



Chapter 6:

# Eliminating discrimination

## Contents

Positive duty .....	214
What is a positive duty? .....	214
Comparative approaches .....	215
Benefits of a positive duty .....	217
Potential limitations .....	221
Will existing obligations be duplicated? .....	225
Framing the duty .....	228
Mechanisms to promote compliance .....	231
Getting the balance right .....	231
A role for the Commission or another entity? .....	233
Tools to support compliance .....	239
Level one: Building an understanding of obligations .....	239
Level two: Cooperating to address systemic issues .....	242
Level three: Addressing non-compliance .....	247

# Positive duty

The Terms of Reference ask us to consider:

- whether a more positive approach is required to eliminate discrimination and other prohibited conduct;<sup>1</sup> and
- whether the Anti-Discrimination Act should contain a positive duty on organisations to eliminate discrimination and other objectionable conduct prohibited by the Act, similar to the duty contained in the *Equal Opportunity Act 2010 (Vic)*.<sup>2</sup>

The Terms of Reference also direct us to include options for legislating a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation as far as possible.<sup>3</sup>

Throughout the Review, we asked stakeholders if the Anti-Discrimination Act is effective in eliminating discrimination in Queensland, or whether the law needs to change.

The consistent theme that emerged throughout our consultations and submissions was that the current system lacks a preventative focus.

Overall, stakeholders strongly supported the introduction of a positive duty within the Anti-Discrimination Act. They told the Review it is imperative the law does more to ensure that everyone takes active steps to prevent discrimination and promote equality.

In the Discussion Paper, we invited responses to questions about whether a positive duty should be introduced. We received 52 submissions on this subject. We also held focused consultations on positive duties during our roundtables, including with small business and industry, government agencies, legal practitioners, and in meetings with government agencies from other states.

Having analysed all submissions, consultation and research on this topic, we have concluded that introducing a positive duty into the Anti-Discrimination Act is required to best protect and promote equality, non-discrimination, and the realisation of human rights in Queensland.

Later in this section, we consider whether the statutory framework should be changed to include regulating compliance with the positive duty, and providing support to duty holders. We look at the role of the regulator, and evaluate whether the Commission, or another entity, should undertake this function.

We conclude that a regulatory approach that focuses on education and awareness should be adopted, and that the Commission should undertake this role.

## What is a positive duty?

A positive duty is an obligation on a person or organisation to take active steps to prevent discrimination and sexual harassment before it happens. These steps are a proactive means to ensure that organisations are working to protect people from discrimination.

Enforcement of the Anti-Discrimination Act currently relies on resolving complaints made by individual people about conduct that has already happened. Given the difficulty of making a complaint, and the barriers that many people face, this approach has limited the effectiveness

---

1 QHRC Review of the Anti-Discrimination Act, Terms of Reference item 3(b).

2 QHRC Review of the Anti-Discrimination Act, Terms of Reference item 3(f).

3 QHRC Review of the Anti-Discrimination Act, Terms of Reference item 5. We consider other aspects of the Respect@ Work report in relation to sexual harassment in chapter 4.

of the Act to protect people from discrimination. Systemic discrimination has remained largely unaddressed.

A positive duty would focus on promoting cultural change rather than reacting to individual complaints.

An organisation could take active steps by:<sup>4</sup>

- familiarising itself with the Anti-Discrimination Act
- ensuring leaders and managers are aware of their obligations through formal and informal education and training
- developing a prevention plan based on guidance material
- considering the extent to which the organisational culture models respectful behaviour
- reviewing internal complaints procedures and outcomes
- monitoring and evaluating any systemic issues.

The types of steps that organisations take will depend on factors such as the size and nature of the business or operation, the resources available, business and operational priorities, the practicability and costs of the measures, and other relevant factors.

## Comparative approaches

Positive duties are an emerging feature of discrimination and sexual harassment laws.

### Recommendations of past inquiries

While Victoria is currently the only Australian state to have a positive duty in its discrimination Act, a positive duty has been recommended by recent Australian reviews and inquiries.

At the federal level, in 2008 a Senate inquiry was conducted into the effectiveness of the *Sex Discrimination Act 1984* (Cth) in eliminating discrimination and promoting gender equality. The final report recommended that the Commonwealth Sex Discrimination Act be amended to impose a positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements and to accommodate family or carer responsibilities.<sup>5</sup> It also recommended that further consideration is given to amending the Sex Discrimination Act to create positive duties on public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment, and promote gender equality.<sup>6</sup>

The Gardner Review recommended that the Victorian Equal Opportunity Act should contain a duty to eliminate discrimination as far as possible.<sup>7</sup> This recommendation was adopted by the Victorian Government, and the law was amended to include a positive duty.<sup>8</sup>

In 2015, the Australian Capital Territory Law Reform Advisory Council's inquiry into the *Discrimination Act 1991* (ACT) recommended that the law be amended to include a positive duty

---

4 Victorian Equal Opportunity and Human Rights Commission, 'Positive duty', (Web page) <<https://www.humanrights.vic.gov.au/for-organisations/positive-duty/>>.

5 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Report, December 2008), Recommendation 14 (11.34).

6 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Report, December 2008), recommendation 40 (11.102).

7 Julian Gardner, *An Equality Act for a Fairer Victoria (Equal Opportunity Review Final Report, June 2008)*, recommendation 9.

8 *Equal Opportunity Act 2010* (Vic) s15.

to eliminate discrimination, and that the positive duty should apply to public authorities immediately and apply to private bodies and community organisations after a period of three years.

In 2020 the Australian Human Rights Commission's *Respect@Work* report recommended that the Sex Discrimination Act be amended to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. It also recommended that the Australian Human Rights Commission be given the functions of assessing compliance with the positive duty, and of enforcement.

In 2021 the Victorian Legislative Assembly Legal and Social Issues Committee's Inquiry into anti-vilification recommended that the existing positive duty for discrimination, sexual harassment, and victimisation matters should be expanded to vilification.

### Other similar legislation

Other state and territory discrimination laws contain elements or objectives similar to positive duties. Tasmania contains a duty for an organisation to take reasonable steps to ensure that no member, officer, employee, or agent of the organisation engages in discrimination or prohibited conduct.<sup>9</sup>

In 2020 Victoria introduced the *Gender Equality Act 2020 (Vic)* which imposes a positive duty on the public sector, councils, and universities to take positive action towards achieving workplace gender equality.

The Queensland Office of the Special Commissioner, Equity and Diversity told the Review that it is in the process of strengthening the Queensland public service, in its capacity as an employer, to address inequalities and is examining options to introduce complementary obligations through the Public Service Act Review.<sup>10</sup>

### The Victorian approach

The only jurisdiction to enact a positive duty in its discrimination law is Victoria. That Act provides that a person must take reasonable and proportionate measures to eliminate discrimination, sexual harassment or victimisation as far as possible.

In determining whether a measure is reasonable and proportionate, a number of factors must be considered, including:

- the size of the person's business or operations
- the nature and circumstances of the person's business or operations
- the person's resources
- the person's business and operational priorities
- the practicability and the cost of the measures.<sup>11</sup>

---

9 *Anti-Discrimination Act 1998 (TAS)* s 104.

10 Office of the Special Commissioner, Equity and Diversity (Qld) submission, 2.

11 *Equal Opportunity Act (Vic)* s 15(6)(a)–(e).

## International approaches

Some international jurisdictions have introduced positive duties into their equality and discrimination laws in the employment area. These include:

- The *Equality Act 2010* (UK) expressly recognises the need to advance equality through imposing a duty on public authorities to eliminate discrimination, harassment, victimisation and other prohibited conduct.<sup>12</sup> The *Disability Discrimination Act 2005* (UK) sets out a general duty to promote equality, and regulations require authorities to publish disability equality schemes that set out how the authority will carry out the general duty.
- The *Northern Ireland Act 1998* (UK) provides a duty for public authorities to have regard to the need to promote equality of opportunity between various groups.<sup>13</sup>
- The Canadian *Employment Equity Act 1995* (CA) imposes an obligation on employers, including private sector employers, to implement employment equality by identifying and eliminating employment barriers for designated groups of people, instituting positive policies and practices, and making reasonable accommodations to ensure people in the designated groups are represented.<sup>14</sup>

## Benefits of a positive duty

Across the course of the Review, there was strong support for the introduction of a positive duty. Of the submissions that addressed this subject, more than two-thirds<sup>15</sup> either supported the introduction of a positive duty or provided qualified support.<sup>16</sup>

Our analysis of material gathered through submissions and consultations revealed four key reasons why stakeholders supported the introduction of a positive duty:

- **Prevention** – A positive duty aims to stop discrimination and sexual harassment before it happens, which goes further than attempting to respond to conduct that has already happened.
- **Education and awareness** – The steps required for organisations to meet their obligations promotes a better understanding of the causes and impacts of discrimination, as well as increasing awareness about the Anti-Discrimination Act.
- **Shared responsibility** – Requiring employers and organisations to take steps to prevent discrimination and sexual harassment shares the responsibility for enforcement of the Act with duty holders, rather than resting largely with the people the Act is designed to protect.

---

12 *Equality Act 2010* (UK) s 149.

13 *Northern Ireland Act 1998* (UK) s 75.

14 *Employment Equity Act*, SC 1995, c 44, s 5.

15 A total of 52 submissions responded to this section of the discussion paper, and of those, 40 supported the introduction of a positive duty or provided qualified support. This level of support for a positive duty was reflected in our consultation process.

16 See for example: Queensland Council of Social Service; Queensland Public Advocate; Fibromyalgia GC Support Group; Rainbow Families Queensland; Office of the Special Commissioner Equity and Diversity (Qld); Assoc Prof Dominique Allen; Life Without Barriers; Queensland Network of Alcohol and Other Drug Agencies Ltd; Sikh Nishkam Society of Australia; LGBTI Legal Service Inc; Maurice Blackburn Lawyers; Sisters Inside Inc; Vision Australia; Queensland Mental Health Commission; Queensland Department of Transport and Main Roads; Multicultural Queensland Advisory Council, Queensland Rugby League (majority of survey participants); Queenslanders with Disability Network; TASC National Limited; Tenants Queensland; Scarlet Alliance, Respect Inc and DecrimQLD; Aged and Disability Advocacy Australia; Jenny King; Maternity Choices Australia; Queensland Nurses and Midwives Union; Australian Discrimination Law Experts Group; Queensland Council for Civil Liberties; Community Legal Centres Queensland; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia; Queensland Council of Unions; Equality Australia; Queensland Advocacy Incorporated; Queensland Council of LGBTI Health; Legal Aid Queensland; Women's Legal Service Queensland.

- **Systemic focus** – Requiring a proactive approach provides better protection from discrimination because it aims to achieve systemic change.

## Prevention

Throughout the Review, we repeatedly heard that stakeholders support a positive duty because it requires a proactive approach in which the objective is to reduce the potential for discrimination.<sup>17</sup> This was seen as an opportunity to avoid discrimination and sexual harassment occurring in the first place.<sup>18</sup>

While helping prevent individual cases of discrimination and sexual harassment, a positive duty was also seen as an opportunity to prevent systemic discrimination by informing and influencing the culture in organisations and creating safer environments that actively encourage diversity and seek to prevent mistreatment.<sup>19</sup>

Many academics in this field consider that introducing a positive duty in discrimination laws marks the important next phase of enforcement. In evaluating the effectiveness of discrimination laws, researchers have repeatedly identified that the current approach is not meeting its aims because it is not focused on prevention or addressing systemic issues.<sup>20</sup> Associate Professor Belinda Smith, who researches primarily in anti-discrimination law, comments that:

The imposition of a negative rule alone creates a fault-based system whereby an organisation is not required to do anything unless fault can be identified and attributed to it... The negative, tort-like rule enables redress but does not require preventative or positive measures to be taken.<sup>21</sup>

There is substantial agreement that prevention should be the focus of amendments to the Act, and that imposing a positive duty will go some way towards achieving this.

## Education and awareness

Through consultations and submissions, we heard that imposing a positive duty has an educative value and the potential to raise awareness about discrimination and sexual harassment and the environments in which they are more likely to occur.

Some submissions emphasised that education about a positive duty may help to reduce stigma and attributes about people with particular attributes, and so reduce discrimination that can occur as a result of conscious or unconscious prejudice.<sup>22</sup>

For example, the HIV/AIDS Legal Clinic said that in their work representing people living with HIV, they have observed that most complaints result from a misunderstanding about HIV and

17 See for example: Queensland Public Advocate submission; Anti-Discrimination Law Experts Group submission; Equality Australia submission; Queensland Network of Alcohol and Other Drug Agencies submission; Vision Australia submission; Tenants Queensland submission; Queensland Council of Unions submission; Caxton Legal Centre submission.

18 See for example: Queensland Law Society submission, Queensland Nurses and Midwives Union submission.

19 The Joint Churches submission submitted that 'while legal and regulatory measures can generate external and formal compliance, they are unable to address the underlying causes of prejudice and discrimination' and consider that 'it is on a much smaller scale that – within families, neighborhoods, schools, workplaces and religious communities that human motivations, priorities and values are shaped and formed'. The Review observes that most of these environments are where the Anti-Discrimination Act applies and therefore the environments in which a positive duty would have a role in shaping attitudes and culture.

20 See for example: Allen, Dominique, *Strategic enforcement of anti-discrimination law: A new role for Australia's equality commissions* (2011), Monash University law review, 1-26; Allen, Dominique, *Barking and Biting: The equal opportunity commission as an enforcement agency* (2016) Federal Law Review, 311-335; MacDermott, Therese, *The collective dimension of federal anti-discrimination proceedings in Australia: Shifting the burden from individual litigants* (2018), International Journal of Discrimination and the Law, 22-39.

21 Belinda Smith, *It's About Time – For a New Regulatory Approach to Equality*, Federal Law Review, 132.

22 For example, Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Consultation with Islamic College of Queensland, 20 Aug 2021; Queensland Council of LGBTIQ Health, 10.

transmission risks. When resolving their complaints through conciliation, their clients often requested that the organisation undertake education and training about HIV and blood borne viruses and their management within the organisation's setting.<sup>23</sup> Another person who made an online submission told the Review:

*I was taken into a private room by a registered nurse... I was asked how I got HIV, did I do prostitution or use needles? I asked her why it was relevant... She stated that the referring [doctor] had phoned the surgical ward and notified them that someone with AIDS was coming in for surgery so that they would all adhere to "extra precautions". I asked her why they would need extra precautions as HIV is a universal standard PPE precaution.*

*She said HIV is respiratory and she must know whether I got it from prostitution or needle in order to protect herself and others. I was treated like a bio hazard and my life experiences were pre-determined due to my HIV status. I was unable to explain to the nurse, I am undetected U=U on medication and as per the universal standard precautions no increased risk to anyone during a surgical procedure. She would not accept my words due to me being HIV positive and as she seen me I was "untrustworthy" and unworthy of patient centred care and, well, care at all. I sat there with tears rolling down my eyes which continued as I was being anaesthetised.<sup>24</sup>*

We also heard that a positive duty could have a broader role in promoting inclusive social values, such as cohesion and belonging, and increase awareness of existing obligations not to discriminate. Reflecting on the benefits of a positive duty, the Special Commissioner for Equity and Diversity said:

[Positive duties] also supports the reframing of equity discussions towards not only how we prevent discrimination, harassment and victimisation but also how we advance the rights of groups that have historically experienced disadvantage.<sup>25</sup>

Research that evaluates the positive duty introduced in the Victorian Equal Opportunity Act indicates that those provisions are being used as an educative tool, and 'set the tone' of the Act.<sup>26</sup>

## Shared responsibility

We were told by stakeholders that introducing a positive duty would ensure that responsibility for enforcing the Act does not only rest with individuals who make complaints, but is shared with those who have responsibilities under the Act. This should result in organisations leading the way to create the change needed to eliminate discrimination and sexual harassment.

This approach shifts the burden of enforcement from individuals who often face a range of barriers to reporting discrimination or sexual harassment, including fear of speaking up.<sup>27</sup>

---

23 Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission, 9.

24 Name withheld (Form.25) survey response.

25 Office of the Special Commissioner, Equity and Diversity (Qld) submission, 2-3.

26 For example: Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2) Melbourne University Law Review 459, from 494. See also Dominique Allen submission, 4.

27 Office of the Special Commissioner, Equity and Diversity (Qld) submission; Maurice Blackburn Lawyers submission; Qld Nurses and Midwives submission; Australian Discrimination Law Experts Group submission; Equality Australia submission.

A positive duty may empower organisations to become drivers of change to eliminate discrimination, and to seek guidance from the Commission on actions to take that would support this cultural change.<sup>28</sup> Vision Australia said that, in their experience, individuals and organisations are not motivated to adopt inclusive practices merely by the possibility of a complaint against them. They commented that:

It is necessary to balance this with positive obligations so as to encourage changed behaviours, and to address areas of systemic discrimination.<sup>29</sup>

In support of this perspective, we heard that a positive duty may encourage organisations to devote resources to prevent discrimination even in the absence of any complaints.<sup>30</sup> In practical terms, resources may be more productively spent on preventative measures to improve the overall culture of an organisation, rather than responding to individual complaints as they arise.

As we observe in chapter 2, under-reporting and reluctance to report discrimination may result from fear of retribution, mistrust of government agencies based on previous traumas in a person's country of origin, or because of stigma around the issue and process of engaging with an agency.

For example, during our roundtable with people with disability, one person told us:

*I just have to deal. And I feel uncomfortable with the, with the complaint procedure. I just, I'm not one to, to put in complaints. Maybe I need to change that about myself... Or maybe the complaint procedures need to [change].<sup>31</sup>*

A shift towards a positive approach would provide the Commission with the mandate to identify themes or trends that contribute to systemic discrimination through community and strategic engagement, and therefore allow the Commission to moderate the impacts of under-reporting.

This mandate is reflected in our recommended objects of the new Act, which include:

- to prevent and eliminate discrimination, sexual harassment, and other objectionable conduct to the greatest extent possible
- to encourage identification and elimination of systemic causes of discrimination.

## Systemic focus

The Review was told that stakeholders see a positive duty as an opportunity to provide greater protection to people who experience discrimination and sexual harassment.

This includes protecting people from discrimination experienced on an individual basis, as well as systemic discrimination experienced at a broader level, through playing a 'dual role'<sup>32</sup> – allowing for a preventative approach alongside and in addition to the complaints process.

Positive duties are largely aimed at structural change.<sup>33</sup> As we identified in chapter 2, the current Act has a limited capacity to address systemic discrimination.

---

28 See for example: Queensland Council of Social Service submission; Maurice Blackburn Lawyers submission; Queensland Nurses and Midwives Union submission; Queensland Council of Unions submission.

29 Vision Australia submission, 5.

30 Office of the Special Commissioner, Equity and Diversity (Qld) submission, 1.

31 People with disability roundtable, 4 February 2022.

32 Queensland Council of Social Service submission, 4.

33 Australian Discrimination Law Experts Group submission, 40.



Many organisations who engaged with the Review considered that the potential to address systemic discrimination by introducing a positive duty would be beneficial, including because changing the cultural and organisational practices of a workplace helps to address the causes of discrimination.

A community legal centre in regional Queensland, TASC National Limited, told us that, in their experience, racism is one form of discrimination that highlights the need for systemic change which can only be achieved through addressing not only the behaviour or conduct when it arises, but also the environment from which those behaviours arise.<sup>34</sup>

The Queensland Council for LGBTIQ Health also said that a positive duty may provide a greater sense of protection for people more likely to experience discrimination:

*Our communities have told us stories where they feel they may be discriminated against in different settings. [A positive duty] will assist our communities to feel more secure at their workplaces, services and organisations that they attend.*<sup>35</sup>

## Potential limitations

A minority of stakeholders<sup>36</sup> did not support introducing a positive duty in the Anti-Discrimination Act or adopted a qualified position and raised concerns about potential disadvantages or limitations of this proposed reform.

### Regulatory burden

Increased regulatory burden was a key concern raised by this group of stakeholders.

A complex regulatory environment can create specific challenges for organisations, and some sectors already experience more regulation than others. Avoiding an unnecessary regulatory burden on business, individuals, and community organisations was a key concern raised with the Review.<sup>37</sup>

Stakeholders who raised this issue wanted to ensure that any legislative change did not greatly increase resources required to comply with the duty, including the time and costs of training. Submissions focused on the regulatory environment of particular sectors, including religious and charitable organisations, schools, and in small and medium-sized businesses.

### Industry specific considerations

#### Religious organisations, charities, and welfare organisations

In relation to religious organisations, charities, and welfare organisations, we were told that the Review should ensure that unreasonable regulatory burdens and associated administrative work are not imposed, given the beneficial, charitable purposes of these organisations, their limited resources, dependence on donations and volunteers, and not-for-profit<sup>38</sup> status.<sup>39</sup>

---

34 TASC National Limited submission, 3.

35 Queensland Council for LGBTIQ Health submission, 10.

36 Of the 52 submissions that responded to this discussion question, seven either did not support the introduction of a positive duty or provided no position with comments that suggested a lack of support.

37 As recognised by the Australian Government Office of Best Practice Regulation, *Australian Government Guide to Regulatory Impact Analysis*, March 2020, and the Queensland Office of Best Practice Regulation, *Queensland Government Guide to Better Regulation*, May 2019.

38 The scope of the current exemptions from duties under the existing Act for not-for-profit organisations is considered in this report.

39 Joint Churches submission; Human Rights Law Alliance submission; Australian Christian Lobby submission; Australian Association of Christian Schools submission.

## Education settings

Consultations and submissions raised concerns about the ‘increasing bureaucratic burden’ on independent schools that operate in an environment that is already highly regulated.

In our initial consultation phase, we heard from independent schools that it would be important to ensure that any duty, and the corresponding approach to compliance, is balanced and proportionate, and recognises the overlapping regulatory environment of the education sector.<sup>40</sup> This concern was reflected by Independent Schools Queensland, who submitted that:

The increasing bureaucratic burden on schools adds significantly to the cost of independent schools and means that scarce financial and staffing resources are directed away from schools’ core business of educating students. In independent schools, the cost burden is inevitably borne directly by parents, families, and school communities... Research undertaken within the independent sector has identified high levels of concern on the part of principals and board members about the amount of time and stress external compliance requirements are placing on school communities.<sup>41</sup>

A number of independent schools said that recommendations from inquiries such as the Royal Commission into Institutional Responses to Child Sexual Abuse had created layers of regulation over time that was increasingly complex to navigate.

Ensuring a responsive regulatory approach that takes account of existing and relevant obligations could go some way to reducing the compliance burden and ensuring that a positive duty within anti-discrimination law addresses a clear and distinct gap, rather than covering well-trodden ground.

Independent Schools Queensland made the point that their member schools are ‘highly accountable to their school communities’ and operate within an ‘environment of choice and diversity’.<sup>42</sup>

## Small and medium-sized business

The cost to business caused by increased regulation was raised in consultations and submissions.<sup>43</sup> The Australian Industry Group, who do not support the introduction of a positive duty, noted that a discrimination law framework should be sensitive to the regulatory burden on employers, including larger businesses complying with up to 12 separate anti-discrimination statutes nationally, and the limited resources of small business.<sup>44</sup>

## Barriers to meaningful change

As well as these industry-specific perspectives, we heard that there may be a risk of organisations drifting towards a ‘tick box’ approach to compliance, instead of meaningful engagement with the purpose of the duty.

In addressing this issue, Queensland Catholic Education commented that ‘compliance actions that organisations would be required to undertake would become the focus rather than the positive duty’.<sup>45</sup>

This concern was shared by Legal Aid Queensland, who note:

---

40 See for example Queensland Catholic Education Commission consultation, 20 August 2021.

41 Independent Schools Queensland submission, 3.

42 Independent Schools Queensland submission, 3.

43 See for example: Australian Industry Group submission; Small business roundtable, 7 March 2022; Chamber of Commerce and Industry Queensland submission.

44 Australian Industry Group submission, 2.

45 Queensland Catholic Education Commission submission, 6-7.

We are concerned that general positive duties may be viewed as a “check box” exercise for employers, businesses and other entities to mitigate their liability, without actually taking meaningful steps to eliminate discrimination and sexual harassment. For example, we are aware of many circumstances where organisations have policies and procedures that would appear to be compliant on paper, but do not actually prevent discrimination or sexual harassment from occurring. In addition, we note the significant cost to businesses and organisations in engaging human resource professionals to create policies of this nature, which may not be justified if it is only to mitigate liability under positive duties provisions.<sup>46</sup>

The requirement for staff training and the associated financial cost to organisations was also raised as a concern.<sup>47</sup> Some stakeholders reflected on their experiences with training in the workplace, and told us that training requirements can be costly,<sup>48</sup> burdensome,<sup>49</sup> and may not necessarily achieve the intended outcomes, particularly in sectors where knowledge of the Anti-Discrimination Act is limited.

Later in this section, we discuss how drafting the positive duty to include a requirement to take reasonable and proportionate measures to eliminate discrimination may moderate the burden of responsibilities and ensure that relevant factors are taken into account when determining the adequacy of the steps taken by those responsible.

In the next section of this report, we consider the features of a regulatory approach needed to achieve compliance with a positive duty.

### Consistency with other regulation

Stakeholders who did not support the introduction of a positive duty, or provided qualified support, were concerned about potential inconsistency between a new positive duty in the Queensland Anti-Discrimination Act and existing duties under other laws and regulations at a state and federal level.

If a new positive duty duplicated other obligations, they felt this would create further fragmentation of legislative and regulatory frameworks and may dilute efforts to comply with other obligations.<sup>50</sup> In considering this issue, the Review noted that some duty holders raised issues with regulatory fatigue, and most expressed that they were genuinely doing their best to ensure good working environments and service delivery. These stakeholders thought that tailoring the approach to specific industries was essential to making it work.

The interface between work, health, and safety (WHS) Acts and regulations and a new positive duty in the Anti-Discrimination Act was a primary concern and is addressed below.

---

46 Legal Aid Queensland submission, 60.

47 Small business roundtable, 7 March 2022.

48 Small business roundtable, 7 March 2022.

49 Australian Association of Christian Schools submission, 5.

50 Australian Industry Group submission, 6.

Other potentially overlapping obligations raised by stakeholders included:

- Professional codes of practice, such as the Medical Board of Australia's *Good Medical Practice: a code of conduct for doctors in Australia*, which are enforceable through professional regulatory and disciplinary action and state and federal oversight agencies.<sup>51</sup>
- Regulation of independent schools through the *Education (Accreditation of Non-State Schools) Act 2017* and *Education (Accreditation of Non-State Schools) Regulation 2017*, especially provisions that relate to students with disability, and oversight by the Non-State Schools Accreditation Board.<sup>52</sup>
- Government strategies for state schools, including the '*We all belong: embracing workplace inclusion and diversity*' strategy.<sup>53</sup>
- National Disability Standards under the federal Disability Discrimination Act that ensure proactive elimination of discrimination based on disability.<sup>54</sup>
- The Child Safe Standards and Reportable Conduct Scheme which require organisations involving children to have policies, procedures, and practices to protect children from abuse.

None of these Acts, legislative instruments, regulations, or policies have the same scope or purpose as the positive duty contemplated by this Review.

## Confusion and complexity

While acknowledging the potential benefits of a positive duty in the Act, some submissions emphasised the need to ensure that the duty is well understood. Knowledge of the new law should extend not only to businesses, but individuals, and duty holders who already have some familiarity with regulatory regimes under WHS laws.<sup>55</sup>

Most stakeholders agreed on the need for the Anti-Discrimination Act to be clear and easy to understand, including the positive duty obligations.<sup>56</sup>

## Enforceability

Ensuring the law is enforceable is vital for its effectiveness. Consultations and submissions frequently raised this point in relation to including a positive duty in the Act.<sup>57</sup>

Later in this section, we consider how compliance with a positive duty could be supported and enforced, and by which entity. Having considered all the factors, we recommend the Queensland Human Rights Commission's functions be expanded to include that the Commission guides and oversees compliance with a new positive duty in the Anti-Discrimination Act. In chapter 9 we discuss the resourcing implications that apply to ensure implementation of these recommendations are effective.

In a resource-constrained environment, it would not always be possible for the Commission (or another entity) to monitor the actions of every organisation subject to the positive duty,<sup>58</sup> particularly given the breadth and diversity of duty holders under the Anti-Discrimination Act.

---

51 Medical Insurance Group Australia submission, 2.

52 Independent Schools Queensland submission, 2.

53 Department of Education (Qld) submission, 8.

54 Queensland Catholic Education Commission submission, 7.

55 Queensland Law Society submission, 12.

56 See for example: Australian Industry Group submission; REIQ consultation, 31 August 2021.

57 See for example: Rainbow Families Queensland submission; Community Legal Centres Queensland submission; Australian Discrimination Law Experts Group submission.

58 Australian Discrimination Law Experts Group submission, 41.

It would also not be possible to explore every suggestion for proactive work raised by individuals, organisations, or the community.

However, we consider resource limitations can be minimised through:

- focusing on providing guidance and education
- taking a proportionate, not heavy-handed approach
- directing resources to the most serious systemic issues or high-risk environments, including a strategic application of mechanisms available to promote compliance.

## Contrary to religious beliefs

A small number of submissions<sup>59</sup> said that complying with a positive duty to eliminate discrimination would require religious institutions and their staff to act contrary to their religious beliefs, and that this may breach their right to freedom of religion.<sup>60</sup>

Three submissions put forward the view that any introduction of positive duties must include balancing provisions or protections for religious organisations, so that they are not required to undertake affirmative action contrary to their religious beliefs.<sup>61</sup>

The requirement not to discriminate is already contained in the Anti-Discrimination Act. On one view, a positive obligation would reinforce rather than expand existing obligations, and ensure all organisations better understand their current legal requirements. If a matter is not unlawful discrimination under the Act because an exception clearly applies, there would not be a duty to take reasonable and proportionate steps to prevent it.

## Will existing obligations be duplicated?

During our initial consultations, some stakeholders told us that they considered a positive duty was not required because the obligation to take steps to prevent discrimination was already contained in either the Anti-Discrimination Act, or other laws and policies.

We have examined the extent of duplication and considered whether the existence of such obligations is sufficient justification for not recommending the introduction of a positive duty in the Anti-Discrimination Act, given the potential benefits it offers.

## Work health and safety laws

The work health and safety regime developed by Safe Work Australia, known as the model WHS laws, provides an instructive example of the use of positive duties. The model WHS laws comprise the: Model WHS Act, Model WHS Regulations, and 24 Model Codes of Practice, which are maintained by Safe Work Australia. To be legally binding, each jurisdiction must implement them as their own WHS laws. The model laws have been implemented in all jurisdictions except Victoria.

The Respect@Work report considered the model WHS laws are a useful example of building a preventative practice through positive duties and clear understanding of workplace responsibilities.

---

59 Human Rights Law Alliance submission; Australian Christian Lobby submission; Australian Association of Christian Schools submission; Australian Christian Lobby Group submission.

60 Some submissions framed this argument as contrary to Article 18 of the ICCPR. This argument is closely connected to the tension between freedom of religion and the right to non-discrimination, both of which are protected by the Anti-Discrimination Act and the Human Rights Act. Given the similarity of that argument to those explored in chapter 8 with respect to exceptions that apply to religious bodies, this section does not present an in-depth analysis of those issues.

61 Human Rights Law Alliance submission; Australian Christian Lobby submission; Australian Association of Christian Schools.

All Australian WHS laws have adopted the three-tiered approach outlined in the 'Robens model',<sup>62</sup> which recommends:

- broad overarching general duties (set out in WHS laws)
- more detailed provisions (set out in regulations)
- codes of practice.

While the obligations are framed as outcome-based, organisations can tailor their approach to fit their circumstances and available resources.

A key element of the Model WHS Act is the obligation on duty holders to eliminate or minimise risks arising from work. The primary duty is to identify, control, and address hazards and risks that may affect the physical and psychological health or safety of staff, so far as is reasonably practicable.

Under the model WHS laws there is an obligation to manage the health and safety risks of workplace sexual harassment. Safe Work Australia has issued guidelines on how employers should manage their WHS statutory duties to prevent sexual harassment, released a model psycho-social hazard regulation, and is developing an associated Code of Practice.

### Are the duties the same?

In our initial consultation phase, the relationship between a positive duty in the Anti-Discrimination Act and existing requirements under the *Work Health and Safety Act 2011* (Qld) was discussed. We invited submissions about the extent of any overlap between WHS laws and a positive duty under the Anti-Discrimination Act, and considerations for the interface between these two legislative regimes.

Positive obligations under WHS laws are only imposed on employers, and so only apply in the workplace. The Anti-Discrimination Act applies to a broad range of areas of activity in public life including education, the provision of goods or services, accommodation, club memberships and affairs, and the public sector. Any potential overlap with WHS is therefore necessarily confined to the area of work.

Almost all submissions that addressed this issue consider that potential overlap is limited because the two Acts have distinct orientations and focuses. The specific focus of WHS creates a gap in coverage for a positive duty to address discrimination and sexual harassment. Submissions also noted that any overlap would not present inconsistencies and would be mutually reinforcing.<sup>63</sup>

The duty of care under WHS laws is:

- focused on assessment of the likelihood of a hazard or risk occurring compared to the degree of harm that might result
- influenced by the objectives of the WHS Act, which are different to the Anti-Discrimination Act
- focused on risk assessment and prevention measures to manage risk.<sup>64</sup>

Submissions also note that federal and state regulators focus on compliance with employment and WHS laws, rather than addressing the causes and impact of discrimination and sexual

---

62 The three-tiered approach was recommended by the 1972 British Robens Report that sought to streamline the WHS regulatory system while recognising practical limitations. The report emphasised the importance of a systematic, preventative, risk management approach to health and safety.

63 See for example: Equality Australia submission, 38; Queensland Council of Unions submission, 19; Vision Australia submission, 6.

64 Queensland Council of Unions submission.

harassment, and a specialist agency with expertise in discrimination law that would be enforcing a positive duty under the Anti-Discrimination Act would be beneficial.<sup>65</sup>

The Australian Industry Group, which does not support the introduction of a positive duty, provided a different view. They submit that if the psycho-social hazard regulation and associated Code of Practice is adopted by the Queensland Government, the WHS framework that currently provides positive duties on employers to ensure safe workplaces (including sexual harassment) will extend more explicitly to steps employers are to take to prevent psychosocial hazards such as sexual harassment.<sup>66</sup>

There is an important distinction between laws and regulations that *overlap* and laws that are *inconsistent* – the first is about coverage and the second is about the extent to which two or more regimes can operate consistently in parallel. This may cause confusion and conflict when trying to comply, and it would be necessary to ensure that awareness and education are sufficient to clarify and simplify this interface to duty holders. Where WHS and a positive duty might overlap, we expect that the two regimes would be complementary, not inconsistent.

In supporting the introduction of a positive duty, Legal Aid Queensland commented that the current WHS exemption in the Anti-Discrimination Act<sup>67</sup> should be retained, and this would allow WHS measures to prevail in the event of any inconsistency between the duties.<sup>68</sup>

### Vicarious liability

Under the Anti-Discrimination Act, a person who contravenes the Act is civilly liable for the contravention. This carries an implied requirement that people, and organisations not discriminate.

If a person's worker or agent contravenes the Act in the course of work, both the person and the worker or agent are liable for the contravention.<sup>69</sup> However, it is a defence if an employer can prove that they took reasonable steps to prevent the worker or agent from contravening the Act. The liability for indirect discrimination also creates an implied obligation on the employer to make reasonable accommodations for people with an attribute.

While these provisions require an employer to take reasonable steps to prevent unlawful discrimination or sexual harassment from happening, this defence is raised in response to conduct that has already happened, rather than requiring proactive, preventative actions. This creates a fault-based system in which the onus is on the aggrieved party to prove the contravention of the Act happened, and there is a limited obligation to take positive steps.

It also means that, to a limited extent, the Act already requires positive steps to be taken to demonstrate compliance unless the defence provisions apply.<sup>70</sup> However, no action can be taken about a failure to meet this requirement unless a person lodges a complaint.<sup>71</sup>

Relying on employers to take reasonable steps to prevent discrimination and thereby defend potential complaints does not achieve the core objectives of a positive duty. Defences cannot be proactively enforced, and the effectiveness of this approach in eliminating discrimination is unable to be tested. The reactive nature of vicarious liability provisions therefore provides limited capacity to meet the aims and benefits identified with a positive duty.

---

65 Equality Australia submission; Queensland Council of Unions submission; Legal Aid Queensland submission, 59.

66 Australian Industry Group submission, 6.

67 *Anti-Discrimination Act 1991* (Qld) s 108.

68 Legal Aid Queensland submission, 59.

69 *Anti-Discrimination Act 1991* (Qld) s 133.

70 *Anti-Discrimination Act 1991* (Qld) s 133(2).

71 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008), 38.

## Framing the duty

In considering whether to recommend the introduction of a positive duty, it is necessary to determine what the scope and coverage of that duty should be. This section considers who should owe the duty, what forms of prohibited conduct it should cover, and in what settings it should apply.

When thinking about the framing of a positive duty, we have been guided by the objectives that the positive duty seeks to achieve. These objectives include prevention, educating organisations, sharing responsibility for enforcement with duty-holders, and greater protection for people who experience discrimination or sexual harassment.

### In what contexts should the duty apply?

#### Prohibited conduct and attributes

Of the submissions that considered this issue, all agreed that a positive duty should cover all forms of conduct prohibited by the Anti-Discrimination Act, including discrimination and sexual harassment,<sup>72</sup> and cover all attributes.<sup>73</sup>

Covering all attributes would prevent forming a 'hierarchy' of attributes, simplify the law, and reduce confusion about the application of the duty. The Human Rights Act also requires laws to provide equal and effective protection against discrimination.<sup>74</sup>

Ensuring all attributes are subject to the same protection would better reflect the intersectional nature of discrimination,<sup>75</sup> an aspect of discrimination that is difficult to adequately protect.

### Who has the duty?

There are two options:

- the positive duty should apply to anyone who has an obligation under the current Act; or
- the positive duty should be confined to certain duty holders, such as the public sector, or employers.

In our Discussion Paper, we asked stakeholders to tell us if they thought a positive duty should apply to all duty holders in all areas. Of the submissions that addressed this point, most said that a positive duty should apply to anyone who has an obligation under the Act.<sup>76</sup>

The Queensland Law Society took a qualified position. In addition to their comments about the burden on particular groups, they consider that for employers, businesses, educational institutions and other similar bodies, imposing a duty is appropriate.<sup>77</sup>

Equality Australia recommended that the public sector could have the extra duty of promoting equality of outcomes, such as requirements to remove or minimise disadvantages experienced by people because of protected attributes.<sup>78</sup>

---

72 Queensland Nurses and Midwives Union submission; Australian Discrimination Law Expert Group submission; Queensland Council of Unions submission; Equality Australia submission; Caxton Legal Centre submission; Legal Aid Queensland submission.

73 Queensland Nurses and Midwives Union submission; Assoc Prof Dominique Allen submission; Australian Discrimination Law Experts Group submission.

74 *Human Rights Act 2019* (Qld) s 15.

75 Qld Nurses and Midwives Union submission, 16.

76 Assoc Prof Dominique Allen submission; Maurice Blackburn Lawyers submission; TASC National Limited submission; Jenny King submission; Australian Discrimination Law Experts Group submission; Equality Australia submission; Legal Aid Queensland submission.

77 Queensland Law Society submission, 13.

78 Equality Australia submission, 26.



The Independent Schools Queensland submission suggested that a positive duty be confined to employment, or alternatively to exclude the area of education in recognition of the significant regulatory framework that schools currently operate within.<sup>79</sup>

The Queensland Council for Civil Liberties submission suggested that a positive duty be confined to employment and education because, in their view, these are the only areas that might have the power and resources to comply with the duty.<sup>80</sup>

None of the submissions discussed which organisations should be exempted from obligations under a positive duty.

## Recommendations of past inquiries

The Australian Capital Territory Law Reform Commission review of the Anti-Discrimination Act recommended that the positive duty apply to public authorities immediately and should apply to all duty-holders within three years.<sup>81</sup>

The Gardner Review in Victoria recommended that the duty apply to all sectors that hold obligations under the Act. It reasoned that, given the Act already covers public and private sectors (with exceptions to moderate the balance between public and private life) such a duty already exists, albeit implied, and so the duty should apply to all sectors that hold obligations under the Act.<sup>82</sup>

We agree with this reasoning and could not identify any clear justification for scaling back or confining the application of the positive duty only to particular areas of public life.

Concerns about resourcing of steps to eliminate discrimination can be mitigated by ensuring the drafting of the legislative provision clarifies that a duty holder is only required to take reasonable and proportionate measures, meaning that the obligations imposed by the duty are effectively scaled depending on the size and resources of the organisation.

## Reasonable and proportionate measures

The Victorian Act only requires duty holders to take measures that are 'reasonable and proportionate', having regard to a non-exhaustive list of factors that should be considered in determining whether a measure is reasonable and proportionate.

The Victorian approach was supported by all submissions that addressed this issue.<sup>83</sup>

The Respect@Work report recommended the same set of factors as the Victorian Act, but added an additional factor that 'all other relevant facts and circumstances' be included. In discussing the justification for this additional criterion, the Australian Human Rights Commission said:

In determining whether a measure is reasonable and proportionate, the factors that must be considered could draw on the positive duty under the Victorian Equal Opportunity Act, as well as *all other relevant facts and circumstances*, which may include systemic issues within that industry or workplace [emphasis added]. The impact on both employers and workers should be considered when assessing each of these factors.<sup>84</sup>

---

79 Independent Schools Queensland submission, 2.

80 Queensland Council for Civil Liberties submission, 10.

81 ACT Law Reform Advisory Council, *Review of the Anti-Discrimination Act 1991 (ACT)* (Final Report, 2015), 48-49.

82 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 40.

83 Vision Australia submission; TASC National Limited submission; Qld Council for Civil Liberties submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Queensland Council of Unions submission; Legal Aid Queensland submission.

84 Australian Human Rights Commission, *Respect@ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020), 479.

Together, these approaches allow the duty to be scaled depending on the size and structure of an organisation and any industry-specific considerations including risk profiles.

## The Review's position

The Review considers that:

- Introducing a positive duty to take active steps to prevent discrimination and sexual harassment before it happens has the ability to reorientate the Act towards prevention and to extend responsibility for enforcement to duty holders, rather than that responsibility resting solely with individuals who experience discrimination and sexual harassment.
- The potential benefits of a positive duty outweigh the limitations. However, limitations identified by the Review, particularly the increased regulatory burden, should be actively managed by the entity with responsibility for promoting compliance and enforcement.
- Justification for confining the duty to a particular form of conduct, area of activity, or limited number of duty holders, was not sufficient to create different obligations for certain types of organisations.
- Ensuring compliance with the duty should focus on addressing the underlying causes of discrimination and sexual harassment.
- Overlap between the positive duty in WHS laws and under the Anti-Discrimination Act is likely to be limited, and to the extent that overlap exists, is likely to be mutually reinforcing.
- Drafting of the positive duty should draw on the approach taken in the *Equal Opportunity Act 2010* (Vic) s 15(6), together with additional criteria recommended by the Respect@Work report.

---

## Recommendation 15

**15.1** The Act should include a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, and other prohibited conduct as far possible.

**15.2** The duty should apply to anyone who has a legal obligation under the Act, and for all attributes and areas covered by the Act.

**15.3** Drawing on the Victorian approach and the additional criteria recommended by the Respect@Work report, in determining whether a measure is reasonable and proportionate, the Act should prescribe that the factors that must be considered are:

- the size of the person's business or operations
- the nature and circumstances of the person's business or operations
- the person's resources
- the person's business and operational exigencies
- the practicability and the costs of the measures
- all other relevant facts and circumstances.

# Mechanisms to promote compliance

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<sup>85</sup>
- whether the functions, processes, powers and outcomes of the Commission are appropriately suited to ensuring it can further the objective of eliminating discrimination and other objectionable conduct under the Anti-Discrimination Act, to the greatest extent possible.<sup>86</sup>

Throughout the Review, we considered whether the Anti-Discrimination Act contained sufficient enforcement mechanisms to actively promote and require compliance with the legislation, and to protect and promote equality, and non-discrimination and the realisation of human rights.<sup>87</sup>

During consultations, we consistently heard from communities who experience high rates of discrimination that the Commission should have a greater role in proactively encouraging and enforcing compliance with the Act, and should respond more effectively to systemic discrimination.

We were told that if a positive duty to eliminate discrimination and sexual harassment was introduced, it must be enforceable. Without additional tools to enforce compliance, there was real concern that a positive duty would be ineffective.

In the Discussion Paper, we invited responses about whether the statutory framework should incorporate a role in regulating compliance with the Act to eliminate discrimination. Of the submissions received, 41 addressed this topic. We also consulted with small business stakeholders, government agencies, legal practitioners, and interstate human rights agencies about this topic.

We have concluded that additional mechanisms are required to promote compliance with the Act and with a positive duty to eliminate discrimination. These mechanisms should focus on guiding and supporting compliance, but also include powers to enforce compliance that could be used as a last resort if attempts to encourage compliance fail. We also conclude that the Commission is the agency best placed to undertake this role.

As we explain below, we recommend changing the Anti-Discrimination Act to reflect enforcement mechanisms in other Australian discrimination laws, and to incorporate additional tools to ensure the Commission can effectively further the objective of eliminating discrimination to the greatest possible extent.

## Getting the balance right

A consistent theme that emerged through consultations and submissions was that to be effective, a positive duty must be enforceable.<sup>88</sup> We also identified that stakeholders expect a more proactive approach to enforcement of the Act.

In the Discussion Paper, we asked whether the statutory framework should incorporate a role in regulating compliance in the Anti-Discrimination Act to support the elimination of discrimination.

---

85 QHRC Review of the Anti-Discrimination Act, Terms of Reference item 3(g).

86 QHRC Review of the Anti-Discrimination Act, Terms of Reference item 3(j).

87 QHRC Review of the Anti-Discrimination Act, Terms of Reference item 2.

88 See for example: Rainbow Families Queensland submission; Community Legal Centres Queensland submission; Australian Discrimination Law Experts Group submission.

Of the 30 submissions that actively addressed this question, 21 endorsed a change in the law to create further mechanisms for regulating compliance.<sup>89</sup> Two submissions provided qualified support.<sup>90</sup>

Two key messages emerged from our analysis of information gathered by the Review:

- The primary purpose of introducing a regulatory role should be to support compliance **through education and cooperation**, rather than taking a punitive approach.
- In addition to the educative approach, the legislation should contain clear accountability and enforcement mechanisms to address **non-compliance** in only very serious circumstances or as a last resort.

We consider these elements are necessary to ensuring the Anti-Discrimination Act achieves the right balance between supporting organisations to comply and ensuring that regulation is not overly burdensome.

We recognise that, in most circumstances, enforcement of the Act is best achieved through persuasion and education, rather than punitive measures.

## Education and cooperation

We heard that for a positive duty to be effective, the entity with responsibilities to promote and enforce compliance should develop, publish, and actively promote guidance resources to simplify and contextualise the law. Clear and industry-specific information about what steps organisations need to take to comply is required.<sup>91</sup>

We were told that an important part of supporting organisations to meet their obligations should include clarifying the relationship between the positive duty in the Anti-Discrimination Act and obligations under other laws – for example, Work Health and Safety laws – would assist with compliance and minimise the additional regulatory burden.

A focus on engagement, education, and collaborating with particular sectors and industries to produce targeted resources was seen as the best way to ensure that the causes of discrimination are effectively addressed.<sup>92</sup>

We also heard similar sentiments through our online survey. For example, one person told us:

*It should be engrained from a young age as a form of education. Also, perhaps public advertising similar to how the government educates people about the dangers of cigarettes and alcohol could send a clear and powerful message in society. To educate through various forms of*

---

89 Queensland Law Society submission; Public Advocate (Qld) submission; Assoc Prof Dominique Allen submission; LGBTI Legal Service Inc submission; Maurice Blackburn Lawyers submission; Sisters Inside Inc submission; Vision Australia submission; Women's Legal Service Qld submission; Queensland Mental Health Commission submission; Tenants Queensland submission; Scarlet Alliance submission; Respect Inc and DecrimQLD submission; Aged and Disability Advocacy Australia submission; Queensland Nurses and Midwives Union submission; Australian Discrimination Law Experts Group submission; Community Legal Centres Queensland submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Queensland Council of Unions submission; Equality Australia submission; Queensland Advocacy Incorporated submission, Legal Aid Queensland submission.

90 PeakCare Queensland Inc submission; Queensland Council for Civil Liberties submission.

91 See for example: Queensland Law Society submission; Queensland Catholic Education Commission consultation, 20 August 2021; Clubs Queensland consultation, 24 August 2021; REIQ consultation, 31 August 2021; Australian Industry Group consultation, 9 August 2021; Small Business Commissioner consultation, 28 September 2021; Small business roundtable, 7 March 2022.

92 See for example: Medical Insurance Group Australia submission; Queenslanders with Disability Network submission; Scarlet Alliance, Australian Sex Workers Association submission.

*advertising. Televisions, billboards etc that sexual harassment of any form is unacceptable and cowardly. We have advertising about the dangers of cigarettes and alcohol and drugs. We also need to stamp out this type of insidious abuse through public education campaigns.*<sup>93</sup>

Legislative change is only the first step. Without awareness raising, education and targeted training, the capacity to address and eliminate discrimination will be limited.

## Addressing non-compliance

In addition to the focus on education, there was support for ensuring the entity responsible for enforcement of the positive duty has a range of escalating powers to be used in serious circumstances.<sup>94</sup> For example, one submission said:

We need a properly resourced regulator with a combination of duties and powers that would enable it to have real impact.<sup>95</sup>

Ensuring accountability for serious or repeated non-compliance, when necessary, would ensure confidence in the regulator and support for its aims.

## A role for the Commission or another entity?

The Discussion Paper asked whether the Commission should be given the role of regulator, or if there is a more appropriate entity.

Most submissions that supported creating further mechanisms for regulating compliance,<sup>96</sup> or provided qualified support,<sup>97</sup> considered the Commission was the most appropriate entity for this function.<sup>98</sup>

Of the seven stakeholders that did not support a regulatory function for the Commission, all were of the view that no entity should have this role.<sup>99</sup> In general, those stakeholders considered that the Commission should not be given what they describe as 'quasi-judicial powers', because it is inappropriate to give an unelected or unappointed bureaucratic body the ability to make rules, adjudicate those rules, and then enforce compliance.

---

93 Benjamin Palmer (Form.005) survey response.

94 See for example: Assoc Prof Dominique Allen submission; Caxton Legal Centre submission; Legal Aid Queensland submission; Queensland Advocacy Incorporated submission; Sisters Inside Inc submission.

95 Caxton Legal Centre submission, 19.

96 Queensland Law Society submission; Public Advocate (Qld) submission; Dominique Allen submission; LGBTI Legal Service Inc submission; Maurice Blackburn Lawyers submission; Sisters Inside Inc submission; Vision Australia submission; Women's Legal Service Qld submission; Queensland Mental Health Commission submission; Tenants Queensland submission; Scarlet Alliance submission; Respect Inc and DecrimQLD submission; Aged and Disability Advocacy Australia submission; Queensland Nurses and Midwives Union submission, Australian Discrimination Law Experts Group submission, Community Legal Centres Queensland submission, Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Queensland Council of Unions submission; Equality Australia submission; Queensland Advocacy Incorporated submission; Legal Aid Queensland submission.

97 PeakCare Queensland Inc submission; Queensland Council for Civil Liberties submission.

98 Queensland Public Advocate submission; Rainbow Families Queensland submission; Assoc Prof Dominique Allen submission; LGBTI Legal Service Inc submission; Maurice Blackburn Lawyers submission; Sisters Inside Inc submission; Vision Australia submission; Queensland Mental Health Commission submission; some survey participants of Queensland Rugby League submission; Tenants Queensland submission; Respect Inc and DecrimQLD submission; Aged and Disability Advocacy Australia submission; Australian Discrimination Law Experts Group submission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Legal Aid Queensland submission.

99 Independent Schools Queensland submission; Human Rights Law Alliance submission; Australian Christian Lobby submission; Christian Schools Australia submission; Australian Association of Christian Schools submission; James Cook University submission; Australian Industry Group submission.

## Alignment and efficiency

Most stakeholders strongly supported a redesign of the Commission's role and functions to include a regulatory function to enforce the positive duty to and prevent discrimination and sexual harassment.

Stakeholders thought the Commission should have this function because:

- The Commission is best placed to respond appropriately to unlawful discrimination and sexual harassment.<sup>100</sup>
- The function would complement the Commission's existing functions of providing education and training about the Act, which is an integral component of supporting compliance.<sup>101</sup>

Responsibility for preventing discrimination and sexual harassment would then be shared between duty holders under the Act, people who may experience discrimination, and the Commission as guiding and enforcing compliance.

## Tension between roles

While most submissions supported the Commission being given additional legislative tools to support and enforce compliance, some thought this might create a perceived or actual conflict of interest between:

- the Commission's impartial role in conciliating disputes; and
- a statutory function to proactively address systemic discrimination and enforce compliance with a positive duty.

There were mixed views about this issue.

A small number of submissions held an absolute position that undertaking both roles would interfere with the Commission's ability to deal with complaints in an objective and neutral way.<sup>102</sup>

These stakeholders – a sub-set of the seven submissions referred to above – considered that no entity should be given the role of supporting compliance with a positive duty.

The Australian Industry Group, who was of this view, explained their position as follows:

Transforming the QHRC into a regulatory enforcement body in respect of a positive duty and other measures would threaten the perception about the QHRC's independence and impartiality in receiving and conciliating complaints. Perceptions of impartiality, independence and fairness are very important when issues arise between employers and employees.<sup>103</sup>

However, while submissions addressed these concerns as something to consider, most did not form the position that the issue of a perceived or actual conflict meant that the Commission should not have the role.<sup>104</sup>

## Is the role substantially different to the current position?

Some submissions queried whether a more proactive role for the Commission would be substantially different to its current statutory responsibilities. On this point, Legal Aid Queensland

---

100 Public Advocate (Qld) submission, 5.

101 Assoc Prof Dominique Allen submission, 6.

102 Human Rights Law Alliance submission; Australian Christian Lobby submission; Australian Association of Christian Schools submission; Australian Industry Group submission.

103 Australian Industry Group submission, 6.

104 See for example: Queensland Council of Unions submission; Legal Aid Queensland submission; Equality Australia submission; Queensland Advocacy Incorporated submission.

said they did not consider the new role as contemplated by the Discussion Paper would be a significant departure from the current work of the Commission, which often involves expressing views about discrimination or human rights issues.<sup>105</sup> This view was not shared by Caxton Legal Centre, who said that:

Currently the QHRC maintains a somewhat awkward position of neutrality which makes it hard to see it as a potentially effective regulator.<sup>106</sup>

### Is the statutory separation of roles effective?

The tension between these roles has been examined in academic literature. Initially, some research considered that complete separation of the complaint handling and enforcement functions may be preferable. For example, in her 2016 article, Assoc Prof Dominique Allen identified justifications for this position:

- to ensure that resources allocated for the express purpose of enforcement are not consumed by the complaints handling responsibilities
- to avoid conflict of interest that would arise if the one agency handles both complaints handling and law enforcement
- to ensure the existing agency can be re-cast as an enforcement agency.<sup>107</sup>

However, during our consultation with the Australian Discrimination Law Experts Group,<sup>108</sup> we observed that for some academics, this view has since altered, particularly after taking into account the challenges experienced in international jurisdictions in which these functions have been split between two separate entities – one with a dispute resolution function and another with a regulatory role.

One discrimination law academic, Assoc Prof Alysia Blackham, provided insights from her current and ongoing research into a comparative approach between Australia and the United Kingdom. Following a structural change in 1999, the Equality Commission for Northern Ireland now has the sole function of encouraging and enforcing compliance with Northern Ireland's discrimination and human rights law.<sup>109</sup> The complaint function is now handled by a separated body. This is similar to the Equality and Human Rights Commission in Great Britain where functions have also been split.

In practice, the Northern Ireland statutory enforcement body has limited capacity to evaluate its effectiveness as it does not have oversight of the number and nature of complaints received. It also has limited capacity to monitor and act on trends in systemic issues identified through complaints. This has led to a sense that the regulatory body is 'essentially working with two hands behind their back'<sup>110</sup> and has been subjected to criticism that the entity has been ineffectual. Assoc Prof Blackham's view is that splitting these roles is not advisable.

This view is repeated in Assoc Prof Blackham's recent publication addressing age discrimination law:

As both enforcers and (objective) conciliators, Australian equality agencies straddle two potentially competing roles; this may limit the extent to which agencies use their assistance functions to support individual claimants. More likely, though, these dual roles

---

105 Legal Aid Queensland submission, 62.

106 Caxton Legal Centre submission, 19-20.

107 Queensland Advocacy Incorporated submission, 24; Dominique Allen, Barking and Biting: The Equal Opportunity Commission as an Enforcement Agency (2016) 44 *Federal Law Review* 311.

108 Australian Discrimination Law Experts Group consultation, 14 September 2022.

109 Dominique Allen, *Addressing Discrimination Through Individual Enforcement: A Case Study of Victoria* (2019) Monash Business School, Monash University, Victoria.

110 Australian Discrimination Law Experts Group (Assoc Prof Alysia Blackham) consultation, 14 September 2021.

are mutually supportive, enhancing agency operations... At a systemic level, equality agencies use their gatekeeping role to inform their compliance activities, through collection and analysis of claim data to inform strategic decision-making.<sup>111</sup>

## How frequently would this tension arise?

Only in limited circumstances does the tension between roles give rise to a perceived or actual conflict of interest. These circumstances would include when the Commission receives complaints about a duty holder/s at the same time as it is undertaking an independent review or investigation into the same entity or person. In this case, the respondents to the dispute may consider that the Commission could not resolve the dispute without a perceived or actual conflict of interest.

This type of scenario would occur infrequently because the focus of any additional functions to promote compliance would be on support and guidance, rather than enforcement actions. Given the resources required in this type of proactive work, only a small number of reviews and investigations could be conducted each year and would therefore need to be focused on target or priority issues.

This must also be considered against the Commission's approach to resolving disputes. As we discuss in chapter 5, the Commission attempts to resolve complaints through conciliation, a form of alternative dispute resolution. It does not have a role in making a decision about whether or not unlawful discrimination or sexual harassment occurred.

A more common scenario, which the Commission currently manages within its existing functions, is when the Commission is requested to undertake education or training with a duty holder about an issue or topic which may form the basis of a current complaint.

## Managing the dual roles

There are three options to manage both roles:

- give both roles to the Commission, but create structural separation within the organisation to ensure the roles are managed by different staff
- constrain the Commission's role to dispute resolution and give the role of supporting and enforcing compliance to an existing regulator, such as Work Health and Safety
- constrain the Commission's role to dispute resolution and establish a new entity to take on the role of supporting and enforcing compliance.

## Structural separation

The first option is to introduce structural changes to minimise and manage any potential or actual conflicts that may arise in the Commission if complaints are made about an entity or organisation that is subject to action undertaken using enforcement powers.

This may include:

- organisational re-structure to ensure staff who are involved in dispute resolution are not involved in the Commission's proactive systemic work
- allocate separate budgets for dispute resolution and proactive systemic work to ensure that one focus does not overtake the other
- explore options for dispute resolution using external conciliators, if requested by a respondent.

---

<sup>111</sup> Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (2022, Oxford Monographs on Labour Law, Oxford University Press) 290-291.



The potential benefits of creating structural separation within the Commission include:

- **Access to information:** The unit responsible for taking a proactive role would have access to the Commission's complaint data and other information that would allow it to identify systemic themes and trends.<sup>112</sup>
- **Complement existing functions:** An expanded role would complement the Commission's existing role of providing education and training about the Act,<sup>113</sup> which is essential to promote compliance.
- **Reducing complexity:** Creating a separate entity may create complexity and overlap in the roles of each entity within the enforcement system.
- **Leveraging existing awareness:** Creating an additional entity may compromise community knowledge of the system. One of the issues identified by the Review was that greater awareness of the Anti-Discrimination Act is necessary to ensure the law is effective.
- **Enhancing efficiency:** Establishing a new statutory entity to develop relevant expertise and undertake enforcement of the Act has significant resource implications. While it is beyond the scope of this Review to consider the extent of the costs of any new entity, it is reasonable to assume they would be considerable.

In providing their support for the Commission to undertake both roles but also creating structural separation, the Aged and Disability Advocacy Australia submission commented that:

The Commission is the entity best placed to undertake a regulatory compliance role. Procedurally, there should be separation of investigation and enforcement responsibilities to ensure that the same officer is not tasked with both functions in relation to investigation of a person or entity. Existing provisions with respect to similar mechanisms under [Work Health and Safety] laws may be a useful model.<sup>114</sup>

In the structural separation model, governance structures, including administrative arrangements for the Act, would need to be in place to ensure an appropriate level of independence from the government.

### Give role to an existing entity

The Queensland Law Society suggested that the Commission could have a role in promoting compliance with discrimination laws, but only where there is not existing coverage by another body.<sup>115</sup>

They considered that other regulators, including Work Health and Safety, SafeWork Australia, and other industry-specific bodies should be considered as options, but noted that a clear delineation of roles and functions of different bodies would have to be put in place.

We have already discussed the limited overlap with WHS laws. The Commission could work constructively with Work Health and Safety and other work-related regulators to ensure minimal duplication of effort and resources. However, any exclusion of the Commission from the work context may create fragmentation and reduce the effectiveness of a positive duty and other objectives of the Act.

---

112 Australian Discrimination Law Experts Group consultation, 14 September 2021.

113 Assoc Prof Dominique Allen submission, 6; Australian Discrimination Law Experts Group consultation (Assoc Prof Alysia Blackham), 14 September 2021.

114 Aged and Disability Advocacy Australia submission, 9.

115 Queensland Law Society submission, 13.

The Queensland Law Society submission also raised the option of the Commission holding a role, but deferring or delegating enforcement to another entity to the extent of any overlap in functions.

This option would effectively separate sections of enforcement to existing entities that may have a limited role in enforcement of the Anti-Discrimination Act.

### Create a new entity

A small number of submissions suggested the establishment of a new entity so that the role of dispute resolution and a proactive role in eliminating discrimination could be completely split.

The Queensland Nurses and Midwives submitted that, in their view, any compliance enforcement function should be separated from the Commission and tribunals that perform the roles of conciliation and deciding individual complaints. They considered that any new body should have all the powers to ensure compliance with the National Compliance and Enforcement Policy, which includes education, infringement notices, compliance notices, enforceable undertakings, prosecution, and civil penalties.<sup>116</sup>

Other submissions provided more equivocal perspectives. Suggestions were made to create a new independent entity such as an Equality Ombudsman,<sup>117</sup> a new entity similar to the Fair Work Commission/Fair Work Ombudsman model,<sup>118</sup> or a separate entity to handle the functions of complaints and dispute resolution,<sup>119</sup> but without coming to a definitive position.

The Queensland Council of Unions raised three options that involve the Commission adopting the education and regulatory functions, along with either the creation of a new entity or transfer of all dispute resolution functions to the tribunals.<sup>120</sup>

### The Review's position

The Review considers that:

- The statutory framework needs to include functions and powers of proactively promoting compliance with the Anti-Discrimination Act.
- The advantages of the Commission having a role in enforcing the Act, including the objectives of the Act recommended by this report, outweigh any limitations of this approach.
- Any tension between the roles of proactive education and enforcement and impartial dispute resolution can be moderated through structural separation within the Commission. This would require the Commission to restructure.
- A clear delineation between the funding provided for the Commission's dispute resolution function and its functions to proactively support compliance with the Act is required to achieve structural separation as well as to ensure the new functions of the Commission would have certainty of resourcing. To achieve transparency, this should be publicly reported.

---

## Recommendation 16

**16.1** The Act should create a function for the Commission to promote and advance the objectives of the Act, and to be an advocate for the Act. This should include taking a proactive role in eliminating discrimination, including systemic discrimination.

---

<sup>116</sup> Queensland Nurses and Midwives Union submission, 31.

<sup>117</sup> Equity Australia submission, 39.

<sup>118</sup> Legal Aid Queensland submission, 62.

<sup>119</sup> Queensland Advocacy Incorporation submission, 25.

<sup>120</sup> Queensland Council of Unions submission, 39-40.

- 16.2** The Commission should ensure structural separation between its dispute resolution function and its role in proactively eliminating discrimination, and this should include reviewing information management and governance structures.
- 16.3** If a complaint is made to the Commission that gives rise to an actual or perceived conflict of interest that arises from the Commission's exercise of its functions, the views of the parties about the appropriateness of the Commission to resolve the dispute should inform the decision about whether dispute resolution can be offered.
- 16.4** The Commission's funding to undertake proactive work to eliminate discrimination, including systemic discrimination, should be separate from its funding for dispute resolution functions, and both should be subject to annual public reporting.
- 

## Tools to support compliance

The existing functions and powers of the Commission under the Anti-Discrimination Act are almost entirely reliant on education and awareness raising, research, and, when complaints are made, resolving disputes. These functions and powers have remained unchanged since introduction of the Act in 1991.

A mix of complex factors contribute to the occurrence of discrimination and sexual harassment. While persuasion and voluntary compliance can be an effective way to address the cause of discrimination and sexual harassment, we were told that persuasion alone is not always sufficient to ensure compliance in serious or complex cases.<sup>121</sup>

In the Discussion Paper, we asked stakeholders what the core components of a regulatory model should be, and what mechanisms and powers it should include. We outlined the components of the responsive regulation enforcement pyramid.<sup>122</sup>

In the discussion below, we examine the mechanisms required to promote compliance. These are grouped in levels, with tools to encourage and support compliance, through to requiring compliance.<sup>123</sup>

### Level one: Building an understanding of obligations

#### Education and awareness

The Commission's functions currently include undertaking educational programs to promote the purposes of the Anti-Discrimination Act<sup>124</sup> and promoting an understanding and acceptance, and the public discussion of, human rights in Queensland.<sup>125</sup>

There was strong support for ensuring that education plays a key role in supporting compliance. The Real Estate Institute of Queensland (REIQ) told the Review that:

---

121 See for example: Queensland Advocacy Incorporated submission; Caxton Legal Centre submission; Legal practitioners' roundtable, 10 February 2022.

122 Professors Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford University Press, 1992).

123 This grouping is loosely based on the levels of regulatory compliance which have been the subject of substantial academic discourse and consideration by equity commissions in Australia and overseas. See for example: Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021).

124 *Anti-Discrimination Act 1991* (Qld) s 235(d).

125 *Anti-Discrimination Act 1991* (Qld) s 235(i).

I'm very much a believer [that] prevention is always better than cure, so it's about educating real estate agents to stop them from getting in trouble in the first place or stop their clients getting in trouble. ... I feel like that's beneficial to everyone, because none of us have limitless resources.<sup>126</sup>

Education and awareness-building activities might include campaigns aimed at business, government, and non-government agencies to encourage compliance with the Act and best practice.

We identified that having industry-specific education campaigns that include ongoing collaboration with peak bodies would allow for two-way exchange about emerging and systemic issues.

## Research

The Commission's existing functions include undertaking research and educational programs to promote the purposes of the Anti-Discrimination Act, and to consult with various organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions of the Act.<sup>127</sup>

The Commission has used this function to prepare reports, including in relation to women in prison, health equity for First Nations people, and building inclusive communities.<sup>128</sup>

However, the Act does not contain powers to support this function, such as requiring or compelling the provision of information to the Commission. This can mean the ability to conduct thorough research and monitor progress is limited to publicly available information.

Stakeholders were supportive of a role for the Commission to conduct research that monitors and reports on systemic discrimination, including through identifying the social, economic, and other conditions that create high risk environments for unlawful discrimination or sexual harassment.<sup>129</sup>

The Gardner Report recommended that the Victorian Commission be given the power to compel public and private sectors to provide data that they can analyse, and to access information on tribunal decisions. The Victorian Equal Opportunity Act provides the Commission with the power to compel a person to produce information or documents.

The capacity to obtain data would support the identification of systemic issues and trends, including to inform the allocation of resources for these research functions. This was specifically supported by some submissions.<sup>130</sup>

## Should organisations be required to publish data?

One submission recommended that a positive duty should require public disclosure of standardised, comparable, and disaggregated information by duty holders on how well they are meeting their obligation to eliminate discrimination and sexual harassment.<sup>131</sup> This could include requiring organisations to report on their employment diversity statistics.

While data transparency and publication may enhance transparency and provide statistics from which to measure trends or themes, many organisations may find such a requirement onerous.

Allowing the Commission to issue notices to produce data in connection with own motion investigations would allow the Commission to obtain data relevant to its inquiries.

---

126 REIQ (Antonia Mercorella) consultation, 31 August 2021.

127 *Anti-Discrimination Act 1991* (Qld) s 235(d) and s 235(e).

128 See for example: *Women in prison 2019: a human rights consultation report*; *Women in prison report* (2016); *Addressing institutional barriers to health equity for Aboriginal and Torres Strait Islander people in Queensland's public hospital and health services* (2017); and *Building inclusive communities: regional conversations about belonging* (2018).

129 Queensland Mental Health Commission submission, 10.

130 See for example: Legal Aid Queensland submission, 61, Assoc Prof Dominique Allen submission, 6.

131 Australian Discrimination Law Experts Group, 41.

## Publishing guidelines

The Commission currently develops resources, including web pages, factsheets, and guides to help duty holders understand their obligations under the Act, and for individuals to know their rights. However, the Commission does not have a legislative function to produce formal guidelines to assist organisations to comply with their obligations under the Act.

These guidelines are non-binding, practical tools that assist with decision-making and compliance. They have educative value and can demonstrate best practice approaches, which is useful where the law is complex, difficult to apply in practice, and when case law is limited. Guidelines can be updated as the law changes and as new issues or approaches to best practice emerge.

Publishing guidelines recognises that people and organisations are more able to comply with the law when they have clear guidance on what their obligations are and how to meet them.

There was strong support for the Commission to have legislative authority to develop and produce guidelines that provide clear guidance on the practical steps an organisation should take to meet their obligations under the Act.<sup>132</sup> One stakeholder said:

I'm a big fan of guidelines, so long as they're practical.<sup>133</sup>

## Consultation is essential

There was a strong message to the Review that guidelines must be co-designed with relevant sectors, and not be unreasonably onerous.<sup>134</sup>

Guidelines should be developed through community and industry stakeholder engagement to ensure they are fit for purpose in different contexts and settings. This would ensure that the development of guidelines is informed by practical realities and resources available to the relevant industry or entity.

Consultation with affected communities is a critical part of the process. It ensures the specific needs of people at risk of experiencing discrimination and sexual harassment are closely considered, particularly where the discrimination may be linked to stigma, myths, and social attitudes.<sup>135</sup>

The importance of consultation was emphasised by groups such as Respect Inc, a non-profit, peer-based organisation that protects and promotes the rights, health, and wellbeing of Queensland sex workers, and Queensland Positive People, a peer-based advocacy organisation that promotes self-determination and empowerment for all people living with HIV throughout Queensland.

A consultation process for developing guidelines would provide an opportunity for meaningful engagement with educative components. In discussing the importance of meaningful consultation, Assoc Prof Alysia Blackham told the Commission:

So I think meaningful consultation, but also meaningful consultation with the right people, giving people the voice to have impact in those processes is really critical to the success of positive duties... consultation is a really important complement to the powers of the

---

132 See for example: Equality Australia submission; Queensland Council for LGBTI Health submission; Queensland Mental Health Commission; Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission.

133 REIQ (Antonia Mercorella) consultation, 31 August 2021.

134 See for example: Aged and Disability Advocacy Australia submission; Small Business roundtable, 7 March 2022.

135 See for example: Queensland Positive People, HIV/AIDS Legal Centre, and National Association of People with HIV Australia submission; Respect Inc and DecrimQLD submission; Scarlet Alliance, Queenslanders with Disability Network.

commission... it's about bringing people along and having unions and employees, and community groups really engaged in that process.<sup>136</sup>

## Comparative approaches

The Victorian Equal Opportunity Act provides that the Victorian Commission may issue practice guidelines on any matter relating to the Act. In preparing practice guidelines, the Victorian Commission must consult with people and organisations that it considers represent the areas or persons to whom the practice guidelines will relate.<sup>137</sup>

Practice guidelines are not legally binding, but a court or tribunal may take into account evidence of compliance with a guideline, if relevant to a matter before it.<sup>138</sup>

This process requires that notice of the publication of a guideline (or its withdrawal) must be published in the *Victorian Government Gazette*, as well as in relevant media and industry publications.

Although there is currently no positive duty in federal discrimination laws, the Australian Human Rights Commission has a statutory function to prepare and produce guidelines for employers, and resources to support duty holders to avoid acts or practices that are inconsistent with human rights.<sup>139</sup> The power to do so is set out in the Australian Human Rights Commission Act and in the four federal discrimination laws.<sup>140</sup>

## The Review's position

The Review considers that:

- The functions and powers of the Commission should be updated to ensure that the Commission's educative and research functions are retained and augmented to include the new objectives of the Act.
- Ensuring the Commission has the power to compel the production of information, including data, for the purposes of undertaking its research functions has value.
- The Commission should have a legislative basis for developing and publishing guidelines, which should be developed in consultation with duty holders and people who experience, or are at risk of experiencing, discrimination, and sexual harassment.

## Level two: Cooperating to address systemic issues

The Commission's functions do not extend to a responsibility to support proactive compliance with the Act. Currently, the relevant function is restricted to undertaking research and educational programs to promote the purposes of the Act and public discussion of human rights.<sup>141</sup>

While the Act contains an existing provision that provides that the Commission can 'consult with various organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions under the Act', the narrow scope of this function is confined to 'consulting'.<sup>142</sup>

---

136 Australian Discrimination Law Experts Group (Assoc Prof Alysia Blackman) consultation, 14 September 2022.

137 *Equal Opportunity Act 2010* (Vic) s148.

138 *Equal Opportunity Act 2010* (Vic) s149.

139 *Australian Human Rights Commission Act 1986* (Cth) s11(n).

140 *Racial Discrimination Act 1975* (Cth) s 20(d); *Sex Discrimination Act 1984* (Cth) s 48(1)(ga); *Disability Discrimination Act 1992* (Cth) s 67(1)(k); *Age Discrimination Act 2004* (Cth) s 53(1)(f). In relation to human rights and ILO 111 matters: *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(n); s 31(h).

141 *Anti-Discrimination Act 1991* (Qld) s 235(d) and s 235(i).

142 *Anti-Discrimination Act 1991* (Qld) s 235(e)



## Hypothetical case example one

The following hypothetical scenario is an example of how tools to promote compliance and awareness could be applied. This example does not relate to any situation or organisation and is provided to assist an understanding of how mechanisms to promote compliance might be used in practice.

After a positive duty is introduced into the Anti-Discrimination Act, the Commission completes a consultation process to identify sectors and organisations that require priority support to comply with the Act, including areas where there is limited knowledge of discrimination and sexual harassment laws.

This process, which includes consideration of data from enquiries and complaints, consultation with key stakeholders, and research, identifies that the residential tenancy sector is a priority area for support, which would assist the sector to take reasonable and proportionate steps to eliminate discrimination and sexual harassment.

To develop the guidance, the Commission conducts research to gauge the prevalence and impact of discrimination and sexual harassment in the sector. The next stage is to work closely with peak entities to prepare the guideline. The guideline undergoes various revisions and is trialled in an organisation to test its practicality and identify opportunities for improvements.

Once the process is complete, the Commission puts a notice in the *Queensland Government Gazette*, publishes the guideline on its website, and promotes it through industry channels. A public awareness campaign targeted at real estate agents is developed in partnership with the peak body for real estate agencies. Follow-up research over the next two years finds that complaints from tenants have declined.



Level two compliance powers include tools for working with duty holders to increase awareness of, and willingness to comply with, discrimination laws. This would allow the Commission to conduct voluntary, independent reviews and have a role in monitoring and providing input to an organisation's action plans.

While previously regarded as 'soft' regulation, this approach has increasingly been considered an effective tool for motivating duty holders to take measurable steps towards eliminating systemic discrimination by supporting and promoting transparency, and through it to make progress towards substantive equality.<sup>143</sup>

## Independent reviews

### What is an independent review?

Independent reviews are a mechanism by which the Commission, on request of a duty holder, can review the duty holder's programs and practices to assist them to comply with the Anti-Discrimination Act, including the positive duty to take reasonable and proportionate steps to eliminate discrimination.

The objective of such a review function is to encourage duty holders to identify systemic issues within their organisation, understand the underlying causes, and develop meaningful steps to eliminate the systemic causes of discrimination and sexual harassment.

An independent review process would allow for close and in-depth consideration of an issue by working cooperatively with the duty holder towards 'transformational change'.<sup>144</sup>

### Comparative approaches

The Victorian Equal Opportunity Act allows the Commission, upon request by a duty holder, to enter an agreement to review an organisation's programs and practices to determine their compliance with the law.<sup>145</sup>

The organisation requesting the review may enter an agreement with the Commission to establish the terms of reference for the review and its methodology. This includes whether and when a public report will be published by the Commission.

The agreement also provides for the payment of the Commission's reasonable costs of undertaking the review.<sup>146</sup>

Using this review function, the Victorian Commission has completed small and large-scale independent reviews. The larger, public reviews have involved Ambulance Victoria<sup>147</sup> and Victoria Police,<sup>148</sup> and the Commission is currently engaged as a research partner on an independent review into sexual harassment in Victorian Courts.

Our consultations with the Victorian Commission and consideration of relevant literature reveal an emerging and compelling body of evidence that demonstrates that reviews conducted under this provision are a powerful tool for achieving organisational change and promoting equality.

---

143 Simone Cusack, 'The Equal Opportunity Act 2010 (Vic) Review function: 'Soft' Regulation or an Effective Tool to Promote Transparency and Equality?' (2021) *Law in Context* 37(2) 132-144.

144 Simone Cusack, 'The Equal Opportunity Act 2010 (Vic) Review function: 'Soft' Regulation or an Effective Tool to Promote Transparency and Equality?' (2021) *Law in Context* 37(2) 132-144., 135.

145 *Equal Opportunity Act 2010* (Vic) s 151.

146 *Equal Opportunity Act 2010* (Vic) s 151(1A).

147 Victorian Equal Opportunity & Human Rights Commission, 'Independent review of Ambulance Victoria', *Research, reviews and investigations* (web page).

148 Victorian Equal Opportunity & Human Rights Commission, 'Independent review of Victoria Police', *Research, reviews and investigations* (web page).



## Functions under the Human Rights Act

Under the Queensland Human Rights Act, the Commission has the function of reviewing public entities' policies, programs, procedures, practices, and services in relation to their compatibility with human rights.<sup>149</sup>

Using this provision, the Commission has recently worked with a social housing provider to conduct a collaborative organisational review to improve the compatibility of the organisation's policies, programs, procedures, practices, and services with human rights.<sup>150</sup>

The provision in the Human Rights Act differs in scope and nature from the independent review function created in the Victorian Equal Opportunity Act,<sup>151</sup> because it:

- only applies to public entities
- focuses on assessment of human rights compatibility, and not the ways in which the duty holder is meeting its positive duty to eliminate discrimination and sexual harassment
- does not provide for the Commission to enter a voluntary agreement with the duty holder
- does not contain an express provision that allows an agreement to include payment of the Commission's reasonable costs.

However, the provisions of the Human Rights Act and the Anti-Discrimination Act could complement each other and ensure that any independent review under the Anti-Discrimination Act could also consider the compatibility of the public entity's policies etc with human rights, including the right to non-discrimination.

## Action plans

### What is an action plan?

Action plans are voluntarily developed by organisations and outline how they will work to achieve particular goals.

Action plans may include: a requirement to develop policies and programs to achieve the objectives of the Act; how those policies will be communicated; policy reviews to identify discriminatory practices; setting goals and targets and measuring success; and appointing people within the organisation to be responsible for implementing the plan.

A discussion paper on the consolidation of discrimination laws published by the federal Attorney-General Department, observed that:

Action plans are voluntary, nonbinding and have limited effect on the action planner's legal obligations. Action plans provide a collaborative mechanism for addressing the needs of people with a particular protected attribute. They are developed through consultation between the employer or service provider and the Commission and the community. This educative process can help businesses to avoid behaviour and practices which are likely to give rise to complaints of unlawful discrimination.<sup>152</sup>

---

149 *Human Rights Act (Qld)* s 61(c).

150 See the Queensland Human Rights Commission's annual reports on the operation of the Human Rights Act 2019 for the periods 2019-20 and 2020-21.

151 *Equal Opportunity Act 2010 (Vic)* s 151.

152 Attorney-General's Department (Cth), *Consolidation of Commonwealth Anti-Discrimination Laws* (Discussion Paper, September 2011) 44 [175].

There is no function or power under the current Anti-Discrimination Act that provides for action plans.

In a submission to the Review, Associate Professor Dominique Allen, a specialist in anti-discrimination law, supported legislative provisions that allow the Commission to assist organisations to develop action plans<sup>153</sup> as this can assist them to meet their obligations under the Act.

## Comparative approaches

Some discrimination laws, such as the federal Disability Discrimination Act and the Victorian Equality Opportunity Act, include provisions that inform the development of action plans and allow them to be lodged with the relevant agency. The relevant human rights agency may set minimum requirements for action plans, provide advice on the development and implementation of the plans, and register or publish the plans.

## Federal disability legislation

To help employers and other organisations eliminate discrimination against people with disability and to increase awareness of the rights of people with disability, the Disability Discrimination Act allows organisations to develop action plans or what is usually called a ‘Disability Action Plan’.

The Disability Discrimination Act provides that a duty holder:<sup>154</sup>

- may prepare and implement an action plan,<sup>155</sup>
- must include certain provisions, such as developing and communicating policies and procedures to achieve the objectives of that legislation, reviewing internal practices to identify any discriminatory practices, and setting goals and targets to evaluate the success of the action plan in achieving its objectives, and
- identify who will implement the provisions and how evaluations will take place.<sup>156</sup>

The purpose of a Disability Action Plan is to encourage, recognise, and promote an active commitment to eliminating disability discrimination and to promote the recognition of the rights of people with disability.<sup>157</sup> Having an action plan assists organisations to plan ways of improving the delivery of goods or services over time.<sup>158</sup>

In commenting on the use of these provisions under the Disability Discrimination Act, the Australian Human Rights Commission’s Free and Equal Position paper noted that action plans have primarily been adopted by employers and service providers, including banks, public transport services and government departments.<sup>159</sup>

## Victorian legislation

The Victorian Equal Opportunity Act provides that the Commission may provide advice about preparing and implementing action plans and set minimum standards for action plans.<sup>160</sup>

---

153 Assoc Prof Dominique Allen submission; Australian Discrimination Law Experts Group submission.

154 In the *Disability Discrimination Act 1992* (Cth), this person is referred to as the ‘action planner’, however they are also in effect a duty holder under that Act.

155 *Disability Discrimination Act 1992* (Cth) s 60.

156 *Disability Discrimination Act 1992* (Cth) s 61.

157 Australian Human Rights Commission, ‘Action plans and action plan guides’, *Disability Rights* (Web page) <<https://humanrights.gov.au/our-work/disability-rights/action-plans-and-action-plan-guides>>.

158 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) [4.6.1], [4.6.5].

159 Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021), 121.

160 *Equal Opportunity Act 2010* (Vic) s 152.

If a person or organisation prepares an action plan, they may give a copy to the Commission who may include it in a register of action plans. This register must be made available on the Commission's website and may be published in any other way the Commission considers appropriate.<sup>161</sup>

Creating an action plan is a voluntary process. It is a planning document that outlines the things an organisation will do to prevent discrimination and sexual harassment and can help improve diversity and inclusion.<sup>162</sup>

The Gender Equality Act, which commenced in March 2021, places obligations on public sector agencies to plan, measure, and track progress to improve gender equality, which includes an express requirement to prepare a gender equality action plan,<sup>163</sup> many of which have been made public by agencies.

As one example, the Victorian Department of Justice and Community Safety published an action plan that sets out four focus areas directed toward improving data on gender and intersectionality; building capacity and capacity related to equality; creating equitable pathways to career development and leadership; and creating a safer, empowering and inclusive culture. It also outlines how progress towards these goals will be measured over time.<sup>164</sup>

### The Review's position

The Review considers that:

- There is significant value in giving the Commission the ability to conduct proactive work through voluntary agreements with the duty holder.
- The Commission should be provided with the express statutory ability to conduct independent reviews, and to have a role in advising on and maintaining a register of action plans.

### Level three: Addressing non-compliance

While the submissions we received generally supported introducing investigation, public reporting, and other functions necessary to make the law effective, they provided limited details of how they anticipated those powers could be used in practice.

For this section, we have therefore relied on research we conducted on similar approaches in other jurisdictions, as well as targeted consultation we conducted with Commissioners and senior staff in federal and Victorian human rights agencies.

### Conducting investigations

#### What is a systemic investigation?

A systemic investigation, instigated at the discretion of the Commission, would allow the Commission to investigate serious and systemic issues.

Currently, the Commission can investigate a complaint after it has been received. Investigation under the current Act is confined to obtaining documents and information, or for a small groups of complaints, obtaining actuarial, statistical and other data.<sup>165</sup> As we discuss in chapter 5, the

---

161 *Equal Opportunity Act 2010* (Vic) s 153.

162 Victorian Equal Opportunity Commission, 'Tools to help you meet your obligations', For organisations (Web page) <<https://www.humanrights.vic.gov.au/for-organisations/tools-to-help-you-meet-your-obligations/>>.

163 *Gender Equality Act 2020* (Vic) s 10.

164 Department of Justice and Community Safety (Vic), *Gender Equality Action Plan* (2022).

165 *Anti-Discrimination Act 1991* (Qld) s 156, 157.

Commission's investigative powers are only used in limited circumstances during the complaints process in which the focus is on resolving disputes. The Commission does not have a role in determining whether the Act has been contravened.

Systemic investigations are often referred to as 'own-motion investigations' because they do not require a complaint to be made to the Commission.

Own motion investigations are different from general research functions or reviews, as they provide the Commission with powers to conduct a coercive – rather than voluntary – investigation and allow specific enforcement outcomes that may include a public report.

Another difference between the review and own-motion investigation functions is whether the inquiry is conducted voluntarily or using coercive powers. The objectives and outcomes of a voluntary review may be different to those of an investigation conducted at the Commission's own initiative.

### **What is the purpose of systemic investigations?**

The Australian Human Rights Commission's *Free and Equal* Position Paper report identified two mutually reinforcing, elements to an inquiry power:

- the capacity to undertake systemic inquiries – such as in circumstances where there is a pattern of discrimination or suspected compliance issues becomes known to the Commission
- compliance monitoring – to ensure that industries, organisations, sectors, or others are complying with the provisions of a positive duty.<sup>166</sup>

### **What powers are required?**

To conduct own motion investigations effectively, the Commission would need the ability to compel the production of information, documents and data, and the power to compel attendance to answer questions at interview. This may include allowing the Commission to prohibit or limit the publication of evidence or the identity of witnesses.

The Gardner Review recommended a public inquiry function for the Victorian Commission. This included functions and powers similar to those provided to oversight agencies such as the Ombudsman, or to a Commission of Inquiry. These powers were initially enacted into the Victorian Equal Opportunity Act and later repealed following a change in government.

### **Findings and recommendations**

Following the completion of an investigation, the Commission should have the legislative basis to find that, on the balance of probabilities, the act or practice to which the investigation relates was inconsistent with or contrary to the Anti-Discrimination Act or the Human Rights Act, and to make recommendations. Any report relating to the outcome of an investigation should include particulars of the findings and any recommendations that it has made.

Procedural fairness provisions that impose requirements at common law should also be codified in the Act. If the Commission believes there are grounds for making adverse findings about a person in the report of an investigation, the Commission must give the person reasonable opportunity to comment on the subject matter of the investigation and respond to the grounds for making the adverse findings before finalising the report.

---

<sup>166</sup> Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021), 151.



## Hypothetical case example two

The following hypothetical scenario provides an example of how tools to promote compliance that focus on cooperating to address systemic issues could be used. This example does not relate to any situation or organisation and is provided to assist an understanding of how mechanisms to promote compliance might be used in practice.

A large state government health agency receives an increase in reports by staff of widespread discrimination, including a number of internal complaints. Staff from culturally and linguistically diverse backgrounds and First Nations people raise concerns that they have not received the same promotional opportunities.

After raising concerns, staff feel that senior managers minimise their issues or consider them individual problems requiring an isolated response, rather than reflecting on broader issues. Those who raise concerns feel they are treated as ‘trouble-makers’.

Staff who have recently resigned make their allegations public during a current affairs television show. In response, senior executives commit to addressing the workplace issues through an independent review. A request is made to the Commission to undertake a review using powers under the Anti-Discrimination Act.

The Commission works collaboratively with the organisation to identify underlying structural issues that are contributing to the issues. An extensive interview process is conducted with staff, and the information gathered is analysed to identify systemic themes. The Commission produces a report setting out its key findings and making recommendations for change.

The review then enters a second phase to create an action plan and implement its recommendations. They later evaluate the extent to which the changes have addressed the original issues. Additional recommendations are made to consolidate changes. A final staff survey finds an improvement in equity measures, including staff diversity rates in management and senior executive positions and cultural competency of all staff, staff retention rates and in client feedback on service delivery.



## Comparative approaches

The Victorian Equal Opportunity Act allows the Commission to conduct systemic investigations at the Commission's own initiative when the following threshold criteria have been met:

- the matter raises an issue that is serious in nature; and
- relates to a class or group of persons; and
- cannot reasonably be expected to be resolved by dispute resolution or by making an application to the Tribunal; and
- there are reasonable grounds to suspect that one or more contraventions of this Act have occurred; and
- the investigation would advance the objectives of this Act.<sup>167</sup>

The legislation includes the following example:

An organisation has a policy that indirectly discriminates against persons with a particular attribute. The Commission has received several calls complaining about this policy and the policy has received media attention. Although some claims that the policy is discriminatory have been settled on an individual basis, the policy has not been changed. The Commission may decide that, in these circumstances, an investigation could help identify and eliminate a systemic cause of discrimination.<sup>168</sup>

The Victorian Commission has described this power to initiate investigations into serious and systemic issues as critical to relieve the burden from individual complainants and allow the Commission to use its enforcement powers to eliminate discrimination to the greatest extent possible.<sup>169</sup>

In 2017 the Victorian Commission conducted an own-initiative investigation into the travel insurance industry. The investigation found that, over an eight-month period, three major insurers sold more than 365,000 policies containing terms that discriminated against people with mental health conditions.<sup>170</sup>

During the investigation, all three insurers committed to changing their practice of issuing travel insurance policies with a blanket mental health exclusion. The outcome was that some of the largest travel insurers in the Australian market now provide some cover for mental health conditions. The report also considered important steps insurers can take to comply with the law in future.<sup>171</sup>

Since the mid-2000s, a number of reports have recommended that federal discrimination laws be amended to give the Australian Human Rights Commission the power to conduct own motion inquiries into systemic discrimination.<sup>172</sup>

---

167 *Equal Opportunity Act 2010* s 127.

168 *Equal Opportunity Act 2010* (Vic) s 127 'Example'.

169 Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019) 29.

170 Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019) 11.

171 Victorian Equal Opportunity and Human Rights Commission, *Fair-minded Cover: Investigation into Mental Health Discrimination in Travel Insurance* (Report, 2019) 128.

172 Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021); Australian Government Attorney-General's Department, Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper (September 2011) 53, refers to: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality (Final Report, December 2008) rec 37; House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Access All Areas' report of the inquiry into Draft Disability (Access to Premises – Building) Standards, recommendation 17; House of Representatives Standing Committee on Employment and Workplace Relations, Making it Fair: Pay equity and associated issues

These recommendations are supported by stakeholders who consider that reform is necessary to enable the Australian Human Rights Commission to identify systemic causes of discrimination, to suggest solutions, and to relieve the burden of enforcement from people who experience discrimination and sexual harassment.<sup>173</sup>

### Does the Commission already have these powers?

The current Anti-Discrimination Act provides that the Queensland Human Rights Commissioner must initiate an investigation if requested to do so by the Minister, or if the tribunal becomes aware of circumstances that may constitute a contravention of the Act and refers the matter.<sup>174</sup>

In addition, the Commissioner may initiate an investigation any time after a complaint is received if:

- a possible contravention against a group or class of people is discovered, the matter is of public concern, and the Minister agrees
- an allegation is made that an offence against the Act has been committed
- a possible offence against the Act is discovered.<sup>175</sup>

The second and third options apply in limited circumstances when an offence against the Act is alleged to have been committed. For example, improper communication of official information, providing false or misleading information, obstruction, or contempt of the Commission.<sup>176</sup> These provisions have rarely, if ever, been used.

The Commission may conduct an investigation if the first option applies, or if the second option applies and the Minister agrees. However, the outcomes of the investigation are limited to those available through the usual complaint process. This means that the outcome of an investigation conducted under these provisions can, at best, result in a conciliation conference and, if it cannot be resolved, referral to the tribunal for determination. It does not allow for recommendations or a public report, or another outcome.

In practice, the limitations of the current law do not provide a sufficient basis for the Commission to conduct investigations into systemic issues.<sup>177</sup> The deficiencies in these provisions may explain why they have rarely, if ever, been used.

A power to conduct preliminary enquiries is included in the Human Rights Act when a human rights complaint has been made or referred to the Commission.<sup>178</sup>

During our consultations, we identified that some stakeholders held a perception that the Commission already had the powers to take a more interventionist approach, including through conducting own-motion investigation powers. In some circumstances, this misinterpretation seems to undermine the credibility of the Commission to effectively achieve the objectives of the Act.

---

related to increasing female participation in the workforce (Report, November 2009) recommendation 19; Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) recommendation 19.

173 Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021), 147.

174 *Anti-Discrimination Act 1991* (Qld) s 155(1).

175 *Anti-Discrimination Act 1991* (Qld) s 155(2).

176 *Anti-Discrimination Act 1991* (Qld) ss 220-223.

177 While the Commission has conducted a small number of systemic reviews, these have relied on the Commission's functions under s 235(e) of the Act which allows the Commission to consult with organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions of the Act, rather than on an investigation using compulsive powers.

178 *Anti-Discrimination Act 1991* s 68.

## What are the possible outcomes?

The outcomes of an own motion inquiry should include:<sup>179</sup>

- taking no further action
- preparing a report that may, at the discretion of the Commission, be provided to the Attorney-General or to the Parliament for tabling.

Recent inquiries and reviews have recommended that the outcome of own motion investigations should also include measures to require and enforce compliance, which include:

- entering into an agreement with a duty holder about action required to comply with the Act
- entering into an enforceable undertaking with the duty holder
- issuing a compliance notice to the duty holder.

While there has been considerable support for the inclusion of these powers in discrimination laws, and despite being a common feature of other regulatory frameworks familiar to many duty holders, there is no current example of the operation of these powers in a human rights agency. While the Victorian Act introduced in 2010 contained these powers, and is therefore instructive, it was later repealed before commencement, following a change in government.

In 2010, Victoria passed legislation that included provisions – now repealed – conferring the power on the Victorian Commission to conduct investigations which could result in enforceable undertakings, compliance notices, and the capacity to apply to a tribunal for enforcement.<sup>180</sup> It also provided the Commission with the power to hold public inquiries that could result in a public report.

The Regulatory Powers Act 2014 (Cth) provides for a standardised suite of provisions in relation to monitoring and investigation powers, as well as enforcement provisions through the use of civil penalties, infringement notices, enforceable undertakings, and injunctions. While not directly applicable to Queensland's discrimination laws, this Act provides a helpful set of standard provisions for effective monitoring, investigation, and enforcement, while ensuring adequate safeguards and protecting procedural fairness.

This legislation and the commentary on its application to discrimination law<sup>181</sup> has informed our assessment of how the tools discussed below might operate if introduced in Queensland.

### Public report

A public report of the outcomes of an investigation could be provided either to the state Attorney-General or the Queensland Parliament. If a report were to be made to Parliament, it should be tabled on the day on which it is received or on the next sitting day.

If the Commission were to make adverse findings against a person in a public report, procedural fairness processes must apply, and could be embedded in the Act. This would be similar to provisions in the Human Rights Act which requires that if the Commissioner proposes to make an adverse comment about a person, they are required to give the person a fair opportunity to make submissions about the comment and ensure that any response is fairly stated in the report.<sup>182</sup>

---

179 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 128-127.

180 *Equal Opportunity Act 2010* (Vic) No. 16 of 2010, as at 28 April 2010.

181 Australian Human Rights Commission, *Free and Equal: a reform agenda for federal discrimination laws* (Position Paper, December 2021).

182 *Human Rights Act 2019* (Qld) s 93.





## Hypothetical case example three

The following hypothetical scenario provides a practical example of how tools to promote compliance that focus on addressing non-compliance could be used. This example does not relate to any situation or organisation and is provided to assist an understanding of how mechanisms to promote compliance might be used in practice.

The Commission receives a complaint from a young woman, on a working visa to Australia, that she experienced sexual harassment from her manager while working in a packing shed at a farm in Queensland. The allegations are serious and could amount to criminal conduct. However, before the matter can be assessed by the Commission and dispute resolution conducted, the woman returns to her country of origin, having cut short her visit.

Later, the Commission receives more enquiries from staff at the same farm, including reports that pornographic images are placed on toilet doors alongside graffiti including the names of female workers. Reports about some staff being asked to provide sexual favours in exchange for having their immigration papers signed emerge from information provided to the Commission and from media reports.

The Commission determines that a threshold of a serious, systemic matter has been met, and an investigation is commenced. It emerges that issues of serious sexual harassment are long standing in the organisation and the industry in that region, and that most complaints made by the women in the workplace were never followed up.

During the process, women who allege sexual harassment are referred to legal practitioners for advice about whether they want to report their experience to police or make a complaint to the Commission or another entity.

At the completion of the investigation the organisation enters into an enforceable undertaking with the Commission to create and display a sexual harassment policy. Using the Commission's published guidelines on sexual harassment, they create an action plan to eliminate sexual harassment. All staff including senior management are required to undertake training within a set time, and the effectiveness of the training is evaluated through onsite interviews with staff.



## Enforceable undertakings

In the situation where an investigation has identified a contravention of the Act, enforceable undertakings could allow the Commission to obtain agreement from the organisation involved to take steps to address discrimination, without a complaint being made. If the terms of the undertaking are not complied with, the Commission could then apply to a tribunal or court for enforcement.

If enforceable undertakings were introduced, a person authorised by the Commissioner could accept an undertaking to take specified action, refrain from taking specified action, or take specified action directed toward ensuring that a person does not contravene the Act.<sup>183</sup>

As Associate Professor Dominique Allen noted in her submission, the power to conduct an investigation would be strengthened if the Commission could reach enforceable undertakings with an organisation in the absence of voluntary compliance, or issue a compliance notice or seek the imposition of sanctions, such as a fine, from a tribunal.<sup>184</sup>

## Compliance notices

If, following an investigation, an agreement with the duty holder could not be reached in the form of an enforceable undertaking, a compliance notice could be issued by the Commission, if certain threshold tests were met.

The notice would set out the details of the conduct or behaviour, decision, policy or practice, that gave rise to the contravention, and the steps to be taken to comply with the Act within a specified timeframe, and in some cases an action plan may also be required.

The compliance notice should contain the name of the duty holder; the details of the non-compliance; the action to be taken to address the non-compliance; a reasonable period within which the duty holder must take the specified action; and a reasonable period within which the duty holder must provide the Commission with evidence that the action has been taken.

If the Commission were to be satisfied that the duty holder has failed to comply with the notice, it may apply to a court or tribunal for an order for compliance or an injunction. Requiring the Commission to apply to a court or tribunal to enforce compliance notice means that the Commission would retain its standing as an administrative body without determinative power, as this role should be left exclusively to tribunals and courts.<sup>185</sup>

The option of issuing compliance notices is available to the Fair Work Ombudsman. Under the Fair Work Act, failure to comply with a compliance notice means that the Fair Work Ombudsman can initiate legal proceedings which may result in a fine. However, we understand that in practice these powers are not often used, and then only as a last resort after education and cooperative measures have failed.

## Civil penalties

In extremely rare circumstances, following the outcome of an investigation, it may be appropriate for the Commission to have the power to apply to a tribunal or court for an order that a person or entity alleged to have contravened the Act pay a civil penalty.

This would only be used where all other options have been exhausted, and where an enforceable undertaking has been entered into, but the terms of the undertaking have been breached.

---

183 This is outlined in the *Regulatory Powers Act 2014* (Cth) Part 6.

184 Assoc Prof Dominique Allen submission, 5.

185 Julian Gardner, *An Equality Act for a Fairer Victoria* (Equal Opportunity Review Final Report, June 2008) 131, [6.149].

Other human rights agencies with regulatory functions have similar powers. The Office of the Australian Information Commissioner receives individual complaints about privacy breaches, and is required to act in accordance with model litigant obligations, and the outcomes may be publicly communicated.

While the Anti-Discrimination Act currently creates offences that attract penalty units,<sup>186</sup> civil penalties could be attached to any additional powers to ensure enforcement of serious or repeated contraventions can be undertaken. It is anticipated civil penalties would only be sought in very rare circumstances and may not ever need to be used.

Some submissions emphasised that, in their view, the capacity of the Commission to apply to a tribunal or court for an order compelling a person or entity to pay a civil penalty for a contravention of the Act is critical to ensure serious and sustained contravention of the Act has consequences.<sup>187</sup>

## Individual enforcement of a positive duty?

A small number of submissions considered whether a person should be able to make a complaint to the Commission on the basis that a duty holder has breached their obligation to take reasonable and proportionate steps to eliminate discrimination and sexual harassment.<sup>188</sup> They suggested this could allow individuals to obtain compensation for loss they have suffered, either concurrent with or independent of any regulatory action.<sup>189</sup>

However, a right of action for breach of the positive duty may place a greater onus on the complainant than for complaints about other contraventions. For example, in alleging that an employer has not complied with their positive duty, the person would have to show that the discrimination or sexual harassment occurred, and that the employer did not take reasonable and proportionate measures to eliminate that conduct. This would be a higher threshold than in other complaints under the Act, where the onus would be on the employer to demonstrate that it took reasonable and proportionate measures.

As a complainant cannot be doubly compensated for the same contravention, there may be limited utility from the complainant's perspective. Conciliation agreements reached with individual complaints often contain provisions to implement training or policy reform within the organisation.

It would be a poor use of Commission resources to undertake an investigation for matters that could be properly dealt with through the complaints process. Instead, the use of investigation powers should be confined to matters in which complaints are unlikely to be made. This could be for reasons such as: a group is particularly marginalised; significant risks of reprisal exist; or the affected group are children who in practical terms are unable to bring a complaint.

A recent decision of the Victorian Civil and Administrative Tribunal considered whether, under current provisions in the Victorian Equal Opportunity Act, a person can apply to the tribunal for failure to comply with the positive duty. The Tribunal concluded that a person cannot apply to the tribunal to lodge a complaint about breach of the positive duty but noted that, had the Victorian Equal Opportunity Act provided the jurisdiction to hear the dispute, it would have found the allegation proven.<sup>190</sup>

---

<sup>186</sup> For example, the *Anti-Discrimination Act 1991* (Qld) s 220 makes it an offence for a person in a specified capacity, for example a staff member of the Commission, to community information obtained during their work to another person. The maximum penalty for a person is 85 penalty units.

<sup>187</sup> See for example: Sisters Inside Inc submission; Caxton Legal Centre submission; Australian Discrimination Law Experts Group submission.

<sup>188</sup> See for example: Australian Discrimination Law Experts Group submission; Queensland Council for Civil Liberties submission; Equality Australia submission.

<sup>189</sup> Equality Australia submission, 24.

<sup>190</sup> *Oliver v Bassari (Human Rights)* [2022] VCAT 329 (28 March 2022).

Some submissions considered whether, instead of making a complaint, a person could make a report to the Commission about an alleged failure to comply with the positive duty, without taking further action. This could provide the Commission with information about serious or systemic issues.

## The Review's position

The Review considers that:

- Providing the Commission with mechanisms to address non-compliance with the Act is critical to ensuring that its function to act proactively is effective.
- The Commission should be given functions and powers to investigate serious and systemic issues on its own initiative, whether a complaint has been brought or not.
- The outcomes of Commission investigations should include the capacity to make a public report to the Attorney-General or Parliament, to seek enforceable undertakings, to issue compliance notices, and to apply to a tribunal or court to seek civil penalties for non-compliance.
- To support proactive compliance, there should be a staged introduction of provisions to allow duty holders time to seek and receive guidance on implementing a program to comply with the positive duty. More punitive enforcement powers such as enforceable undertakings, compliance notices, and civil penalties should commence after the new Act has been in operation for two years.

---

## Recommendation 17

**17.1** The Commission's educative and research functions should be retained, and their scope should be expanded to ensure they can meet the new objectives of the Act.

**17.2** The Commission should have a legislative basis for:

- Developing and publishing guidelines in consultation with relevant duty holders and people affected by discrimination and sexual harassment to whom the practice guidelines will affect or relate.
- Conducting independent reviews that allow the Commission to, on request by a duty holder, enter an agreement to review an organisation's programs and practices to promote compliance with the Act. An agreement may provide for the payment of the Commission's reasonable costs of undertaking the review.
- Providing advice about action plans. An action plan should not be legally binding but may be considered by a tribunal or court if relevant to a matter before the court or tribunal under this Act.
- Conducting investigations on its own initiative if certain criteria apply. The criteria should be based on section 127 of the *Equal Opportunity Act 2010* (Vic), and include whether the matter raises a serious issue, relates to a class or group of people, cannot reasonably be expected to be resolved through dispute resolution, there are reasonable grounds to suspect one or more contraventions of the Act have occurred and the investigation would advance the objectives of the Act.

---

### **Recommendation 18**

**18.1** At the conclusion of an investigation, the Commission should have the legislative basis to make findings and recommendations.

**18.2** The Act should ensure that the outcome of an investigation conducted under these provisions can include:

- taking no further action by the Commission
- providing a public report that contains recommendations to the Attorney-General or Parliament
- entering into an enforceable undertaking with the duty holder
- issuing a compliance notice and, if breached, applying to a tribunal or court to seek civil penalties.

---

### **Recommendation 19**

**19.1** The Commission should retain its investigation powers to compel the production of information and documents, including data. These powers should be for the following purposes:

- undertaking research
- conducting inquiries into complaints received by the Commission
- conducting own-initiative investigations.

**19.2** The Act should allow the Commission to require a person to attend before the Commission at a reasonable place and time for the purposes of giving information or answering questions relevant to an investigation.

**19.3** The Act should update the penalty provisions that apply to a person for failure to comply with a requirement to produce, provide or attend.

---

### **Recommendation 20**

**20.1** All of the above provisions should be introduced into the new Act. However, to allow time for duty holders to take reasonable and proportionate steps to comply with any new obligations, provisions relating to enforceable undertakings, compliance notices, and civil penalties should come into effect after a period of two years.

---

