# Submission to the Review of the

# *Anti Discrimination Act 1991* (Qld)

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# 1. Introduction

1.1 The Queensland Council of Unions is the peak union organisation in Queensland representing twenty-six affiliated unions, ten regional councils, and around 360,000 union members. The QCU is also affiliated with the Australian Council of Trade Unions.

1.2 Formed in 1885, the QCU has represented the voices of millions of Queenslanders through advocating for political, social, industrial, and social reforms that impact on workers and the Queensland community.

1.3 Reform to sexual harassment laws and effective responses to matters such as discrimination in work and work-related areas, protections for injured workers, and gender-based violence in workplaces and the community are considered part of our core activities.

1.4 The QCU therefore welcomes this review being conducted by the Queensland Human Rights Commission (the 'QHRC') of the *Anti Discrimination Act 1991* (Qld) (the 'AD Act') for the Queensland Attorney General as the first broad and substantive review since its inception in 1991.

1.5 Our submissions are based upon consultation with our affiliates which we have tried to reflect in our recommendations for change. A number of our affiliates are also providing written submissions to the QHRC as part of this process.

1.6 While the QCU is strongly supportive of broader social and community reforms in the legislation, the content of the QCU's submissions is by and large reflected through a workplace and work-related lens.

# 2. Discrimination

## Definitions and Tests for Discrimination

2.1 Discrimination is currently defined as meaning both direct and indirect discrimination under the AD Act. In general terms, direct discrimination adopts a less favourable and comparator test, while indirect discrimination occurs where an unreasonable term, condition or requirement is imposed which disadvantages a person with a protected attribute in circumstances where a higher proportion of persons without the attribute comply or are able to comply.[1]

2.2 Both definitions require a form of comparison with other persons without the attribute and as a result, in the majority of cases, a comparator must be constructed which has often forms the basis of the majority of legal challenges.

2.3 More contemporary Australian discrimination laws have removed the legislative requirement for a comparator for both direct and indirect discrimination (see Victoria and the Australian Capital Territory ('ACT'). For direct discrimination, a person must prove they have an attribute and have been unfavourably treated.[2] This is similar to how adverse action is defined under Australian industrial law.[3] For indirect discrimination, a person must be found to have imposed, or proposed to impose, a condition or requirement that has, or is likely to have, the effect of disadvantaging a person because of an attribute, and which is unreasonable.[4]

2.4 Additionally, the ACT legislation was updated in 2016 to include a combined definition of direct and/or indirect discrimination as meaning:

> *'…conduct that occurs directly, indirectly, or both directly and indirectly, where discrimination that occurs directly is unfavourable treatment … and discrimination that occurs indirectly is the imposition of a condition or requirement or practice …'*

2.5 This was to ensure complainants were not limited in making a complaint to either direct **or** indirect discrimination but importantly, to clarify the law for many complainants where the definition in particular of indirect discrimination is not well known, also noting this was as similar approach to that adopted in Canada, New Zealand and the USA.[5]

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[1] *Anti Discrimination Act 1991* (Qld) (the 'AD Act') ss 10, 11.
[2] *Equal Opportunity Act 2010* (Vic) (the 'EO Act (Vic)') s 8(1); *Discrimination Act 1991* (ACT) s 8(2).
[3] *Fair Work Act 2009* (Cth) (the 'FW Act') s 340; *Industrial Relations Act 2016* (Qld) (the 'IR Act') s 282.
[4] *EO Act* (Vic) s 9(1); *Discrimination Act 1991* (ACT) s 8(3), (4).
[5] ACT Law Reform Advisory Council Inquiry into the *Discrimination Act 1991* (ACT), Final Report (2015) pp 28-31.

2.6 The QCU supports the changes to the definition of direct discrimination based on the unfavourable test, indirect discrimination based on the disadvantage test, and also to include a combined definition of direct and/or indirect discrimination as outlined in the ACT legislation.

## Intersectional Discrimination

2.7 Currently, the AD Act prohibits discrimination on the grounds of a protected attribute. This is consistent with other Australian discrimination law jurisdictions, except for an intersectional definition adopted into the ACT legislation in 2015. This definition provides that discrimination occurs because the other person has one or more protected attributes.[6]

2.8 The QCU and its affiliates are aware of many instances where the discriminatory effects and disadvantages can be compounded where a person holds a combination of attributes. For example, an older woman who is also from a culturally and linguistically diverse background or is an older First Nation's woman. This makes it difficult to prove that the discrimination has specifically occurred because of one of those individual attributes because it has often occurred as a result of the combination of the attributes.

**Example – Intersectional Discrimination (Older Women, Superannuation and Homelessness)**

The QCU notes that there are multiple combinations of protected attributes that may occur across the community resulting in compounded discrimination, such as the disadvantages faced by many older women nearing retirement who have significantly less superannuation than men of the same age, and who are making up one of the fastest growing sections of the population experiencing homelessness.

This a particular case of systemic discrimination over a long period of time experienced by many women.

2.9 Adoption of a definition of discrimination that recognises intersectional discrimination will also help to focus on the achievement of special measures or proactive measures to positively redress these types of disadvantages and social and economic inequality caused by structural discrimination within the community. One example is the adoption of special measures to positively discriminate towards older women in superannuation arrangements to redress the example cited above.

2.10 The QCU therefore supports the adoption of the definition as contained within the ACT legislation.

[6] *Discrimination Act 1991* (ACT) s 8(2), (3).

## 3. Burden of Proof

3.1 Under the AD Act, a complainant must prove on the balance of probabilities ('BOP') the respondent contravened the Act for all complaints,[7] with some provisos.

3.2 In cases of indirect discrimination, the respondent must prove on the BOP that a term complained of is reasonable;[8] and if a respondent seeks to rely upon an exemption, the respondent must raise the exemption and prove on the BOP that the exemption applies.[9] This reversal of the burden of proof for indirect discrimination is similar to that contained within Commonwealth discrimination laws.[10]

3.3 In addition, under the AD Act, where there are two or more reasons why a person treats, or proposes to treat, another person with an attribute less favourably, there is a presumption that a person is taken to have treated the other person less favourably on the basis of the attribute if the attribute is a substantial reason for the treatment.[11] A substantial reason means one which is real, actual, solid, material or an important reason.[12]

3.4 Comparing these provisions with similar matters such as the adverse action provisions under the *Fair Work Act 2009* (Cth) and *Industrial Relations Act 2016* (Qld), it can be seen that there has been a shift in the burden of proof under these laws toward the respondent.

3.5 Section 360 of the FW Act provides that 'a person takes action for a particular reason if the reasons for the action include that reason'. Section 361 of the FW Act provides a presumption that action was taken for a prohibited reason unless proven otherwise by the respondent.

3.6 In essence, to prove an adverse action claim, an applicant must establish they have been subject to adverse action, possess a protected attribute, and then it is presumed that adverse action was taken because of the attribute, unless the employer proves otherwise. That presumption means that it is for the employer to prove on the BOP that the reason they took the adverse action was for a reason other than a protected attribute.

3.7 In considering these provisions, the Federal Court has noted that:

> *'119. Section 361 is important. It raises a rebuttable presumption when it is alleged that a person took or is taking action for a particular reason or with a particular intent. If such an allegation is made in an application, it is presumed that the action was or is being taken for the reason or intent alleged unless the person against whom the allegation is made proves*

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[7] AD Act s 204.
[8] Ibid s 205.
[9] Ibid s 206.
[10] See for instance, *Sex Discrimination Act 1994* (Cth) s 7C.
[11] AD Act s 10(4).
[12] *Thorne v Toowoomba Regional Council & Tytherleigh* [2016] QCAT 212, [109].

*otherwise. Section 361 casts the onus upon who it is alleged took or is taking an action for a particular reason or with a particular intent to prove that the person did not in fact do so.*

*120. Section 361 only operates to raise the presumption in relation to the particular reasons in an application. That is why I said in [17] that it is necessary to identify precisely the claims made by the appellants in their application and why in [19] I identified those claims. Regard must be had to the reason alleged in the application which initiated the proceeding'.*

3.8 The other jurisdiction that has adopted changes to their burden of proof provisions is the ACT jurisdiction arising from the ACT Law Reform Advisory Council Inquiry 2015 Report. This Report recommended that complainants should be required to demonstrate they were treated unfavourably at which point the burden of proof should shift to the respondent to demonstrate that the person was not treated unfavourably because of a protected attribute.[13] This was recommended to address the difficulties encountered by complainants being required to demonstrate what was in the mind of the complainant at the time of the unfavourable treatment.[14]

3.9 Section 53CA(2) was subsequently inserted in 2016 into the *Human Rights Commission Act 2005* (ACT) by introducing a rebuttable presumption for both direct and indirect discrimination **but also** requiring the complainant to establish the unfavourable treatment or disadvantage **and** that the treatment or disadvantage was because of a protected attribute of the complainant:

> *(2) It is a rebuttable presumption that discrimination has occurred **if the complainant**—*
>
> *(a) establishes that—*
>
> *(i) for a complaint about direct discrimination—the treatment or proposed treatment is unfavourable; and*
>
> *(ii) for a complaint about indirect discrimination—the condition or requirement has, or is likely to have, an effect of disadvantaging the other person; and*
>
> *(b) **presents evidence** that would enable the ACAT to decide, in the absence of any other explanation—*
>
> *(i) for a complaint about direct discrimination—that the treatment or proposed treatment is because of a protected attribute of the other person; or*
>
> *(ii) for a complaint about indirect discrimination—that the effect of disadvantaging the other person is because of a protected attribute of the other person* **[emphasis added]**.

[13] ACT Law Reform Advisory Council Inquiry into the *Discrimination Act 1991* (ACT), *Final Report*, Recommendation 25.2, 20, 143.
[14] Ibid 143.

3.10 This is not entirely consistent with the ACT Law Reform Advisory Council recommendation because it still requires the complainant to present evidence that the discrimination occurred about the reasons for the unfavourable treatment or disadvantage caused, as opposed to shifting this to the respondent to address.

3.11 It has been noted that these provisions combined with the application of the *Briginshaw principle* in relation to the standard of evidence required, has made the additional evidentiary burden insurmountable in a number of cases under the ACT legislation – the effect being to convert what was intended as the trigger for establishing a presumption, back to being a primary burden of proof, and undermining the policy reasons for shifting the burden.[15]

3.12 The QCU supports a shift in the burden of proof more consistent with that contained for the adverse action provisions under the FW Act and on this basis, the QCU supports a shifting of the burden of proof to incorporate the following key elements:

(i) A complainant must prove on the BOP they were unfavourably treated or disadvantaged and that they have a protected attribute.

(ii) In cases of discrimination, the respondent must prove that the unfavourable treatment was for a reason other than a protected attribute.

(iii) In cases of indirect discrimination, the respondent must prove that a term complained of is reasonable (no change).

(iv) If there are two or more reasons why a person treats or proposes to treat a person unfavourably treating a person with an attribute that disadvantages them and that is not reasonable, there is a presumption of discrimination if the attribute is found to be a substantial reason for the treatment.

(v) If a respondent seeks to rely upon an exemption/exception, the respondent must raise the exemption/exception and prove on the BOP that it applies (no change).

[15] Rees, N, Rice S & Allen D 'Australian Anti-Discrimination & Equal Opportunity Law' The Federation Press (2018) [3.2.48] – [3.2.49] 119.

# 4. Sexual Harassment

## Respect@Work Report 2020

4.1 There are a number of key recommendations of the Australian Human Rights Commission Respect@Work: Sexual Harassment National Inquiry Report 2020 (the 'Respect@Work Report') that are relevant to consider in the context of amendments to the AD Act. These relate to the creation of the new offences contained as part of Recommendation 16.

> ***Recommendation 16 – R@W***
>
> *Amend the Sex Discrimination Act to ensure:*
>
> - *…*
> - *sex-based harassment is expressly prohibited*
> - *creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited*
> - *…*

## Respect@Work Amendment Bill 2021 (Cth)

4.2 The Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (the 'Respect@Work Bill') was passed by the Commonwealth Parliament in 2021 which among other things, introduced a new offence of sex-based harassment.

4.3 The Bill did not include the recommended new offence for creating an intimidating, hostile, humiliating or offensive environment on the basis of sex. However, it is noted that this matter is currently the subject of further consultation with industry and community stakeholders with the Commonwealth Attorney General.[16]

4.4 These offences will be addressed following the discussion question relating to whether the sexual harassment offence should be amended to clarify that it pertains to conduct of a sexual nature, to, or in the presence of a person.

## 'To, or in the presence of a person'

4.5 The discussion paper asks specifically whether the current offence of sexual harassment should be limited to 'in the presence of a person' based upon the definition of sexual harassment in the ACT legislation. This definition includes conduct of a sexual nature, that includes 'the making of a statement of a sexual nature **to, or in the presence of, a person**, whether the statement is made orally or in writing'[17] **[emphasis added].**

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[16] Australian Government, Attorney-General's Department 'Consultation Paper: Respect@Work – Options to Progress Further Legislative Recommendations (February 2022).

[17] *Discrimination Act 1991* (ACT) s 58(2).

4.6 This compares with the definition of sexual harassment under the AD Act which includes (among other matters) making 'a remark with sexual connotations relating **to the other person**'[18] **[emphasis added].**

4.7 In this context, the Queensland definition can be seen to limit sexual harassment that involves making statements of a sexual nature directly to another person, as opposed to the ACT legislation which broadens the definition to statements either to, or in the presence of a person.

4.8 The QCU is aware that often-times sexual remarks are made in front of employees and other persons about them but not directly to them. For example, where a person makes sexualised comments or jokes about a person to other employees in the presence of the employee.

4.9 The QCU notes that the current prohibition on sexual harassment under the AD Act extends to any public act in Queensland and is not restricted to workplaces or workplace participants. The QCU therefore considers that a clarification of the definition of sexual harassment should not be limited to, for example, workplaces as the standard of conduct should apply regardless of the public place across the community.

4.10 The QCU would therefore support an extension of the current definition to include '…the making of a statement of a sexual nature to, or in the presence of, a person, whether the statement is made orally or in writing' based upon the ACT legislation but applied to all areas of public life.

## Sex-based harassment offence

4.11 As noted previously, the Respect@Work Report recommended the introduction of two new offences relating to sex-based harassment and sexually hostile workplaces. Both aimed at clarifying the existing law.

4.12 The first of these recommendations was introduced in the Respect@Work Amendment Bill in 2021 as a new offence of sex-based harassment,[19] prohibiting 'unwelcome conduct of a seriously demeaning nature in relation to the person harassed on the grounds of sex', in circumstances where a reasonable person would be offended, humiliated, or intimidated.

4.13 While the QCU supports the Respect@Work recommendation to create the new offence, the inclusion of 'a seriously demeaning nature' is in effect a narrowing of existing case law where 'sexist' behaviour and harassment has occurred compared with the existing

[18] AD Act s 119(c).
[19] *Sex Discrimination Act 1994* (Cth) ('SD Act') ss 28AA, 28B.

definition of sexual harassment or sex discrimination where the courts have made similar findings. For example, consider the following elements for comparison purposes:

| Sex-based harassment (SD Act) | Sexual harassment (AD Act) | Sex discrimination (AD Act) (direct) |
|---|---|---|
| 1. Unwelcome conduct<br>2. Based on the sex or characteristic imputed to a person of that sex<br>3. Of a **seriously demeaning nature** in relation to the person being harassed<br>4. Reasonable person test | 1. Unwelcome conduct<br>2. Of a sexual nature (and other specific conduct)<br>3. In relation to the other person<br>4. Intention or reasonable person test | 1. A person has an attribute<br>2. Is treated less favourably<br>3. Comparator test to other people without the attribute |

4.14 The inclusion of a seriously demeaning nature combined with the reasonable person test appears to establish a higher standard than would otherwise apply to sexual harassment or sex discrimination matters.

4.15 The QCU therefore supports a definition of sex-based harassment which is consistent with the existing case law i.e., that sex-based harassment should be defined as 'unwelcome conduct based on the sex or a characteristic imputed to a person of that sex, that is **of a demeaning nature** to the person' with the intent of offending, humiliating or intimidating the other person, or where a reasonable person would have anticipated the person would be offended, humiliated or intimidated.

## Prohibition of the creation or facilitation of an intimidating, hostile, humiliating or offensive environment on the basis of sex

4.16 This offence arises from Recommendation 16(c) of Respect@Work twhich was not adopted in the 2021 Respect@Work Amendment Bill, but which is currently part of a further consultation process by the Commonwealth.

4.17 In the Respect@Work Report, the AHRC cited cases where in certain circumstances, sexual harassment may occur where a work environment or culture is sexually charged or hostile, even if the conduct is not directed at a particular person.[20]

4.18 The AHRC further noted that in a sexually hostile workplace, one sex is made to feel uncomfortable or excluded by the workplace environment and that factors that point to a sexually hostile workplace may include the display of obscene or pornographic materials,

[20] Respect@Work 458 citing *Johanson v Michael Blackledge Meats* [2001] FMCA 6, [89].

general sexual banter, or innuendo and offensive jokes.[21] In addition, the Report noted that conduct that creates an intimidating, hostile, humiliating or offensive environment for a person may also be captured through the existing sex discrimination provisions in the *Sex Discrimination Act*, constituting discrimination on the ground of sex.[22] The Report then referred specifically to the case study of the matter of *Horne v Press Clough Joint Venture* [1994] EOC 92, 92–591 as a case in point about creating a sexually hostile workplace.

4.19 As can be evidenced from these cases, the creation of the new offence is in fact a clarification of the existing law in relation to both sexual harassment and sex discrimination. However, it is aimed more at the perpetrators who create or facilitate a sexually hostile work environment as opposed to the sex-based harassment offence which is about individual particular behaviour.

4.20 A particular case study an affiliate of the QCU has provided demonstrates the nature of such a workplace that has occurred more recently.

**Case Study**

In line with best practice an employer sought to employ only female apprentices to promote women employees among the trades. After their employment, four out of the four female apprentices in one location were forced out of their jobs and chosen apprenticeships because of a sexually hostile work environment.

The workplace had a pervasive culture of bullying and intimidation towards anyone who wasn't in the 'in crowd" and that culture turned its attention towards the women once they were employed in the workforce, whittling them away until there were none.

Two of the female apprentices were moved to other roles for their own safety, one was terminated as a part of a campaign of bullying against her in the form of performance allegations, and one left due to mental health issues after a long battle over whether her psychological injury was a workplace injury or not. Management on site were both directly complicit and wilfully blind to the culture, and in doing so, the union believes helped to foster the sexually hostile work environment.

The relevant union fought for years to improve the culture at that location and to improve facilities for women but struggled to address these issues without the support of local management.

An involved union officer stated:

> "In one of my visits to the site, there was a manufactured 'contraption' that had a stainless-steel flip-top lid that sat atop a urinal for women to sit on to use as a toilet. They needed to climb a stepstool to get onto it. Surprisingly, when I was shown it and

[21] Respect@Work 458.

[22] Respect@Work 459 citing *Poniatowska v Hickinbotham* [2009] FCA 680, [303]-[306]; *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91.

> expressed my horror, the women who had to use it advised me that it was surprisingly comfortable…
>
> This aside, it misses the point that in the 21st century, women are still being required to modify facilities that were only ever designed to accommodate men".
>
> It should be noted that this is in direct breach of the relevant Work Health and Safety Managing the work environment and facilities Code of Practice 2021.[23]

4.21 The QCU supports the creation of a stand-alone offence based on the existing case law for the creation or facilitation of a sexually hostile work environment.

[23] Section 3.3, 19.

# 5. Objects and Reframing for Positive Obligations and Special Measures

## Objects and Purpose of the Act

5.1 The current objects of the AD Act are essentially to promote equality of opportunity for people with a protected attribute as outlined in the Preamble to the Act and which reflect many anti-discrimination laws internationally and within Australia at the time of its introduction in 1991. This type of equality of opportunity legislative framework is largely predicated upon a complaints-based system once discrimination has occurred and focuses to a lesser extent on indirect discrimination aimed at proactively changing systemic disadvantages for people with a protected attribute.

5.2 Within the last decade or so, more contemporary anti-discrimination laws are beginning to be framed with an objective to focus on the elimination or prevention of discrimination, harassment, and victimisation, as well as to achieve substantive equality through the taking of positive actions or special measures such as reasonable adjustment and reasonable accommodations.[24]

5.3 In contrast to the equality of opportunity focus under the AD Act, this type of approach is aimed at prevention before a contravention occurs and changing workplace and other practices by placing positive obligations and requirements on duty-holders to take proactive measures to eliminate direct and systemic discrimination, harassment and victimisation as far as possible.

5.4 This approach recognises equality cannot be achieved until it is recognised that discrimination causes social and economic disadvantages and that access opportunities are not equally distributed across the community. Further, that equal application of a rule to everyone will have unequal results or outcomes to different groups, and essentially that the achievement of substantive equality may require the making of reasonable adjustments and accommodations including the taking of special measures.[25]

5.5 A more proactive approach to regulation is also similar to Australia's model work health and safety laws, which require persons conducting a business or undertaking to take measures, that are reasonably practicable, to ensure the health and safety of workers and other people at a workplace. The focus is on prevention measures rather than a prescriptive offence-based system. A key component to ensure that the positive duties contained within work

[24] See for instance the EO Act (Vic) s 3; *Discrimination Act 1991* (ACT) s 4.
[25] *Discrimination Act 1991* (ACT) s 4(d).

health and safety laws are implemented is through having a strong regulator to oversee compliance and enforcement.

5.6 In this context, if Queensland's anti-discrimination laws are to be modernised and reframed to focus upon the prevention of discrimination, harassment, and victimisation and to include positive duties or obligations for duty-holders to take proactive measures to do so, it will also need a strong regulatory arm – something missing from the Victorian and ACT discrimination jurisdictions.

5.7 The QCU supports a reframing of the objects of the Act along the lines of both the *Equality of Opportunity Act 2010* (Vic) and the *Discrimination Act 1991* (ACT) to:

- prevent and eliminate of discrimination, harassment, and victimisation
- promote the identification and removal of systemic causes of discrimination
- promote the achievement of substantive equality by recognising:
    - discrimination can cause and result in social and economic disadvantage and inequality and that access opportunities are not equally distributed throughout the community,
    - equal application of a rule to different groups within the community can have unequal results or outcomes, and
    - the substantive equality may require the taking of reasonable adjustments, reasonable accommodations, and special measures.

5.8 The QCU further supports a renaming of the Act to support these new objects to the **Equality Act (Qld)** as opposed to the Equality of Opportunity Act which exists in Victoria, which could be seen to reflect a continuation of the current principle of equality of opportunity only and not reflect the principle of achieving substantive equality.

## Special Measures

5.9 Section 104 of the AD Act provides that a person may do an act to benefit the members of a group of people with an attribute for whose welfare the act was designed if the purpose of the act is not inconsistent with this Act; while section 105 provides that a person may do an act to promote equal opportunity for a group of people with an attribute if the purpose of the act is not inconsistent with this Act.

5.10 Section 12 of the EO Act (Vic) provides that a person may take a special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute; that the measure must be undertaken in good faith; and that any

measure must be reasonable, proportionate to achieving its purpose and justified.[26] This latter provision is consistent with the approach adopted in the *Human Rights Act 2019* (Qld) (the 'HR Act').[27]

5.11 The QCU supports the adoption of the term 'special measures' and legislative requirements consistent with the EO Act (Vic), rather than continuance of the terms 'welfare measures' and 'equal opportunity measures' for similar reasons to those outlined above in regard to changing the objects and purpose of the legislative framework.

5.12 Further, the QCU supports the change of special measures to form part of the definitional sections of the Act for discrimination as opposed to an exemption or exception from discrimination. This is consistent with previous case law where the Queensland Civil and Administrative Tribunal ('QCAT') considered an application made by Anglo Coal under section 113 of the Act seeking an exemption to implement a program at a Queensland mine site to recruit a female-only intake to complete a RII20309 Certificate III in Underground Coal Mining training program.[28]

5.13 In that matter, QCAT stated that in granting an exemption from discrimination, it must consider:

- Whether any other persons or bodies other than the applicant support the application e.g., Human Rights Commissioner?
- Whether the exemption is in the community interest e.g., consider the value of gender diversity of the workforce?
- The effect of not granting the exemption e.g., without a proactive approach to recruitment women's participation in mining will remain low.
- Is there a non-discriminatory way of achieving the same result?

5.14 In deciding, QCAT held that it did not need to make a decision on an exemption because section 105 of the Act provides that a person may do an act of equal opportunity if the purpose is not inconsistent with the Act and in that case, the applicant's proposal was designed to accelerate de facto equality between men and women and eliminate the idea of stereotyped roles for men and women, and that to promote equal opportunity for a group of people with an attribute – women in this case, is in any case protected by section 105.

5.15 A similar approach should be embedded into the new Act without the need for applications for exemptions to reflect a more proactive approach to removing discriminatory

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[26] EO Act (Vic) ss 12(1)-(3).
[27] *Human Rights Act 2019* (Qld) ('HR Act') s 13.
[28] *Anglo Coal (Grosvenor Management) Pty Ltd & Ors* [2016] QCAT 160 (23 February 2016) (Senior Member Stilgoe) ('*Anglo Coal*').

practices and also promoting special measures to actively redress discriminatory practices against protected groups of people under the Act.

## Positive Duties

5.16 The QCU supports the introduction of a positive duty into the AD Act consistent with a proactive approach to removing discriminatory practices and focusing duty-holders on implementing preventative and positive actions and measures for discrimination, harassment, and victimisation consistent with the positive obligation contained in the EO Act (Vic).[29]

5.17 As outlined elsewhere in this submission, the QCU also supports the creation of a modern strong regulator to focus on education, compliance and enforcement of this new duty, as well as creating a 'cause of action' for representative bodies and unions in relation to this duty.

5.18 The Respect@Work Report asserted that the lack of a positive duty to prevent sexual harassment meant that employers place a higher priority on compliance with employment and work health and safety laws, as opposed to discrimination law, which in turn places a heavy onus on individuals to complain.[30] The AHRC recommended the introduction of a positive duty into the SD Act that were accompanied by enforcement powers for the AHRC to assess compliance with the positive duty.[31] This matters remains the subject of further consultation by the Commonwealth Government.

5.19 While the Respect@Work Report focused solely on sexual harassment, the QCU considers that this positive duty should apply not just for sexual harassment but also be extended to all forms of discrimination and protected attributes. The QCU also supports the creation of regulatory powers for the QHRC to oversee education, compliance, and enforcement.

5.20 Similarly, the QCU supports the extension of this duty into all areas of activity in which the AD Act operates. The particular focus of compliance activities should be a matter for the new regulator based on either risk based or complaints-based factors, similar to other matrices used by modern regulators.

5.21 Finally, the actions that a duty-holder should take to meet their obligation should be framed similar to the reasonable and proportionate measures contained in the EO Act (Vic) at section 15(6).

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[29] EO Act 2010 (Vic) s 15.
[30] Respect@Work Report 28.
[31] Ibid.

## Overlap between WHS and Discrimination Laws and a Positive Duty

5.22 It has been noted by many parties, that there may be an overlap between a new positive duty/obligation created under the SD Act or the AD Act and the primary duty of care for a person conducting a business or undertaking (a 'PCBU') contained under section 19 of the WHS Act. However, this overlap should only occur in relation to where there is a risk to the health and safety of workers or other persons at a workplace by way of discriminatory practices, sexual harassment, or victimisation occurring at the workplace.

5.23 The primary duty of care for a PCBU is scoped to focus on the prevention or elimination of a risk, as far as is reasonably practicable,[32] which is to a large extent based upon an assessment of the likelihood of a hazard or risk occurring, compared with the degree of harm that might result from the hazard or risk (among other matters).[33]

5.24 What is reasonably practicable must also be considered within the context of the objects of the WHS Act in that regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from particular types of substances or plant as is reasonably practicable.[34]

5.25 When considering whether the primary duty of care is being met – for example in relation to sexual harassment – the WHS regulator by and large focuses on the risk assessment and the prevention measures put in place to manage its risk, whereas the proposal for a positive obligation under discrimination law is for all duty holders to introduce reasonable and proportionate measures to eliminate discrimination, harassment, and victimisation as far as possible.

5.26 This is a different focus to WHS laws in that it requires all duty holders to implement measures regardless of the assessment of their risk, instead based upon factors such as the size of the person's business, its nature and circumstances, the person's resources and business and operational requirements, and the practicability of the measures.[35]

5.27 In this context, it is considered that there is not a duplication of effort, but rather an opportunity for a new 'Equality Regulator' to review the measures to address discrimination, harassment and victimisation which should be standardised across all workplaces for instance, but with flexibility to adapt those measures to each workplace, based on the

[32] *Work Health and Safety Act 2011* (Qld) (the 'WHS Act) ss 17-19.
[33] WHS Act s 18.
[34] Ibid s 3(2).
[35] See EO Act (Vic) s 15(6).

factors affecting the workplace, rather than the risk (likelihood and consequences) of discrimination, harassment, and victimisation occurring.

## Reframing to a Positive Obligation

### Reasonable Adjustments

5.28 Sections 35 and 36 of the AD Act contains specific exemptions from discrimination against a person with an impairment in relation to special services and facilities and based upon unjustifiable hardship provisions under section 5 of the Act.

5.29 With the reframing of Act to focus on more positive obligations and requirements of employers, the QCU supports the repeal of these provisions and replacement with similar reasonable adjustments requirements contained within the EO Act (Vic). This should also incorporate the special terms provision from section 34 of the AD Act.

5.30 Also refer to comments elsewhere in this submission in relation to the reframing of the occupational requirements exemption and clarifying that occupational requirements are not related to the inherent requirements of a position.

### Reasonable Accommodations

5.31 A key area where discrimination law intersects with industrial law is for employee's work and family or caring responsibilities.

5.32 Section 65 of the *Fair Work Act 2009* (Cth) (the 'FW Act') provides that an employee may make a request to their employer to enter into a change to their work arrangements, to accommodate for example, if they are a carer or a parent or person with responsibility for a child of school age or younger.

5.33 An application for a flexible work arrangement is able to be refused by an employer on 'reasonable business grounds'. The Explanatory Notes to the Fair Work Bill stated that the reasonable of grounds is to be assessed in the circumstances that apply when the request is made and may include for example:

- the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity, and customer service;
- the inability to organise work among existing staff; and
- the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.[36]

[36] Explanatory Notes Fair Work Bill 2009 cl 27.

5.34 However, where there is a dispute about such a request, there is no provision for the Fair Work Commission to conciliate, mediate or determine an outcome, unless the industrial parties have agreed that the matter may be so resolved in an enterprise agreement.

5.35 Importantly, section 66 of the FW Act provides that the Act is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements in relation to flexible working arrangements, to the extent that those entitlements are more beneficial to employees than the entitlements under this Division. This applies in relation to discrimination laws that may provide superior provisions in this area, as opposed to state industrial laws.

5.36 Section 27 of the *Industrial Relations Act 2016* (Qld) (the 'IR Act') which applies to state public sector and local government employees only, also allows an employee to request a change in the way the employee works, including a change to their ordinary hours of work, the place where the employee works, or a change to the way the employee works, e.g., the use of different equipment as the result of a disability, illness or injury.

5.37 The scope of a flexible work arrangement under this Act has been generally taken to extend to employees with family and caring responsibilities consistent with one of the key purposes of the Act – to promote diversity and inclusion in the workforce, including by providing a right for employees to request flexible working arrangements to help balance their work and family responsibilities.[37] However, it can also apply to an employee who has a disability or an illness or injury.

5.38 A decision of an employer to refuse an application can only be made upon 'reasonable grounds'.[38] However, unlike the Fair Work Commission, the Queensland Industrial Relations Commission has specific power to conciliate and arbitrate on the matter if it is unable to be resolved between the individual employee and employer.[39]

5.39 Sections 17 and 19 of the EO Act (Vic) provides that an employer is required to make reasonable accommodations of requests from prospective or existing employees to accommodate the responsibilities they have as a parent or carer. This is subject to the facts and circumstances of each case with specific factors for consideration including:

(i) the employee's circumstances, including the nature of his or her responsibilities as a parent or carer; and

(ii) the nature of the employee's role; and

[37] IR Act 2016 s 4(k).
[38] Ibid s 28(2).
[39] Ibid s 29.

(iii) the nature of the arrangements required to accommodate those responsibilities; and

(iv) the financial circumstances of the employer; and

(v) the size and nature of the workplace and the employer's business; and

(vi) the effect on the workplace and the employer's business of accommodating those responsibilities, including—

(i) the financial impact of doing so;

(ii) the number of persons who would benefit from or be disadvantaged by doing so;

(iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and

(vii) the consequences for the employer of making such accommodation; and

(viii) the consequences for the employee of not making such accommodation.

5.40 These factors are almost the same as those that apply when an employer is to consider making a reasonable adjustment for an employee or prospective employee with a disability and are largely based upon traditional 'unjustifiable hardship' criteria similar to section 5 of the AD Act and the special terms, services or facilities exemptions that apply for people with an impairment.[40]

5.41 In this context they are not considered as suitable as those factors outlined in the Explanatory Notes to the Fair Work Bill 2009 to balance a request from a person with caring or parental responsibilities with the needs of the workplace.

5.42 Therefore, in the context of discrimination law, the QCU supports the introduction of a positive obligation on an employer to make a reasonable accommodation for an employee with caring or family responsibilities similar to sections 17 and 19 of the EO Act (Vic) but with the factors for consideration as outlined in the Fair Work Bill Explanatory Notes.

5.43 The QCU supports such an arrangement as consistent with promoting a special measure to help remove systemic disadvantages against women, who primarily bear the responsibilities of caring for members of their family either as a parent or carer.

5.44 A suggested drafting format is outlined following:

[40] AD Act ss 34-36.

**Reasonable accommodation of the responsibilities of a parent or carer**

(1) A duty holder under Division 2 of this Act must not unreasonably refuse to accommodate a request of a person seeking to balance the responsibilities the person has as a parent or carer with their employment or work.

**Examples**

An employer may be able to accommodate a person's responsibilities as a parent or carer by offering work or on the basis that the person could work additional daily hours to provide for a shorter working week or occasionally work from home.

An employer may be able to accommodate an employee's responsibilities as a parent or carer by allowing the employee to work from home on a Wednesday morning or have a later start time on a Wednesday or, if the employee works on a part-time basis, by rescheduling a regular staff meeting so that the employee can attend.

(2) A reasonable accommodation should be assessed in the circumstances of the particular case and after weighing up the following:
   (i) the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity, and customer service;
   (ii) the inability to organise work among existing staff; and
   (iii) the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.

5.45 The QCU also notes and supports a similar provision which could be adopted in relation to employees requiring accommodation of matters such as cultural leave or to attend specific religious activities.

5.46 Finally, while industrial laws provide a mechanism for employers and employees to enter into flexible work arrangements, the focus of equality or discrimination law should be on effecting positive changes and removing systemic practices and conditions that limit the achievement of substantive equality, for example, between women and men, or for people with an impairment/disability.

5.47 The introduction of a positive duty for both workers with family and caring responsibilities, and for workers with an impairment or disability with new regulatory powers and functions is consistent with positive measures to achieve substantive equality and are therefore supported.

# 6. Attributes

## Impairment

6.1 The QCU has approached this review primarily applying a work-related lens to discrimination laws and with that caveat indicates that our affiliates have some concerns at the potential replacement of the term 'impairment' with 'disability' in the AD Act, and the implications for injured workers seeking to return to work.

### *Changing the term 'impairment' to 'disability'*

6.2 The term 'impairment' is a common term used under the various workers' compensation jurisdictions, including in Queensland. *The Workers' Compensation and Rehabilitation Act 2003* (Qld) (the 'WCR Act') provides a regulated compensatory system for workers who are injured as a result of work.

6.3 The WCR Act refers to the level of a worker's impairment incurred as a result of a personal injury arising out of, or in the course of employment, if the employment is a significant contributing factor to the injury. This includes both a physical and a psychological injury. Impairment is defined in the legislation as '(a)n impairment, from injury, (which) is a loss of, or loss of efficient use of, any part of a worker's body'.

6.4 WorkCover Queensland further defines an impairment as:

> '…any loss or abnormality of psychological, physiological, or anatomical structure or function. It will be permanent if it is stable and stationary and is unlikely to change with further medical or surgical treatment. This is the number used to uniquely identify WorkCover Queensland policy holders.'

6.5 Within the context of work-related injuries, many injured workers do not see themselves as suffering from a 'disability' when many only have a degree of impairment or a temporary impairment.

### *Mental Health*

6.6 Likewise, the term 'disability' is not a well-used term with respect to psychological injuries which are also covered by the current attribute. A change in the name of the protected attribute may in fact adversely impact on this group of people and act as an unintended barrier to accessing protections from discrimination.

6.7 Similarly, a separation of psychological injuries or impairments from physical impairments into a separate attribute termed 'psycho-social disability' may also act as an unintended barrier for many people who suffer from work-related impairments such as anxiety, depression, and PTSD.

6.8 The QCU does however, see some merit in further public guidance and educative materials around the meaning of 'impairment', including both physical and psychological impairments and that psychological impairments are generally picked up by the current definition as meaning a 'condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour'.[41]

6.9 The QCU also supports a consistent definition of impairment/disability with that contained in the *Disability Discrimination Act 1994* (Cth) (the 'DD Act') which should see an update to the Queensland definition to include an impairment/disability that may exist in the future (including because of a genetic predisposition to that disability), or is imputed to a person, including the DD Act notation that:

> *'(t)o avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability'.*

### *Addiction*

6.10 The QCU believes that an 'addiction' is currently covered under the AD Act definition of 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour'.[42] The QCU notes that a person who suffers from an 'addiction' such as to alcohol or drugs may not always be 'impaired' in the context of work. However, a person who suffers from an addiction must still be able to perform the inherent requirements of the position and to also not be impaired while at work.

6.11 Addiction is therefore best considered within the context of a framework where an employer must take reasonable and proportionate measures to prevent discrimination as far as possible, including to make a reasonable adjustment where the person with an impairment is able to perform the inherent requirements of the position after the adjustment is made.

6.12 General work health and safety requirements would continue to apply as an inherent requirement of a job under relevant work health and safety laws i.e., section 19 of the WHS Act. This is also consistent with section 108 of the AD Act which provides that a person may do an act reasonably necessary to protect the health and safety of any person at a place of work.

6.13 The QCU therefore supports the retention of the term 'impairment' for both physical and psychological injuries, noting that the QCU is also not opposed to including both

[41] AD Act Schedule 1(d) (definition of 'impairment').
[42] Ibid Schedule 1(g) (definition of 'impairment').

impairment and disability as protected attributes in the AD Act. Further, the QCU supports stronger public guidance and educative materials around impairment and disability discrimination.

### *Positive Obligations and Requirements for Employers to make Reasonable Adjustments*

6.14 Section 232B of the WCR Act provides that an employer must not dismiss a worker solely or mainly because the worker is not fit for employment in a position because of the injury, within 12 months after a worker sustains an injury. A dismissal includes where an unreasonable employment condition is designed to make the worker leave employment is imposed on the worker and the worker consequently leaves the employment.[43]

6.15 There are no legislative protections from dismissal after this 12 month period, which means that a worker who is dismissed after this time only has the option of lodging a discrimination claim on the basis of the worker's impairment under the DD Act or the AD Act. However, a worker might also seek to claim they have been subject to adverse action under the FW Act or IR Act with respect to being dismissed or injured in their employment because of discrimination on the grounds of impairment.

6.16 However, as noted elsewhere the adverse action jurisdiction before the Federal Court is a difficult jurisdiction to access and like current discrimination law relies upon a worker making a complaint often as an event is occurring, or after the event has occurred.

6.17 The QCU is aware of many cases, where workers are subject to a return to work program and are simply provided with no work or support until the worker eventually leaves the employment due to frustration. This is clearly a form of discrimination in the terms of work being offered.

6.18 The QCU therefore supports the adoption of a more positive obligation to prevent discrimination by requiring employers to prevent discrimination on the grounds of impairment so far as possible and to make a reasonable adjustment for a worker who has a disability, including a work or non-work related injury consistent with sections 15 and 20 of the EO Act (Vic).

6.19 The combination of a positive duty to prevent discrimination along with a requirement to make a reasonable adjustment for injured workers will mean, among other things, that every employer is required to take a more proactive approach to integrating reasonable adjustments into the management of return to work programs for injured

[43] WCR Act s 232A (definition of 'dismissal').

workers, and help to obviate the mandatory 12 month cut off currently applied for protection from dismissal.

## Trade Union Activity

6.20 Trade union activity is a protected attribute under section 7(k) of the AD Act. However, there is no statutory definition of the attribute meaning the common law meaning will apply.

6.21 Section 22(2) of the HR Act provides that it is a human right of every person to freedom of association with others, including the right to form and join trade unions.

6.22 One of the purposes of the IR Act is to encourage representation of employees and employers by organisations that are registered under the Act. Chapter 12 of that Act also provides proscriptive arrangements for industrial organisations, including registration; content of organisational rules; election rules; validity and compliance with rules; amendment of rules; conduct of elections; election inquiries; officers; membership; records and accounts; exemptions; validations; amalgamations and withdrawals; complaints; investigations and appointment of administrators; and deregistration.

6.23 There has been a range of recent activity where organisations who are not registered nor are they seeking registration under the IR Act (but instead are incorporated under the *Associations Incorporated Act* (Qld)) who have been seeking to misrepresent themselves as 'trade unions' with rights and entitlements under the Industrial Relations Act 2016 (Qld) without the consequent accountabilities required of a registered organisation under the same Act. Those same organisations have also sought to use the AD Act and Human Rights Act freedom of association rights to gain de facto recognition as a trade union.

6.24 The issue of what is a 'trade union' has also been the subject of an extensive review conducted of the Industrial Relations Act 2016 (Qld) in a review conducted in 2021. Recommendation 9 of the subsequent Report recommends: [44]

- That the definition and description of what is currently referred to as an association of employees for the purposes of section 279 of the Industrial Relations Act 2016 comprise the following elements:
    a. it is an unincorporated body; and
    b. it is formed or carried on with the principal purpose of the protection and promotion of members' interests in matter concerning their employment; and
    c. it is eligible to be registered under the Industrial Relations Act 2016; and

[44] Five-year Review of Queensland's Industrial Relations Act 2016 Final Report (November 2021) p 11.

d. it has been formed with the intention of becoming registered under the Industrial Relations Act 2016.

6.25 Recommendation 11 of the Report is that the IR Act should also make clear (by a note or new subsection) that eligibility for general protections does not grant representation or any other rights in any other Part of the IR Act outside Chapter 8 Part 1 General Protections.

6.26 Finally, Recommendation 14 of that Report was that penalty provisions be included in the IR Act to ensure that an unregistered organisation does not misrepresent their status, for example by claiming that they are eligible to represent employees under the Industrial Relations Act 2016.

6.27 The QCU therefore recommends that an amendment is made to the AD Act to clarify that 'trade union activity' means activity conducted by an organisation that is registered under the IR Act or the FW Act to ensure consistency with the legislative changes to the IR Act and to ensure that protections are provided to legitimate trade unions that operate under the auspices and with all of the accountabilities required under the IR Act or the *Fair Work (Registered Organisations) Act 2009* (Cth).

6.28 The QCU notes that section 13 of the HR Act also provides that a right may be limited if it is reasonable and justifiable taking into account a number of factors such as: the nature of the human right; the nature and purpose of the right and the limitation; the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose; whether there are less restrictive and reasonably available ways to achieve the purpose; the importance and purpose of the limitation; the importance of preserving the human right; and the balance between all of the factors. This is consistent with the High Court's proportionality principle as adopted in *McCloy v NSW* (2015) 257 CLR 178.

## Employment activity

6.29 'Employment activity' is a protected attribute under the EO Act (Vic). Employment activity is defined as meaning:

(a) an employee, in the employee's individual capacity —
  (i) making a reasonable request to the employee's employer, orally or in writing, for information regarding the employee's employment entitlements; or
  (ii) communicating to the employee's employer, orally or in writing, the employee's concern that the employee has not been, is not being or will not be given some or all of the employee's employment entitlements; or

(b) a contract worker, in the contract worker's individual capacity —

(i) making a reasonable request to the contract worker's principal, orally or in writing, for information regarding the contract worker's employment entitlements; or

(ii) communicating to the contract worker's principal, orally or in writing, the contract worker's concern that the contract worker has not been, is not being or will not be given some or all of the contract worker's employment entitlements'.[45]

6.30 The QHRC Discussion Paper mentions that discrimination based on employment activity is a common ground of complaint in Victoria, being the fifth most common complained about (despite access to the general protections provisions under the FW Act).[46]

6.31 The provision is currently protected under section 341 of the FW Act and section 284 of the IR Act in Queensland. However, as noted in other areas, the jurisdiction of the FW Act before the Federal Circuit Court or Federal Court is difficult to access and cost prohibitive.

6.32 Inclusion of the attribute as protected under the AD Act would mean employees under the Fair Work jurisdiction would have the option to proceed to conciliation and a hearing in a less costly jurisdiction.

### Irrelevant medical records

6.33 In Queensland, it is only possible to raise a complaint about the discrimination based on a distinction, exclusion or preference made on the ground of a medical record under the Human Rights and Equal Opportunity Commission Act (the 'HREOC Act'). However, this does not give rise to a legally enforceable remedy and the Commission is restricting to conciliating a complaint.

6.34 Section 124(1) of the AD Act also provides that a person must not ask another person to supply information orally or in writing, on which unlawful discrimination might be based.

6.35 The QCU is concerned that there are active employment screening processes in place across many employers and industry sectors that commonly request access to a person's full medical records as part of pre-employment screening. These are not restricted to medical conditions that might relate to the inherent requirements of the job but can extend for example, into previous mental health conditions and the like.

6.36 In most cases, the employer does not disclose the purpose for which the medical information is sought. In others, the employer is engaging is medical testing such as the following:

[45] EO Act 2010 (Vic) s 4(1) (definition of 'employment activity').
[46] Victorian Equal Opportunity and Human Rights Commission, 2018–19 Annual Report (Report, 2019).

**Case Study - Medical Testing**

A maritime employer in Queensland is currently using hair follicle testing for pre-employment. Hair follicle testing can be used to determine evidence of historical and habitual drug and alcohol use. This does not relate to whether a person is currently substance using or abusing and in effect can screen out someone with a previous addiction or disorder that currently no longer applies.

6.37 Additionally, under the *Privacy Act 1988* (Cth), once a prospective employee hands over their medical records to an employer, the records become part of the employee's records which can be accessed and stored at any time without being subject to the privacy principles.

6.38 The QCU is also aware that it is also common practice for many employers to use such information later as a defence to a common law injury claim, particularly in psychological injuries and mental health issues.

6.39 As noted in the Discussion Paper, section 16 of the Tasmanian anti-discrimination legislation and section 19 of the Northern Territory legislation provide that a person must not discriminate based on an irrelevant medical record. An 'irrelevant medical record' is not defined in the legislation.

6.40 The QCU therefore recommends the adoption of a new protected attribute of 'irrelevant medical records' outlining factors to be considered or not relating to the inherent requirements of the job.

## Irrelevant criminal records

6.41 The HREOC Act provides some protection from discrimination against a person with an irrelevant criminal record, but as noted previously for the attribute of 'irrelevant medical record', the Commission is restricted to conciliating the matter and there are no mechanisms to ensure enforcement.

6.42 In a 2004 Discussion Paper by the Australian Human Rights Commission (the 'AHRC'), the AHRC identified principles which underpinned the law with respect to what constitutes an 'inherent requirement':

- an inherent requirement is something that is 'essential' to the position rather than incidental, peripheral or accidental.
- the burden is on the employer to identify the inherent requirements of the particular position and consider their application to the specific employee before the inherent requirements exception may be invoked.

- the inherent requirements should be determined by reference to the specific job that the employee is being asked to do and the surrounding context of the position, including the nature of the business and the manner in which the business is conducted.
- there must be a 'tight correlation' between the inherent requirements of the particular job and an individual's criminal record. There must be more than a 'logical link' between the job and a criminal record.
- the inherent requirements exception will be interpreted strictly so as not to defeat the purpose of the anti-discrimination provisions.[47]

6.43 'Irrelevant criminal records' is a protected attribute under both the Tasmanian and Northern Territory discrimination laws.

6.44 An irrelevant criminal record is defined in the Tasmanian law as meaning:

*'… a record relating to arrest, interrogation or criminal proceedings where –*

*further action was not taken in relation to the arrest, interrogation or charge of the person; or*

*a charge has not been laid; or*

*the charge was dismissed; or*

*the prosecution was withdrawn; or*

*the person was discharged, whether or not on conviction; or*

*the person was found not guilty; or*

*the person's conviction was quashed or set aside; or*

*the person was granted a pardon; or*

*the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises; or*

*the person's charge or conviction was expunged under the Expungement of Historical Offences Act 2017'.*

6.45 An exception to discrimination on the grounds of irrelevant criminal records in the Tasmanian legislation is records relating to dealing with children.[48]

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[47] Australian Human Rights Commission 'Discrimination in Employment on the Basis of Criminal Record' Discussion Paper December 2004.

[48] *Anti Discrimination Act 1998* (Tas) s 50.

6.46 This provides that it is an exemption from discrimination on the grounds of irrelevant criminal records in relation to the education, training, or care of children if it is reasonably necessary to do so to protect the physical, psychological, or emotional wellbeing of children having regard to the relevant circumstances.

6.47 An irrelevant criminal record in the Northern Territory legislation is defined similarly to Tasmania, but also includes where 'the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises'.[49] It also includes an exemption to discrimination where the work principally involves the care, instruction or supervision of vulnerable persons, including children.[50]

6.48 The QCU is aware that many employers require a background criminal check for all types of work which does not necessarily relate to the 'inherent requirements' of a particular job. This is also commonplace for professional registration bodies that positively discriminate on the grounds of criminal records even where these do not relate to dealing with children or the particular profession. For example, teacher registration in Queensland and also the Australian Health Practitioner Regulation Agency (AHPRA) who oversee regulation of health practitioners.

6.49 In doing so, many potential employees are directly excluded from working in a range of professions even if their past records are not relevant to the job. Direct discrimination against many people with a criminal record actively continues the systemic disadvantages many face without providing an opportunity to demonstrate rehabilitation.

6.50 The QCU supports the inclusion of a protected attribute of 'irrelevant criminal records' based upon the Northern Territory with the accompanying exception for records relating to dealing with children or that are related to the inherent requirements of a particular job. It is further recommended that a definition of inherent requirements is considered based upon the case law outlined above by the AHRC and any further emergent case law since that time.

[49] *Anti Discrimination Act 1992* (NT) ss 4 (definition of 'irrelevant criminal record'), 19(1)(q).
[50] Ibid s 37.

## Domestic and Family Violence

6.51 Domestic and family violence is not currently a protected attribute under the AD Act.

6.52 In the 2015 review of the ACT legislation, the Law Reform Advisory Group recommended the introduction of a new protected attribute of 'subjection to domestic or family violence' which was subsequently adopted in amendments to the Act.[51]

6.53 In that Report, the Council indicated that research shows that many people experience discrimination in areas such as employment and accommodation because they have been subjected to domestic or family violence with an example of a person being treated unfavourably at work because they have to take time off to attend court to get a protection order in relation to domestic or family violence, or because their partner contacts them at work to abuse or harass them.[52]

6.54 The Report referred to evidence provided by the Women's Legal Centre (ACT and Region) citing an example of a woman who was terminated from her employment due to her employer's concern about the workplace health and safety risk posed by the presence of her abusive partner at her workplace.[53]

6.55 The QCU is aware of a similar example which occurred in Queensland in late 2021 where an employee was also terminated due to concerns about a work health and safety risk. See case study below.

**Worker experiencing FDV dismissed for risk of WHS**

An employee of a community service organisation was subjected to domestic and family violence in her private life by her partner. After intervention by police, police took out a protection notice against the partner. The employee disclosed this matter privately to a work colleague who without the employee's permission informed a senior manager. The organisation subsequently terminated the employee on the basis that she was a risk to the health and safety of other staff and clients.

6.56 Additionally, the QCU through its affiliates is aware of several employees who continue to experience unfavourable treatment in their employment because they have been subjected to family and domestic violence (see case studies below). Similar experiences are reported across a range of industries, including from large public sector employers.

[51] *Discrimination Act 1991* (ACT) s 7(1)(x).
[52] ACT Law Reform Advisory Council Inquiry into the *Discrimination Act 1991* (ACT), *Final Report*, 77.
[53] Ibid 78.

**Unfavourable treatment in employment because of experiencing FDV**

A teacher impacted by domestic and family violence (DFV) in a regional setting was forced into extremely expensive hotel accommodation as the employer perceived that she was not eligible for departmental housing, despite the clear provisions of this support being available in policy for employees impacted by DFV, as they understood she owned property and therefore was able to support herself financially.

An aspiring leader seeking release from her classroom role was not provided with the release as a successful applicant for an acting promotional position in another school and setting, despite the employer being aware of her DFV situation as it was viewed by management "that she would be better off sorting herself out" prior to taking on a leadership role.

A regional classroom teacher was advised by management that she would be taken off class and need to undertake a regional relief role as her DFV related absences "were too many and the parents are complaining".

6.57 Section 296 of the IR Act (which covers state public sector and local government employees) provides that an employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because someone has committed, or is committing, domestic violence against the person. Adverse action includes dismissal or injury in employment, altering their position to the person's prejudice, or discriminating between the person and other employees.[54]

6.58 However, there is no similar protection that applies in the FW Act which applies to most other employees in Queensland. If a protected attribute were to be introduced into the AD Act, the Fair Work Commission would also gain jurisdiction to deal with the matter by way of the discrimination provisions in the FW Act.[55]

6.59 The QCU is therefore supportive of the introduction of a new protected attribute like the ACT legislation.

[54] IR Act 2016 s 282(1).
[55] FW Act s 351(3).

# 7. Exceptions – Occupational and Inherent Requirements

7.1 Section 25 of the AD Act provides an exemption from discrimination where a person can impose genuine occupational requirements for a position. The current Act refers to specific examples such as an actor being employed for a dramatic performance because of age, race etc, or membership of a political party to be employed as a political advisor etc.

7.2 The policy reasons for this exemption relate to the qualifications or attributes that a person may be required to have to perform a specific job. Separately, sections 34 to 36 provide exemptions where a person requires special conditions to do the work, or a 'reasonable adjustment' because of an impairment to accommodate a person who has restricted capacity to do the work genuinely and reasonably required for the position.

7.3 Where special services or facilities are required as a reasonable adjustment, an employer can argue unjustifiable hardship is involved. For other matters, unjustifiable hardship may also apply depending on the nature of the impairment and the nature of the work.

7.4 These are similar, but different to the 'inherent requirements' of a position to be taken into account after a reasonable adjustment has been made under the DD Act. In that Act, relevant factors to determine whether a person would be able to carry out the inherent requirements of work include:

- the person's past training, qualifications, and experience relevant to the particular work;
- if the person already worked for the discriminator – the person's performance in working for the discriminator;
- any other reasonable factor to take into account.

7.5 There would appear to be a clear policy differentiation between the occupational requirements exemption based upon positively discriminating for a person's attribute and the inherent requirements provision relating to exemptions for a person with a disability or impairment.

## Chivers' Case

7.6 However, in the case of *Chivers v Queensland (Queensland Health)* [2014] QCA 141 ('*Chivers*'), the Queensland Court of Appeal found that the 'genuine occupational requirements' exception in section 25 of the AD Act was similar in meaning to the 'inherent requirements' test previously determined by the High Court.[56]

7.7 It is particularly noted that in *Chivers*, the Court stated:

> "The expression "genuine occupational requirements" is not defined for the purposes of the AD Act. Nor does that legislation list facts or circumstances which must or may be taken into account in determining whether a given requirement is a genuine occupational requirement".[57]

7.8 It has been since noted in that matter, that Queensland Health only sought to rely upon section 25 of the AD Act as a defence and not the provisions relating to reasonable adjustments and unjustifiable hardship under sections 34 to 36 and this has had the effect of

[56] *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 and *X v The Commonwealth* (1999) 200 CLR 177.
[57] *Chivers* [38].

conflating the law relating to two very different provisions thereby depriving either of real meaning.[58]

7.9 The QCU's view is that as a result of *Chivers* and potentially unintended consequences, the occupational requirements and inherent requirement matters need to be clearly separated in the legislation.

7.10 In addition, the legislation should also be clarified to make explicit mention that reasonable adjustments should include a person's capacity to be permitted to work particular hours or patterns of hours of work as part of the Examples in the Act.

7.11 It is also recommended that sections 34 to 36 be replaced with the more proactive obligation on an employer to make a reasonable adjustment for a person with a disability unless they could not or cannot adequately perform the genuine and reasonable requirements of the employment even after the adjustments are made.[59]

7.12 A suggested drafting is included as follows:

**Replace section 25 AD Act with similar provisions to section 26 of the EO Act (Vic)**

**Exception—genuine occupational qualifications ~~requirements~~**

(1) An employer may limit the offering of employment to people of one sex if it is a genuine occupational qualification ~~requirement~~ of the employment that the employees be people of that sex.

(2) Without limiting the generality of subsection (1), it is a genuine occupational qualification ~~requirement~~ to be a person of a particular sex in relation to employment if—

(a) the employment can be performed only by a person having particular physical characteristics (other than strength or stamina) that are possessed only by people of that sex; or

(b) the employment needs to be performed by a person of that sex to preserve decency or privacy because it involves the fitting of clothing for people of that sex; or

(c) the employment includes the conduct of searches of the clothing or bodies of people of that sex; or

(d) the employee will be required to enter a lavatory ordinarily used by people of that sex while it is in use by people of that sex; or

(e) the employee will be required to enter areas ordinarily used only by people of that sex while those people are in a state of undress.

(3) An employer may limit the offering of employment in relation to a dramatic or an artistic performance, entertainment, photographic or modelling work or any other employment—

(a) to people of a particular age, sex or race;

(b) to people with or without a particular disability—

if it is necessary to do so for reasons of authenticity or credibility.

(4) An employer may discriminate on the basis of physical features in the offering of employment in relation to a dramatic or an artistic performance, photographic or modelling work or any similar employment.

(5) An employer may discriminate on the basis of political or trade union activity as an employee of a political party or representative or within a trade union.

**Legislative note:**

A genuine occupational qualification is one where an employer is excepted to positively discriminate on the basis of a person's attribute. Under this Act, it does not relate to the tasks or requirements of a particular

[58] Rees, N, Rice S & Allen D 'Australian Anti-Discrimination & Equal Opportunity Law' The Federation Press (2018) [11.2.35] 577.

[59] EO Act (Vic) s 20.

occupation or job. See 'inherent requirements' in section X (link back to the positive obligation on employers to make reasonable adjustments).

**Section X – Employer must make reasonable adjustments for person offered employment or employee with an impairment or a disability**

(1) This section applies to a person with an impairment or a disability who—

(a) is offered employment or is an employee; and
(b) requires adjustments in order to perform the genuine and reasonable requirements of the employment.

(2) The employer must make reasonable adjustments unless the person or employee could not or cannot adequately perform the genuine and reasonable requirements of the employment even after the adjustments are made.

**Example**

An employer may be able to make reasonable adjustments for a person or employee with an impairment or a disability by—

- providing a ramp for access to the workplace or a particular software package for computers;
- modifying work instructions or reference manuals;
- allowing the person or employee to be absent during work hours for rehabilitation, assessment, or treatment;
- allowing the person or employee to take breaks more frequently;
- **allowing the person or employee to work particular hours or patterns of hours of work.**

(3) In determining whether an adjustment is reasonable, all relevant facts and circumstances must be considered, including—

(a) the person's or employee's circumstances, including the nature of his or her impairment or disability; and
(b) the nature of the employee's role or the role that is being offered; and
(c) the nature of the adjustment required to accommodate the person's or employee's impairment or disability; and
(d) the financial circumstances of the employer; and
(e) the size and nature of the workplace and the employer's business; and
(f) the effect on the workplace and the employer's business of making the adjustment including—

(i) the financial impact of doing so;
(ii) the number of persons who would benefit from or be disadvantaged by doing so;
(iii) the impact on efficiency and productivity and, if applicable, on customer service of doing so; and

(g) the consequences for the employer of making the adjustment; and
(h) the consequences for the person or employee of not making the adjustment; and
(i) any relevant action plan made under Part 3 of the Disability Discrimination Act 1992 of the Commonwealth.

## Occupational Requirements Exemption – Religious Bodies

7.13 Section 25(3)-(8) of the AD Act also provides an exemption from discrimination in relation to matters that are otherwise prohibited in the Act where a person works for an educational institution or another body generally under the direction or control of a body established for religious purposes.

7.14 The QCU supports the submissions of its affiliate the Queensland Independent Education Union ('QIEU') in repealing this exemption in a contemporary society.

# 8. Structure and Role of a Regulator and Tribunal(s) and Complaint Handling Processes

## Queensland Human Rights Commission

8.1 The QHRC has a specific role and functions under both the AD Act and the HR Act, which are primarily of an educative and complaints-handling functions. However, to accommodate a new regulatory function the QCU recommends the QHRC consider itself adopting the education and regulatory functions and transferring its complaints investigation and conciliation to the relevant tribunal (QCAT or the QIRC).

8.2 This is consistent with the adoption of positive obligations and more proactive measures aimed at the achievement of substantive equality for people with protected attributes, as well as the requirements for employers to make reasonable adjustments and accommodations.

8.3 As noted, these positive obligations currently exist in the EO Act (Vic). However, the Victorian HRC has limited powers to actively enforce compliance with these positive obligations (having been repealed in 2011 by the Coalition Government after their enactment in 2010).

8.4 It is envisaged that the new 'regulator' will have responsibility for enforcing compliance consistent with the National Compliance and Enforcement Policy (for example see: https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/national-compliance-and-enforcement-policy). This enforcement model ranges from education to infringement notices, to compliance notices, to enforceable undertakings, to prosecutions and civil penalties.

8.5 There are several options to accommodate the separation of these functions for consideration:

Option 1:

Maintain the QHRC in its current form including complaints handling but require QCAT and the QIRC to only hold hearings on matters referred (removing the duplication of further conciliation).

The QHRC would continue to have conciliation powers under the Human Rights Act for human rights complaints.

However, this may be difficult given the nature of these tribunals (like other courts) which automatically refer matters to conciliation or ADR processes.

Maintaining conciliation functions for AD Act matters also does not sit within the framework of a modern regulator under the national compliance and enforcement policy. It is considered that there should be a separation of a regulator with modern compliance powers from the role of conciliation of complaints from an independent body.

Option 2:

Recreate the QHRC as a regulator to focus on education, compliance, and enforcement under the AD Act. All work related matters should automatically be referred to the QIRC for conciliation and arbitration under the AD Act and to QCAT for non-work related matters.

The QHRC could also undertake investigations into systemic issues of discrimination which could also result in further compliance powers, enforceable undertakings or prosecutions being entered into.

Under this model, the QHRC Commissioner should have a statutory right of intervention in all QCAT and QIRC proceedings.

The QHRC Commissioner should also be able to act as the equivalent of a Director of Public Prosecutions (also similar to the WHS Prosecutor) to take actions under the AD Act for non compliance with the AD Act e.g., for new positive obligations and to bring on a matter of significant public interest before the relevant Tribunal.

Option 3:

Recreate the QHRC by splitting it into two bodies. The first is a new regulator to perform the functions outlined above in Option 2. The second is to create a stand-alone specialist tribunal to deal with both conciliation and the determination of all discrimination, harassment and victimisation complaints and thereby removing the determination function from QCAT and the QIRC. The regulator could also bring enforcement actions against bodies with a positive obligation before the specialist tribunal.

In addition, the QHRC Commissioner could also be given powers to initiate specific investigations into matters of significant public interest around discrimination, harassment, or victimisation as the head of the Tribunal by way of a public inquiry. For example, a significant public interest matter could relate to a matter such as 'Citipointe College', rather than await the outcome of the current complaints process which requires a complaint to be initiated by a person personally affected by the matter e.g., a school student.

## Funding and Resourcing

8.6 The QCU supports the creation of a new regulatory body without which it is near impossible to achieve an object of substantive equality. All options above or variations of will require the Government to provide significantly more funding and resourcing to support the jurisdiction.

## Two staged enforcement model

8.7 One of the key components of the original AD Act was that it included a two staged enforcement process being conciliation by the Anti Discrimination Commission and determination by the Anti Discrimination Tribunal where the matter was unable to be resolved through conciliation.

8.8 The Anti Discrimination Tribunal was later disbanded and matters requiring determination were referred to the Queensland Civil and Administrative Tribunal ('QCAT') and then in 2017 work-related matters were referred for determination to the Queensland Industrial Relations Commission ('QIRC'). Conciliation of complaints, including initial investigations

were maintained by the former Anti Discrimination Commission – now the Queensland Human Rights Commission.

8.9 The practical effect of these changes is that there is now essentially a four-stage process involved in dealing with a discrimination or harassment complaint. First an initial investigation by the QHRC followed by conciliation. Then if the matter is not resolved, a further conciliation is heard for work-related matters by the QIRC and then referral for determination if not resolved. Combined with the delay in hearings of matters, the processes are considered inefficient as well as serve to either dissuade people from pursuing a complaint to completion or in retraumatising the complainant through the multiple processes.

8.10 On this basis, the QCU recommends that there is substantive change both in terms of accessibility and processes. In terms of the options for creating a regulator outlined above, the most efficient and cost-effective way of doing this would appear to be leaving the education and compliance and enforcement functions with the QHRC and for work-related matters referring all complaints for both conciliation and hearing directly to the QIRC, including the QIRC Registry. In this way all applications can be made directly to the QIRC. Any complainant requiring assistance with outlining or preparing their complaint can still be managed by the QHRC by providing a supportive function.

8.11 The QCU does not support direct access to a tribunal within this context i.e., if all applications for a work-related discrimination or harassment matter was to be referred directly to the QIRC, similar to industrial matters currently, a Commissioner can in the first instance convene a conciliation conference and determine whether conciliation is appropriate and if required can move fairly quickly to a hearing stage.

8.12 Adopting a similar approach, the QHR Commissioner or head of the regulator can be given automatic standing and intervention rights before the QIRC and Industrial Court,[60] as well as have a specific right to bring a matter of significant public interest before the QIRC without the need for an individual party to progress the matter. For example, in a case such as Citipointe College, where it appeared that there was a direct breach of the AD Act, and the matter was of significant public interest.

[60] See IR Act s 533.

## Time Limits

8.13 Complainants are currently required to make a complaint with the QHRC within one year of the date of an alleged contravention of the AD Act,[61] or longer period if the Commissioner is satisfied the complainant has shown good cause,[62] provided the Commissioner decides to accept or reject a claim within 28 days of its lodgement.[63]

8.14 The Respect@Work Report noted that in the context of the six month restriction then contained under the SD Act for making a complaint about sexual harassment, that many complainants are not simply not ready to pursue a complaint while they are still employed, are unaware of their legal rights, are experiencing stress or other mental health issues as a result of a contravention, may still be pursuing an internal investigation, or are dissuaded from making a complaint by the very knowledge their complaint may be rejected at any time.[64]

8.15 The AHRC agreed that the then 6-month time limit was insufficient but also noted concerns at significantly extending the timeframe, ending with recommending the timeframe be extended to two years to address the many complex reasons for delays in bringing a sexual harassment complaint.[65]

8.16 The Respect@Work Amendment Bill 2021 extended the timeframe for a period of 2 years for complaints involving a contravention of the *Sex Discrimination Act 1994* (Cth).[66]

8.17 The QCU notes that many of the same reasons also exist for why people delay bringing a discrimination or victimisation complaint, and therefore recommends that a complaint about a contravention of the AD Act should be made within 2 years of the alleged contravention. This should be accompanied by a discretion for the relevant tribunal (noting the recommended changes to separate the regulator from the tribunal conciliation and hearing processes outlined above), to have a general discretion to accept an out of time complaint after giving fair and balanced consideration to the reasonableness of accepting the late complaint.

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[61] AD Act s 138(1).
[62] Ibid s 138(2).
[63] Ibid s 141.
[64] Respect@Work 495.
[65] Ibid 495.
[66] Amending section 46PH(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth).

## Organisation Complaints

8.18 Section 138(1) of the AD Act provides that a complaint may be made by a person, an agent of the person, or a person authorised by the Commissioner to act on behalf of a person alleging a contravention of the Act.

8.19 In contrast section 46P(2)(c) of the AHRC Act permits a person or trade union on behalf of one or more other persons to make a complaint to the AHRC for a contravention of the relevant Commonwealth discrimination laws.

8.20 Recommendation 23 of Respect@Work was to also amend the AHRC Act to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the AHRC Act that allow unions and other representative groups to bring a representative complaint to the Commission.

8.21 Unions play a recognised role under relevant industrial laws in representing the individual and collective interests of their membership within workplaces and organisations. Applications for a proceeding about an industrial instrument under these laws can be made by a registered organisation, and for individual disputes by a union or agent. However, special leave is required for a lawyer or agent to appear before the Fair Work Commission in a proceeding and only lawyers or paid agents who are paid employees of unions that are registered under the *Fair Work (Registered Organisations) Act* are able to appear without the need to seek leave of the Fair Work Commission.[67]

8.22 Similarly to industrial law, unions play a central role in relation to discrimination and harassment matters in work and work-related areas.

8.23 Therefore, the QCU supports amendments to the AD Act to recognise that:

1) registered unions can make an application on behalf of a member or members for an alleged contravention under the Act for conciliation and hearing purposes;
2) registered unions can make an application to the tribunal in relation to the proposed new positive obligation for an employer to put in place measures to prevent discrimination, harassment and victimisation; and
3) registered unions can make an application to the tribunal in relation in relation to the proposed new requirements for employers to make reasonable adjustments and reasonable accommodations.

[67] FW Act s 596.

## 9. Grounds of Discrimination – Other Attributes

9.1 Discussion Questions 25-39 of the QHRC Discussion Paper raises a number of other existing and potentially new protected attributes.

9.2 The QCU is supportive of updating the existing protected attributes to reflect contemporary laws and approaches.

END SUBMISSION >>>