment.[328]
- Discrimination based on certain attributes is more likely to succeed because explicit reasons are more often provided, whereas with other attributes explicit reasons are rarely given.[329]
- Shifting the burden from the complainant to the respondent would get to the heart of the issue, rather than relying on assumptions, and so increase efficiency and improve transparency.[330]

We were also told that partly shifting the onus away from the complainant would acknowledge and address the power imbalance often inherent in discrimination cases.[331]

A shifting or shared burden of proof is established in overseas jurisdictions, including Canada, the United Kingdom, and the European Union.[332]

Challenges for certain attributes

Race complaints

The Review was told about the challenges of proving race discrimination. We heard that First Nations people and culturally and linguistically diverse people may lack trust and confidence that the system will work for them.[333] This is compounded by the requirement to prove the treatment was because of the person's race where the treatment is less overt, or where the respondent claims that everyone is treated the same.[334] These issues were reflected in research with First Nations women, where it was found that this group did not confront discrimination they encountered because of a keen sense it would be very difficult to prove.[335]

The Queensland African Community Council told us about a situation where a student was suspended because it was falsely assumed he had stolen a phone, until it was proved through security camera footage that he had nothing to do with the incident. In another case, a highly skilled and experienced worker was invited to attend a job interview, but when the panel saw him in person they exhibited disinterested and disengaged body language.[336] We also heard from young people of colour about their experiences of being followed in shops, and instances of being refused jobs because of Muslim-sounding names or wearing hijab.[337]

326 Equality Australia submission, 30.
327 Queensland Nurses and Midwives Union submission, 13; Dominique Allen submission, 2; Respect Inc. submission, 19-20; Basic Rights Queensland consultation, 15 September 2021.
328 Queensland Advocacy Incorporated submission, 19. See also Assoc Prof Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' [2009] *Sydney Law Review 24*; (2009) 31(4) Sydney Law Review 579, 1.A.
329 Caxton Legal Centre submission, 7. The submission put forward that respondents are more likely to provide explicit reasons for the treatment when it comes to pregnancy, breast feeding, family responsibilities, mental illness, and lawful sexual activity. But this is less likely with race, gender, and age, and so these attributes are harder to establish.
330 Community Legal Centres Queensland submission, 2; Caxton Legal Centre submission, 7.
331 See for example: Women's Legal Service submission, 4; Scarlett Alliance submission, 21.
332 Australian Discrimination Law Experts Group submission, 26.
333 Aboriginal and Torres Strait Islander Women's Legal Service North Queensland Consultation, 15 September 2021; Queensland African Community Council consultation, 8 August 2021.
334 Aboriginal and Torres Strait Islander Women's Legal Service North Queensland Consultation, 15 September 2021.
335 Alexis Goodstone, Patricia Ranald, Public Interest Advocacy Centre, Wirringa Baiya Aboriginal Women's Legal Centre, *Discrimination… have you got all day? Indigenous women, discrimination and complaints processes in NSW* (2001), 56.
336 Queensland African Community Council consultation, 8 August 2021.
337 Young peoples' roundtable, 17 February 2022; Queensland Program of Assistance to Survivors of Torture and Trauma consultation, 23 August 2021.

Some stakeholders said that requiring the complainant to take on the entire burden of proof is a genuine deterrent to making complaints about race or religion. Some felt it gave the impression that the complainant themself was the wrongdoer.[338]

Academic literature supports these views. Instancing the low numbers of successful complaints made under the Racial Discrimination Act, Jonathan Hunyor, an academic and lawyer, observed:

> We know that racism exists, why is it so hard to prove?

Hunyor refers to a reluctance of courts and tribunals to draw inferences of racial discrimination despite acknowledging its systemic nature, and suggests that courts and tribunals should:

- scrutinise the reasons proffered by respondents for their decisions, being sensitive to the systemic bias (both conscious and unconscious) which may underlie them
- recognise that the evidential burden should rest on the employer to provide an explanation for conscious or unconscious reasoning.[339]

Dr Fiona Allison, an academic researcher in the area of First Nations access to justice, considers that placing the whole onus of proof on the complainant makes race discrimination cases 'virtually impossible to win', in part because the respondent controls all the relevant information. Allison provides this scenario:

> A complainant claiming direct racial discrimination when turned down for a job, for example, needs to establish that the decision of the employer in question was based on race. The respondent need only suggest, however, that the job application was declined based on merit to rebut the allegation and without further evidence from the complainant, the case will be dismissed as unsubstantiated.[340]

Allison argues that the current burden of proof on complainants deters Aboriginal and Torres Strait Islander people from even taking the first step of making a complaint. But if they do make a complaint, they are then faced with often insurmountable barriers to proving their case.[341]

Disability complaints

We also heard that disability complaints are hard to prove, and in particular when a person is seeking employment. In a roundtable discussion with people with disability, we heard about the lack of availability of meaningful employment, with one participant commenting that:

> *People jump to conclusions. When they see the outside of your body, they see that you're not going well at the moment. And they go, ah, no, you wouldn't be able to do that. So that's preconceived ideas.*[342]

Another participant in the roundtable told us that:

> *A key barrier to lodging a complaint is the challenge of 'evidencing' unconscious bias, for example, in job applications, rental accommodation applications, etc.*[343]

338 Sikh Nishkam Society of Australia submission, 4.
339 Jonathan Hunyor, 'Skin-deep: Proof and Inferences of Racial Discrimination in Employment' (2003) 25(4) *Sydney Law Review* 535.
340 Dr Fiona Allison, 'A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians Through An Access To Justice Lens', (2013/2014) 17(2) *Australian Indigenous Law Review*, 14-15.
341 Dr Fiona Allison, 'A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians Through An Access To Justice Lens', (2013/2014) 17(2) *Australian Indigenous Law Review*, 15.
342 People with disability roundtable, 4 February 2022.
343 People with disability roundtable, 4 February 2022.

Vision Australia commented that people with blindness and low vision often feel they have been filtered out unfairly because of their disability, but do not hold the evidence about the basis for the decision. Vision Australia considers it is reasonable for the respondent to have to provide these reasons.[344]

Queensland Advocacy Incorporated noted the low rates of employment for people with disability, and commented:

> It is only by reversing the onus of proof and asking employers and potential employers, as well as educators and potential educators, gatekeepers to goods and services, etc, to explain why they did not employ, enrol, admit or assist the person with disability that this will start to change culture and cause unconscious and conscious bias to be placed in the spotlight. It is time to stop asking people with disability to bear the burden of proving something that goes on behind closed doors, a process they can only guess at.[345]

Concerns with changing the burden of proof

Unfair burden on respondents

Of the submissions that did not support changing the current onus of proof, a key concern was the potential for an unfair or unreasonable burden on certain respondent groups. These included:

- small to medium businesses without in-house human resource management staff or legal expertise[346]
- health care providers[347]
- churches, non-profit organisations, and charities[348]
- education providers.[349]

Other submissions were concerned that reversing the onus could lead to an increase in vexatious claims, costs, and time spent in litigation.[350]

The Australian Industry Group told the Review that they often hear from employers that it is not unusual for unfounded and erroneous perceptions to arise that employment decisions have been made for discriminatory reasons. Many employers feel that the low threshold under the Fair Work Act leads to unfair situations where the employer needs to prove they did not discriminate.[351]

Commenting on the potential impact of a reverse onus on schools, the Queensland Catholic Education Commission suggested a balanced approach. They stressed that schools need certainty about their obligations under the Act, and so it is 'appropriate that such an allegation is able to be substantiated in a meaningful way by the complainant, initially, so that the respondent can appropriately investigate and meaningfully respond to the matter.'[352]

344 Vision Australia submission, 4.
345 Queensland Advocacy Incorporated, 19.
346 Australian Industry Group submission, 3.
347 Medical Insurance Group Australia submission, 3.
348 Human Rights Law Alliance submission, 3.
349 Australian Association of Christian Schools submission, 8; James Cook University submission, 1; Department of Education submission, 8; Queensland Catholic Education Commission submission, 5; Queensland Law Society submission, 7.
350 Australian Association of Christian Schools submission 8; James Cook University submission, 1
351 Australian Industry Group submission, 3-4.
352 Queensland Catholic Education Commission, 5.

Presumption of innocence

Three submissions questioned whether changing the burden of proof displaced the presumption of innocence,[353] which is a fundamental principle of criminal law.[354] This was also raised in our roundtable with legal practitioners.[355]

As the Anti-Discrimination Act relates to civil and not criminal action, this principle does not directly apply. While a fundamental legislative principle in the Legislative Standards Act[356] includes ensuring that legislation does not reverse the onus of proof without justification, this only applies to criminal proceedings.[357]

The Queensland Law Society considered that it is a fundamental tenet of the legal system that the prosecution or plaintiff bear the onus of proof, but acknowledged the principle could be displaced for a good reason. Queensland Law Society noted a diversity of views among their members about whether there were sound reasons to disrupt the general principle in this context.[358]

The Queensland Council for Civil Liberties was concerned about dispensing with procedural safeguards on the basis of the proposition that the person who makes an accusation should be responsible for proving that accusation. They did not accept there was any justification for changing the current position.[359]

FamilyVoice provided a detailed submission about the legal principle of 'innocent until proven guilty', which as noted above, applies in a criminal rather than civil context. However, they acknowledged that shifting the burden is not rare, and it has been permitted by the High Court when displaced for a good reason. Changes in the onus of proof that may allow vexatious litigation in civil cases, however, was a concern to them.'[360]

Given there was some general hesitancy with the approach, some stakeholders suggested[361] that improving disclosure requirements might be an alternative way to achieve the objective sought by shifting the onus of proof. [362] While the Act currently specifies that the tribunal is not bound by the rules of evidence,[363] the tribunals may already make orders requiring the production of documents.[364]

Is the presumption of innocence a relevant consideration?

The burden of proof is generally on the plaintiff in civil claims.[365] This is different from the premise that the prosecution should bear the onus of proof in criminal matters, where the consequences are generally more serious and may include terms of imprisonment.

353 FamilyVoice Australia submission; Queensland Council for Civil Liberties submission; Queensland Law Society submission.
354 *The CCH Macquarie Dictionary of Law* (rev ed, 2001) 'presumption of innocence'.
355 Legal practitioners' roundtable, 10 February 2022.
356 *Legislative Standards Act 1992* (Qld).
357 *Legislative Standards Act 1992* (Qld) s 4(3)(d).
358 Queensland Law Society submission, 7.
359 Queensland Council for Civil Liberties submission, 4-5.
360 FamilyVoice submission, 8-10.
361 Queensland Council for Civil Liberties submission, 4; Queensland Law Society submission, 8; Aboriginal and Torres Strait Islander Legal Service consultation, 19 August 2021.
362 Disclosure is the delivery or production of documents by a party to a case to the other parties in the case (*Uniform Civil Procedure Rules 1999* (Qld) r 210).
363 *Anti-Discrimination Act 1991* (Qld) s 208.
364 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ss 63, 97; *Industrial Relations (Tribunals) Rules 2011* sub div 7A, r 115.
365 *Currie v Dempsey* (1967) 69 SR (NSW) 116, 125.

The Queensland Human Rights Act provides that a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.[366] This provision does not apply in a civil complaints process.

The presumption of innocence is not absolute, and even in criminal matters. The High Court has said that the principle is an 'important incident of the liberty of the subject' but is not 'unqualified',[367] and 'it has long been established that it is within the competence of the legislature to regulate the incidence of the burden of proof…'.

A 2015 Australian Law Reform Commission Report (ALRC Report), in considering the burden of proof, acknowledged that there may be a blurring between criminal and civil penalties, such that some civil laws are effectively criminal in nature.[368] The ALRC Report, citing the United Nations Human Rights Committee, stated matters to consider in assessing whether a civil penalty is 'criminal in nature', which includes:

- the classification and nature of the penalty
- whether the penalty is intended to be punitive or deterrent in nature
- whether the proceedings are instituted by a public authority with enforcement powers
- the severity of the penalty.[369]

These considerations would generally not apply to a complainant seeking resolution of a complaint against an individual respondent or an organisation through conciliation. At the tribunal stage, the award of damages is compensatory, rather than punitive or deterrent in nature.[370]

Comparative approaches

While most submissions supported shifting the burden of proof, there were different views about the best approach.

Submissions received by the Review considered the extent to which the complainant should first have to establish their case before the onus shifts to the respondent. The two approaches most commonly put forward were the:

- UK Equality Act approach
- Fair Work Act approach

There was approximately equal support for each model.[371]

366 *Human Rights Act 2019* (Qld) s 32(1).
367 *Momcilovic v The Queen* (2011) 245 CLR 1 [44].
368 Australian Law Reform Commission, *Traditional Rights And Freedoms—Encroachments By Commonwealth Laws* (Report No 129, December 2015) [9.7].
369 Australian Law Reform Commission, *Traditional Rights And Freedoms—Encroachments By Commonwealth Laws* (Report No 129, December 2015) [9.107]–[9.112].
370 *Hehir v Smith* [2002] QSC 92; *Edwards v Hillier & Educang Ltd* [2006] QADT 34; Gray v Queensland Rail [2000] QADT 3.
371 Those in support of Fair Work model included: Caxton Legal Centre submission; Multicultural Queensland Advisory Council submission; Queensland Council of Unions submission; Queensland Nurses and Midwives Union submission; Queensland Advocacy Incorporated submission. See also Community Legal Centers Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) <https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>. Those in support of the UK Equality Act approach included: Australian Discrimination Law Experts Group, Name withheld (Sub.135), Queensland Catholic Education Commission, Equality Australia, Associate Professor Dominique Allen, Youth Advocacy Centre Inc, Legal Aid Queensland.

Fair Work model – reversal of the burden of proof

The federal Fair Work Act contains general protections for certain rights (workplace rights, industrial action, and discrimination). In Queensland most employees except for the state government fall under the Fair Work Act. To commence an action, an employee or prospective employee only needs to establish that adverse action was taken and that the employee had one of the relevant attributes. It is then presumed that the adverse action was taken because of the attribute unless the employer can prove otherwise.[372]

Some stakeholders with experience in this jurisdiction felt that implementing the Fair Work model would have the benefit of improving respondents' record-keeping and leading to fairer tribunal outcomes, but not increase litigation.[373] It was also suggested that a reversal of the onus of proof was the best way to address power differentials inherent in the process, and to avoid erroneous assumptions to the detriment of complainants.[374]

However, members of the Queensland Law Society provided different views about the effectiveness of the Fair Work model. Some were concerned about an increase in unmeritorious or vexatious claims, as well as 'unintended consequences for the complainant from this reform, including that a respondent may call a number of witnesses or present a number of documents which may be a significant impost on the complainant and result in additional costs.' [375]

Further concerns raised about the Fair Work model included:

- The outcomes may be unfair, as an entirely unmeritorious claim might succeed because the respondent either fails to present the evidence to rebut the presumption or is practically unable to do so because the relevant witness is unavailable or deceased.[376]
- Reports of anecdotal experience of the Fair Work jurisdiction suggest that the process of reversing the onus has made cases longer and more difficult.[377]

Uncovering unconscious bias

Some submissions supported an approach in which tribunals examine the reasons for alleged contraventions at a deeper level and consider the possibility of unconscious bias. However, courts have been reluctant to consider unconscious discrimination when interpreting the Fair Work Act's burden of proof provision.

The Full Federal Court in *Barclay* determined that the reason for a person's conduct is not necessarily the reason they assert it to be, and so discrimination may be either conscious or unconscious.[378] However, the High Court later rejected this reasoning, and said that while 'state of mind, intent and purpose' will be relevant, the key question remains 'why was the adverse action taken?' Therefore, all that is required to discharge the burden of proof on the employer is 'direct testimony from the decision-maker which is accepted as reliable', [379] although more recent cases have made it clear that a decision-makers' direct evidence will not be automatically accepted, particularly if it has inconsistencies.[380]

372 *Fair Work Act 2009* (Cth) s 361(1).
373 Caxton Legal Centre submission, 7.
374 Queensland Law Society submission, 7, commenting on the views of some members; Community Legal Centers Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) 4 <https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/>.
375 Queensland Law Society submission, 8.
376 Name withheld (Sub.135) submission, 18-19.
377 Queensland Civil and Administrative Tribunal submission, 7.
378 *Barclay v The Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 (9 February 2011) [28].
379 *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32 [44-45].
380 *Ross v RC Mackenzie and Sons Pty Ltd* [2013] FMCA 31.

This contrasts with the approach taken in the United Kingdom (UK) where the courts have shown more willingness to look at unconscious reasons, and acknowledge the challenges in proving discrimination in circumstances where:

> …those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them.[381]

UK Equality Act model – a shared burden of proof

While the Fair Work Act approach can be seen as a reversal of the onus of proof, the UK model represents a shift towards a shared burden of proof between the parties.

Under the UK Act, the claimant must be able to make a prima facie case[382] that the treatment would amount to direct or indirect discrimination on the basis of a prohibited ground.[383] This may be established by relying on inferences drawn from the primary facts. A two-stage test was established in the case of *Igen v Wong*[384] in 2005 and later codified in the Equality Act. [385]

Summary of two-stage test

Stage one: Is there a prima facie case?

- The claimant has the burden of proof and must present facts from which the tribunal can conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of an attribute. The tribunal should consider what inferences could be drawn from the facts and assume there is no adequate explanation at this stage. The tribunal can consider any evidence before it in determining whether the complainant has a prima facie case, but should not take the respondent's explanation into account.

Stage two: Was the less favourable treatment for a reason other than discrimination?

- The burden of proof moves to the respondent to present facts from which it could be concluded that the treatment was in no way on the grounds of a protected attribute.[386]

In contrast to the Fair Work approach, the UK model requires the claimant[387] to show causation (or a link between the attribute and the unfair treatment) to establish a prima facie case.

The Equality Act (UK) includes the words 'if there are facts'[388] which may allow the court to draw the causal link from either what the claimant asserts, or from other sources available to it:

> **136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

381 *Strathclyde Regional Council v Zafar* [1997] UKHL 54 (Lord Browne-Wilkinson).
382 A prima facie case is one in which a party produces 'enough evidence to allow the fact-trier [ie a judge or jury] to infer the fact at issue and rule in the party's favour'. From *Black's Law Dictionary* (abridged 7th ed, 2000) 'prima facie case' (def 4).
383 *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] EAT 18-03-0304; [2003] ICR 1205 [20]; *Igen Ltd & Ors v Wong* [2005] EWCA Civ 142; [2005] All ER 812 [76] Annex (9).
384 *Igen Ltd & Ors v Wong* [2005] EWCA Civ 142; [2005] All ER 812.
385 *Equality Act 2010* (UK).
386 We draw attention to the annex in the judgement of *Igen Ltd v Wong* [2005] ICR 931, which presents a detailed 13-step guide to assist the tribunal in applying the two-stage test.
387 'Claimant' in the language used in UK case law.
388 Overturning an earlier decision that found that 'if there are facts' meant that there was no burden on the claimant at the first stage, the UK Supreme Court in *Royal Mail Group v Efobi* [2019] EWCA Civ 18 has confirmed that the claimant must first establish a prima facie case.

…

Nonetheless, the claimant must do more than make a mere assertion that is not backed up by a factual foundation.[389]

This approach aligns with the current approach of the Commission in accepting only those complaints that meet a threshold for acceptance under the current Act.[390]

Benefits of the UK approach

Analysis of case law indicates that the UK Equality Act approach is established and working well.[391] In recommending the UK approach, the Australian Discrimination Law Experts Group (ADLEG) considers it has the following advantages:

- taking the tribunal straight to the key issues of what happened and why
- avoiding time-consuming and costly preliminary technical issues
- enabling the respondent to volunteer what they know about the allegations.

ADLEG anticipates that adopting the approach in the UK Act would lead to more focus on the central issues of whether there was discrimination or not, and lead to clearer case law.[392] However, ADLEG concluded that the impact of burden of proof should not be overstated, and that it would 'only likely to be determinative in finely balanced cases with very particular fact scenarios.'[393]

Some submissions thought that this approach was fairer, and less likely to result in unmeritorious or vexatious claims, compared with the Fair Work approach.[394]

The Act operates across a breadth of areas compared with industrial law. Requiring a large, well-resourced employer to prove why they acted for a non-discriminatory reason may be reasonable, whereas placing this onus a small shop owner, a volunteer chairperson of a club, or a committee secretary of a body corporate may not be.

One submission commented that shifting the burden of proof was the only way in which underlying unconscious biases could be revealed.[395] In determining whether a prima facie case has been established, the UK has looked below surface level explanations for the treatment. The court noted in *Barton*:

> *It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".*[396]

389 *Royal Mail Group v Efobi* [2019] EWCA Civ 18 at [59].
390 Anti-Discrimination Act 1991 (Qld) s 136. Section 136 requires that a complaint contains 'reasonably sufficient details to indicate an alleged contravention of the Act'.
391 See also Assoc Prof Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' [2009] *Sydney Law Review 24*; (2009) 31(4) Sydney Law Review 579.
392 Australian Discrimination Law Experts Group submission, 26.
393 Australian Discrimination Law Experts Group submission, 27.
394 Youth Advocacy Centre submission, 3; Name withheld (Sub.135) submission, 17. We note that the Commission may lapse or reject complaints that are frivolous, trivial etc under ss 139, 168.
395 Name withheld (Sub.135) submission, 17-19.
396 *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] UKEAT 18_03_0304 [18] quoting *King v GB China Centre* [1992] ICR 516 [528F] (Neill LJ).

The UK model is consistent with the approach of other international human rights jurisdictions including the European Union[397] and Canada.[398] Two Australian inquiries have recommended the UK approach:

- ACT Law Reform Commission[399]
- Consolidation of Commonwealth discrimination laws inquiry.[400]

This approach, along with the Fair Work Act model, is currently being considered by the Western Australian Law Reform Commission.[401]

A similar approach exists in relation to discrimination matters determined by the ACT Civil and Administrative Tribunal,[402] but the drafting is more complex and this test is less well established, with limited case law to guide how it may apply in practice.

The Review's position

The Review considers that:

- There are sound reasons to depart from the Act's current approach to burden of proof and to adopt a shared burden of proof because:
  - respondents are often the only people holding key information about reasons for the treatment, or the state of mind that led to the treatment
  - significant power imbalances characterise many discrimination cases
  - retaining the whole burden of proof is too onerous for complainants, especially if unrepresented
  - time and costs may be saved by adopting an approach that gets quickly to the key issues.
- Overall, the UK model appears to be the most consistent with equality jurisdictions and is fairer and more balanced when considering the range of potential respondents – all with varying levels of knowledge and resources – who interact with the law across the numerous areas of activity protected by the Act.
- Under the Fair Work Act, the focus shifts immediately to establishing the 'real reasons' of the respondent, which may mean less, rather than more, focus on the complainant's experiences, including the impact of the discrimination. It may reduce the educative value of the law if the focus of key tribunal and court decisions rests primarily on the respondent's reasons why they did not discriminate.
- The Fair Work Act model may also be less likely to address underlying unconscious motives for discrimination than the UK Act since the High Court decision in *Barclay*.
- The Fair Work Act approach may result in skewed outcomes in which a complainant's case succeeds because the tribunal does not hear evidence from a particular witness who could rebut the presumption. In practice, this may lead to large witness lists, particularly if many decision-makers are involved. The effect of this might be to overload tribunals and increase delays and costs for all parties.

397 *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16, 31.
398 *Ontario Human Rights Commission v Simpson-Sears Limited* [1985] 2 SCR 536, 28.
399 ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991* (ACT) (Final Report, 2015) 143.
400 See the Exposure Draft of the Commonwealth Human Rights and Anti-Discrimination Bill (Clause 124) and Explanatory Memorandum.
401 Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Discussion Paper, August 2021) 176-177.
402 *Human Rights Commission Act 2005* (ACT) s 53CA.

- The current requirement under the Act that the respondent should be required to prove reasonableness for indirect discrimination, or to prove that an exception applies should remain unchanged.

Recommendation 13

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

Standard of proof

Some submissions expressed concern about the challenge of proving discrimination in circumstances where courts and tribunals have determined that the appropriate standard of proof is the *Briginshaw* standard.[403] The case of *Briginshaw v Briginshaw*[404] confirmed that the standard of proof is 'on the balance of probabilities' for civil claims, but clear or cogent evidence is required where the allegations are more serious in nature.

One submission took the contrary view and said that they would 'strenuously oppose any departure' from the *Briginshaw v iiNet* standard.[405]

While some matters in this jurisdiction are of an extremely serious nature, such as sexual assault, if the Briginshaw standard is applied to all matters, it could result in unfair burdens on the complainant.

Previous Australian cases have determined that drawing an inference of race discrimination is not something to be done lightly, applying the Briginshaw standard.[406]

However, in the 2008 case of *Qantas Airways Ltd v Gama* the Full Federal Court determined that applying the 'onerous' *Briginshaw* standard to racial discrimination complaints can lead to errors, and that:

> The correct approach to the standard of proof in a civil proceeding in a federal court is … that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved — and, I would add, the circumstance in which it is sought to be proved.[407]

The result of this case is that in the federal jurisdiction not all cases of racial discrimination (or other forms of discrimination such as disability, sex, or age) will necessarily be of the gravity or seriousness that requires evidence of a higher persuasive value.[408]

In Queensland, cases have referred to applying the *Briginshaw v iiNET Ltd* standard in a similarly measured way with due consideration of the seriousness of the allegations.[409]

403 Queensland Nurses and Midwives Union submission, 13; Legal Aid Queensland submission, 19-20.
404 *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34.
405 Queensland Council for Civil Liberties submission, 5.
406 *Department of Health v Arumugam* [1988] VR 319; *Sharma v Legal Aid (Qld)* [2002] FCAFC 196.
407 *Qantas Airways Ltd v Gama* [2008] FCAFC 69 [139].
408 Australian Human Rights Commission, *Federal Discrimination Law* (2016) 534-538 [6.19].
409 See for example, *Bell v iiNET Ltd* [2017] QCAT 114 refers in footnotes to the case and reasoning Branson J in Gama.

The Review's position

The Review considers that:

- As this issue is mostly settled, no legislative change is required.

The tribunals

The Terms of Reference ask the Review to consider:

- the functions, processes, powers and outcomes of the Queensland Civil Administrative Tribunal and the Queensland Industrial Relations Commission under the Anti-Discrimination Act[410]
- ways to improve the process and accessibility for bringing and defending a complaint of discrimination, including how the complaints process should be enhanced to improve access to justice for victims of discrimination.[411]

Two Queensland tribunals deal with matters under the Anti-Discrimination Act. For work-related matters the tribunal is the Queensland Industrial Relations Commission (the QIRC) and for all other matters the tribunal is the Queensland Civil and Administrative Tribunal (QCAT).

Until December 2009, matters under the Act were dealt with by the Anti-Discrimination Tribunal. The Anti-Discrimination Tribunal ceased when QCAT was established and became responsible for dealing with anti-discrimination matters. Since 2017, the QIRC has been responsible for work-related anti-discrimination matters, and QCAT continues to be responsible for all other anti-discrimination matters.

When conducting a hearing for matters arising under the Anti-Discrimination Act, QCAT is constituted by one legally qualified member.[412] In *Owen* v *Menzies & Ors*, the Court of Appeal held that QCAT is a court with the power to determine constitutional questions,[413] which sets it aside from other tribunals hearing discrimination matters in Australia.[414]

The tribunal may arrange for certain persons to assist it in its proceedings, including a solicitor or barrister, or an officer of the Commission.[415] Where an officer of the Commission assists the tribunal, that officer is under the control and direction of the tribunal.

Functions and powers

In this section, we consider whether the functions and powers of the tribunals remain appropriate. We also include discussion on Commission powers to intervene in court proceedings.

Functions of the tribunals

Under the Anti-Discrimination Act, the tribunals have the following functions in relation to complaints about contraventions of the Act:

- to make injunctive orders
- to review decisions to lapse
- to enforce conciliation agreements

410 Review of the Anti-Discrimination Act 1991 (Qld), Terms of Reference 3(k).
411 Review of the Anti-Discrimination Act 1991 (Qld), Terms of Reference 3(l).
412 *Anti-Discrimination Act 1991* (Qld) s 176.
413 *Owen v Menzies & Ors; Bruce v Owen; Menzies v Owen* [2012] QCA 170.
414 In contrast, see: *Burns v Corbett & Ors* (2018) ALJR 423; *Citta Hobart Pty Ltd & Anor v Cawthorn* [2022] HCA 16.
415 *Anti-Discrimination Act 1991* (Qld) ss 185-186.

- to hear and decide complaints
- to grant exemptions and
- to provide opinions about the application of the Act.[416]

Elsewhere in this chapter, we recommend that a complainant be able to seek leave to appeal to the tribunal against the Commission's decision not to accept a complaint. If this recommendation is implemented, the tribunals would have the jurisdiction to make merits reviews of the Commission's administrative decisions to accept or reject a complaint, and whether to offer dispute resolution services.

Powers of the tribunals

Orders the tribunals may make

The orders a tribunal may make if a complaint is proven in the tribunal are set out in the Act.[417] The potential orders include:

- requiring the respondent to pay to the complainant or another person, within a specified period, an amount the tribunal considers appropriate as compensation for the loss or damage caused by the contravention
- requiring the respondent to make a private apology or retraction
- requiring the respondent to implement programs to eliminate unlawful discrimination.

The breadth of the potential remedies is a strength of Queensland's laws.

In 2002, the Act was amended to provide additional remedies if a complaint is proven, which expanded the options to include private or public apologies or an 'order requiring the respondent to implement programs to eliminate unlawful discrimination.'[418]

In 2003, the Anti-Discrimination Tribunal decided the case of *Bellamy v McTavish & Pine Rivers Shire Council*.[419] In that case, the complainant had bipolar affective disorder and the respondent banned him from a certain place as a result of an incident that occurred when he had a manic episode as part of his disorder. The Tribunal found that the discrimination in that case was 'significant', 'deliberate' and nasty', and ordered that a written apology be made to the complainant and shared with the Chief Executive Officer, Mayor and every councillor of the Pine Rivers Shire Council.

In 2004, QCAT decided the case of *Sailor v Village Taxi Cabs Pty Ltd and Markwick*.[420] In that case, QCAT found that in saying certain words to the complainant, who was an Aboriginal woman, the respondent had treated her less favourably in the supply of taxi services than a non-Aboriginal person, and using this remedy power, ordered the taxi company to develop an anti-discrimination policy and provide training to its drivers.

These cases demonstrate how the existing powers of the tribunals have the capacity to promote outcomes that seek to address systemic discrimination, and it is important that the Act retains these provisions.

416 *Anti-Discrimination Act 1991* (Qld) ss 174A, 174B.
417 *Anti-Discrimination Act 1991* (Qld) s 209.
418 *Anti-Discrimination Act 1991* (Qld) s 209(d)-(g).
419 *Bellamy v McTavish & Pine Rivers Shire Council* [2003] QADT 15.
420 *Sailor v Village Taxi Cabs Pty Ltd and Markwick* [2004] QADT 15.

Other powers

The tribunals also have various other powers to be able to execute their functions, including the power to join a person as a party,[421] to allow a complainant to amend a complaint,[422] or in relation to anonymity.[423]

The power to make an order prohibiting the disclosure of a person's identity in certain circumstances was commented on as being critically important by the Respect Inc and DecrimQLD submission.[424] That submission supported strengthening the protection by taking any discretion away from the tribunal.[425]

Commission interventions

The Commission's functions under the Act include intervening in a proceeding that involves 'human rights issues with the leave of the court'.[426] The definition of human rights is tied to that in the Australian Human Rights Commission Act,[427] which refers to international human rights instruments.

The intervention function was included when the Act first came into force and Queensland did not have its own Human Rights Act, as it does now.

Six submissions commented on this issue, with general support for the Commission to be able to intervene, either with or without leave.[428] The reason for support was generally that the Commission's experience would be valuable in proceedings.

The Review's position

The Review considers that:

- Generally, the functions and powers currently granted to the tribunals do not need to be changed.
- Potential orders currently available to the tribunals remain appropriate and necessary.
- Allowing the Commission to intervene in proceedings as of right when a question of law arises that relates to the application of the Act is beneficial, and would allow the Commission to provide assistance to the tribunal.
- The definition of human rights should no longer refer to the Australian Human Rights Commission Act but rather align with the Human Rights Act given that it is now law in Queensland.

Processes and outcomes

Although we did not identify any issues with the functions and powers of the tribunals under the Anti-Discrimination Act, we heard that in certain circumstances, the processes of the tribunals could be enhanced and that, in turn, this may improve outcomes.

421 *Anti-Discrimination Act 1991* (Qld) s 177.
422 *Anti-Discrimination Act 1991* (Qld) s 178.
423 *Anti-Discrimination Act 1991* (Qld) s 191.
424 Respect Inc and DecrimQLD submission, 27.
425 Respect Inc and DecrimQLD submission, 28.
426 *Anti-Discrimination Act 1991* (Qld) s 235(j).
427 *Australian Human Rights Commission Act 1986* (Cth).
428 Australian Discrimination Law Experts Group submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Caxton Legal Centre submission; Queensland Civil and Administrative Tribunal submission.

In the Discussion Paper we asked questions focused on the processes of the tribunals, including specialisation, consistency, and publishing outcomes and data. These topics reflected the issues raised during our initial consultations.[429]

There are practical limitations to harmonising the processes of the two tribunals or tailoring the process for matters arising under the Anti-Discrimination Act. As observed by QCAT in their submission:

> QCAT handles multiple jurisdictions and in order to seek to promote consistency and efficiencies throughout QCAT, we need to be able to develop and alter our own procedural manuals and documents as needed.[430]

We understand those considerations and have therefore sought to ensure that, in addressing this aspect of the Terms of Reference, we present practical and workable options to improve the processes and outcomes of matters determined by the tribunals under the Anti-Discrimination Act.

Current approach

Complaints that are not resolved in the Commission may be referred to the relevant tribunal for hearing and determination.

A complainant may ask for a complaint to be referred after a conciliation conference,[431] or if the Commissioner gives written notice that the complaint cannot be resolved through conciliation.[432] A respondent may ask for a complaint to be referred if it has not been finalised within six months.[433]

In 2020-21, the Commission finalised 284 complaints, and of those 186 were resolved through conciliation. The Commission referred 125 complaints to either QCAT or the QIRC, which was a decrease from 157 in the previous year.[434] Not all referred complaints proceed to a final hearing and determination.

Dealing with matters under the Anti-Discrimination Act forms one relatively small part of the tribunals' responsibilities. This is illustrated by the proportion of lodgements in both tribunals. Of their total caseload between 1 July 2019 and 30 June 2021, 0.2% of QCAT matters[435] and 3.4% of QIRC matters[436] were from referrals made by the Commission under the Anti-Discrimination Act.

Specialisation

Experience in discrimination law

In the Discussion Paper, we asked whether there should be a specialist list within the tribunals for discrimination matters. There were 18 submissions that touched on this issue.[437] Of those, 15 said that a specialist tribunal or list would be beneficial.[438]

---

429 See for example: Legal assistance sector, consultation, 6 October 2021; Caxton Legal Centre, consultation, 11 August 2021.
430 Queensland Civil and Administrative Tribunal submission, 2.
431 *Anti-Discrimination Act 1991* (Qld) s 164A.
432 *Anti-Discrimination Act 1991* (Qld) s 165.
433 *Anti-Discrimination Act 1991* (Qld) s 167.
434 Queensland Human Rights Commission, *Annual report 2020-21* (Report, 2021) 43.
435 Queensland Civil and Administrative Tribunal, *Annual Report 2020-21* (Report, 2021) 11.
436 Queensland Industrial Relations Commission, *Annual Report 2020-21* (Report, 2021) 40.
437 Fibromyalgia ME/CFS Gold Coast Support Group submission; Rainbow Families Queensland submission; Women's Legal Service submission; NEAMI submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Community Legal Centres Queensland submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; [name withheld] Sub.135 submission; LawRight submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission; Queensland Civil and Administrative Tribunal submission.
438 Fibromyalgia ME/CFS Gold Coast Support Group submission; Rainbow Families Queensland submission; Women's Legal Service submission; Neami National submission; Australian Discrimination Law Experts Group submission;

Support for specialisation was for the following reasons:

- it would reduce inconsistent approaches by different decision makers to foundational anti-discrimination law concepts
- discrimination cases are often legally, conceptually and factually complex
- non-legal concepts such as 'unconscious bias' require relevant expertise and understanding[439]
- creating a fair and inclusive environment for the vulnerable and marginalised people to have complaints decided[440]
- increased ability to recognise systemic discrimination.[441]

QCAT outlined in their submission that Anti-Discrimination Act and Human Rights Act matters are currently managed by a designated list manager who is a Member of QCAT, and that the professional experience of Members is taken into account when allocating matters.[442]

An alliance of Queensland lawyers and advocates have suggested a stand-alone Anti-Discrimination Tribunal or at least a specialist division of QCAT and the QIRC. They say that this would lead to clearer and more consistent decisions, which would make it easier to predict how a case will be determined, which in turn leads to fewer disputes and more early resolutions.[443]

However, LawRight, the Queensland Council for Civil Liberties, and QCAT did not support a specialist list as contemplated by the Discussion Paper. The Queensland Council for Civil Liberties suggested that the creation of specialist tribunals can lead to 'tunnel vision' by decision-makers.[444]

The QCAT submission agreed that discrimination law is complex and technical, but pointed out that, fundamentally, it involves application of a legal test to facts.[445] QCAT also noted that tribunal members deal with other sensitive matters, such as end of life decisions.

Understanding experiences of discrimination and minority communities

When answering the Discussion Paper question about specialisation, six submissions raised the benefits of direct experience of discrimination, as opposed to discrimination law, amongst tribunal Members.[446]

Submissions indicated that this could be achieved through single Members having lived experience of discrimination,[447] or a panel where there might be a legal expert and a person with lived experience,[448] or through training for Members.[449]

Community Legal Centres Queensland submission; Equality Australia submission; Legal Aid Queensland submission; Aged and Disability Advocacy Australia submission; Respect Inc and DecrimQLD submission; [name withheld] Sub.135 submission; Caxton Legal Centre submission; Queensland Advocacy Incorporated submission; Queensland Law Society submission; Youth Advocacy Centre Inc submission.

439 Community Legal Centres Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/, 6.

440 Neami National submission, 3.

441 Legal Aid Queensland submission, 14; Caxton Legal Centre submission, 20.

442 Queensland Civil and Administrative Tribunal submission, 5.

443 Community Legal Centres Queensland, 'Reviewing the Anti-Discrimination Act – 10 point plan for a fairer Queensland', (Web page) https://www.communitylegalqld.org.au/news/reviewing-the-anti-discrimination-act-a-ten-point-plan-for-a-fairer-queensland/, 7.

444 Queensland Council for Civil Liberties submission, 11.

445 Queensland Civil and Administrative Tribunal submission, 4.

446 Rainbow Families Queensland submission; Vision Australia submission; Women's Legal Service submission; Australian Discrimination Law Experts Group submission; Equality Australia submission; Legal Aid Queensland submission.

447 Equality Australia submission, 41

448 Queensland Law Society submission, 11.

449 See for example, Rainbow Families Queensland submission, 4; Vision Australia submission, 6.

Some submissions emphasised the need for development of cultural competence in tribunal members to deal with issues affecting vulnerable minority communities, including First Nations and LGBTIQ+ people.

Caxton Legal Centre provided an example of a recent race discrimination case determined in Townsville:[450]

> The local QCAT member hearing the matter considered a volume of 'character evidence' about whether the respondent was generally racist, provided by a number of his friends from diverse backgrounds who did not experience racism from him.
>
> This evidence apparently carried some considerable weight. However, allegations made by the complainant regarding historical and ongoing treatment of Aboriginal and Torres Strait Islander people in Townsville received less sympathetic, indeed relatively patronising, treatment as though the complainant simply failed to convince the decision-maker any such problem exists. This demonstrates an unusual view of the operation of the [Anti-Discrimination Act] as a technical piece of law, as well as [an] extraordinary position on the social context for First Nations people in that part of Queensland.[451]

Legal Aid Queensland also gave an example of the original tribunal decision in *Tafao v State of Queensland and Ors*[452] where the Member showed limited understanding of the concepts of sex and gender and the experience of transgender persons.[453]

The Review's position

The Review considers that:

- The tribunals should continue to endeavour to allocate discrimination matters to Members who have experience in discrimination law because of its technicality.
- When tribunal members exhibit the diversity of the community that comes before them, the cultural competency of the tribunal generally is enhanced.

Consistency of process between the tribunals

Very few submissions commented on the procedural issues that arise as a result of having a split jurisdiction between the QCAT and the QIRC, and those that did noted the difficulty with achieving uniformity.

In their submission, QCAT said that they are not in favour of a uniform set of rules and procedures across the two tribunals (QCAT and QIRC) when dealing with complaints under the Act, because QCAT handles multiple jurisdictions and so relies on internal consistency and efficiency.[454]

450 *Cassady v Hardings N.Q. Pty Ltd and Anor* [2021] QCAT 353
451 Caxton Legal Centre submission, 20.
452 *Tafao v State of Queensland and Ors* [2018] QCAT 409.
453 Legal Aid Queensland submission, 64.
454 Queensland Civil and Administrative Tribunal submission, 2.

Publishing decisions and outcomes

Tribunals

Only a small number of matters are referred to tribunals under the Act, and not all matters that are referred proceed to a final hearing and decision.[455]

Published reasons for decisions show how the Act is interpreted, and what protection the Act ultimately affords. These published decisions provide precedent and can be used to:

- educate the community and frame community expectations
- allow lawyers to give more definitive advice to clients about pursuing remedies under the Act
- assist in advising potential respondents about what they must to do comply with the Act.

While a number of submissions refer to the fact that not all QCAT decisions are published, we did not receive any detail about when this has occurred – which is consistent with the limited publicly available information on this jurisdiction. QCAT indicate that reasons for decisions are still being published, but acknowledge that this is not always the case, due to resource constraints.[456]

Under the Human Rights Act, which came into effect in 2020, the right to a fair hearing requires that decisions must be publicly available.[457]

Commission

About half of the complaints accepted by the Commission are resolved through the Commission's conciliation process. If a complaint is resolved by conciliation, the commissioner must record the terms of the agreement and have the documents signed by the complainant and the respondent,[458] many of which include a confidentiality clause.

Caxton Legal Centre indicated that resolving complaints on a confidential basis can be a barrier to achieving systemic change because the resolution happens in private and no one outside the dispute knows anything about it.[459]

Similar to published tribunal decisions, there is also a potential educative value in parties and/or lawyers, academics, and the community more broadly having access to outcomes of complaints resolved through the Commission. The Commission currently does this for some complaints in a de-identified way published on the Commission's website.

Publishing data and information

Only five submissions discussed the issue of data collection and/or sharing.[460] While there was support for the general notion of having access to good data and information sharing between the Commission and the tribunals, the QCAT submission pointed out that it is important to know the purpose of the data in order to make decisions in this area.[461]

Overall, understanding more about the matters that enter the tribunals, including how many matters proceed to conciliation, and to hearing, is important. Data may provide useful insights that

455 For example, this could be because the complainant withdraws or the matter resolves.
456 Queensland Civil and Administrative Tribunal submission, 3.
457 *Human Rights Act 2019* (Qld) s 31(3).
458 *Anti-Discrimination Act 1991* (Qld) s 164.
459 Caxton Legal Centre submission, 11.
460 Assoc Prof Dominique Allen submission; Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Legal Aid Queensland submission; Community Legal Centres Queensland submission.
461 Queensland Civil and Administrative Tribunal submission, 3.

could be shared with parties during Commission dispute resolution processes, helping them to understand the journey of a complaint if it does not resolve within in the Commission.

The Review's position

The Review considers that:

- All reasons for decisions in matters heard under the Act by the tribunals should be published, or made publicly available as this provides greater guidance on how the law will be interpreted. This is also required by the Human Rights Act in relation to the right to a fair hearing.
- Providing information to the public about discrimination disputes and outcomes through the Commission enhances understanding of the process and possible outcomes.

Recommendation 14

14.1 The Act should enable the Commissioner to intervene as of right in a proceeding before a court or tribunal in which a question of law arises that relates to the application of the Act, and the Commission should publicly report annually on the number and type of interventions it has conducted. The definition of human rights should reflect the Human Rights Act.

14.2 The tribunals should ensure that, wherever possible, members who deal with matters under the Act have demonstrated knowledge and experience in discrimination law.

14.3 When considering appointments to the tribunals, the Queensland Government should have regard to the benefits associated with tribunal membership reflecting the diversity of the community that comes before them.

14.4 The Tribunals should ensure that members undertake regular training on cultural competency.

14.5 Tribunals should provide written reasons for all final decisions and significant interlocutory decisions, and should publish those decisions and reasons.

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