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Scott McDougall
Commissioner
Queensland Human Rights Commission
Level 20, 53 Albert Street
Brisbane QLD 4000

25 February 2022

Dear Commissioner McDougall,

Re: Review of Queensland's Anti-Discrimination Act

Thank you for the opportunity to meet last year to discuss the review with yourself and members of the review team. It was a very useful discussion. Please find to follow my submission to your inquiry.

Australian anti-discrimination laws have historically focused on addressing an individual instance of discrimination rather than targeting wider, systemic discrimination or tackling inequality. It is important to ensure that an individual can pursue a discrimination claim, and this submission considers how this could be done more effectively. However, the review is also an opportunity for modernising Queensland's anti-discrimination law by re-orientating it towards tackling discrimination proactively and removing the overall burden of addressing discrimination from the individual.

In its current form, the *Anti-Discrimination Act 1991* (Qld) ('ADAQ') does not contain the tools necessary for effectively eliminating discrimination, particularly systemic discrimination, or promoting equality of opportunity. The law could also be aimed at achieving substantive equality which would benefit both the individual and the community more broadly.

In writing this submission, I have drawn upon the empirical and doctrinal research I have completed on anti-discrimination laws over the past fifteen years, in particular a research project I completed about the effectiveness of the *Equal Opportunity Act 2010* (Vic) ('EOAV') which examined the innovative provisions in the Act including the definitions of discrimination, the enforcement mechanisms and the s 15 duty.

1. Defining Discrimination

The concepts of direct and indirect discrimination are difficult for both lawyers and non-lawyers to understand. This is not helped by the limited body of case law that exists.

The EOAV uses the 'unfavourable treatment' test in order to depart from the 'comparator' requirement due to the difficulties this concept has created. The tribunal has consistently interpreted s 8 of the EOAV as not requiring a comparator.[1] The lawyers I interviewed in Victoria were very supportive of the new definition and said it was a positive development for the law.[2] They have found that it is easier to explain the concept of direct discrimination to clients. Staff at the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') have also found it a simpler concept to explain and easier to provide information to potential complainants and respondents. If a claim is litigated, the focus is on the treatment itself, not on complexities created by legislative terminology.

Indirect discrimination occurs when a respondent imposes a requirement, condition or practice which is neutral on its face but has a disadvantageous effect on the complainant because of an attribute and it is not reasonable. The ADAQ requires the complainant to show that a 'higher proportion of people' without the attribute comply or are able to comply. Determining this can be a complex exercise for the complainant and presents an additional and unnecessary hurdle for them to clear, particularly for complainants without legal representation or a lawyer who is not experienced in discrimination law. Because of its complexity, the proportionality requirement has been removed in the ACT, Tasmania and Victorian legislation and from the federal Acts.

The EOAV contains a much more workable definition of indirect discrimination because it focuses on the effect of the disadvantageous effect, and avoids complex legal tests that are difficult for complainants to establish and often for courts to apply and understand. It focuses on the impact and whether or not the requirement, condition or practice is reasonable.

[1] Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, from 481.
[2] Ibid from 483.

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The case law about 'reasonableness' is not particularly clear and so the EOAV contains guidance about what constitutes reasonableness (s 9(3)). This provisions has proved to be useful for lawyers, their clients, the VEOHRC and the tribunal.[3]

Moreover, under s 9(2) the respondent is required to show reasonableness, which recognises that the party imposing the requirement, condition or practice is the party best placed to provide the justification for it. Indeed this is what had occurred in practice anyway.[4]

Recommendations

- The 'unfavourable treatment' approach should be adopted in the definition of direct discrimination.
- The proportionality requirement should be removed from the definition of indirect discrimination.
- The respondent should be required to prove reasonableness in an indirect discrimination claim.

2. Reasonable Adjustments

In its current form, the ADAQ responds to discrimination that has already occurred, rather than requiring organisations to identify policies and practices that impact on equality and do something to address them.[5]

The EOAV contains mechanisms which move beyond this approach, such as reasonable adjustments. The obligation to make reasonable adjustments for a person with a disability is a mechanism which requires, for example, an employer to change working arrangements so that an employee or potential employee with a disability can perform the role (see EOAV, s 20). Failure to do so amounts to discrimination (see eg EOAV, s 7(1)(b)). This shifts the focus towards being proactive – requiring the employer (or the service provide) to accommodate the person's disability from the outset, rather than having to resolve the situation once discrimination has taken place and the complainant has found themselves unable to perform the job. This approach addresses the situation much earlier and can lead to wider change in a workplace or organisation which may well benefit other similarly situated individuals.

Under the EOAV, employers are also required to reasonably accommodate an employee's family or caring responsibilities (s 19). Again, this recognises that modifications to working arrangements are needed so that workers with family or caring responsibilities (which are predominantly women) will be able to work on an equal basis to those without. As well as operating proactively, these mechanisms remove the burden from the individual complainant.

Recommendations

- The ADAQ should contain a positive obligation which requires employers and service providers (eg in education and accommodation) to make reasonable adjustments for a person with a disability and to state that the failure to do so amounts to discrimination.
- The ADAQ should require employers to reasonably accommodate an employee's family or caring responsibilities and to state that the failure to do so amounts to discrimination.
- The QHRC should be supported to develop educative materials about the operation of each of these new mechanisms.

3. Proving Discrimination

One of the reasons a complainant may be advised to settle their claim is because it is difficult to prove discrimination because (in most instances) the onus of proof rests on the complainant, yet the respondent controls the evidence and is better placed to explain the reasons for their decision. I have attached a journal article[6] in which I explore the problems with proving discrimination in detail and suggest ways of improving this (it pre-dates the *Fair Work Act 2009* (Cth) so it does not consider the shifting onus of proof in s 361 of that Act).

Recommendations

- The evidentiary burden of proof should shift to the respondent once the complainant establishes a prima facie case of direct or indirect discrimination.

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[3] See further ibid from 485.
[4] Ibid.
[5] See discussed in more detail in Dominique Allen, '"Thou Shalt Not Discriminate" Moving from a Negative Prohibition to Imposing a Positive Obligation on Business to Tackle Discrimination' (2020) 26(1) *Australian Journal of Human Rights* 110.
[6] Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579.

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- The respondent should be required to prove reasonableness in an indirect discrimination claim.

4. The Act's Objects Clause

As part of reorientating Victoria's anti-discrimination laws towards tackling systemic discrimination and promoting substantive equality, a new objects clause was included. The objects clause in s 3 of the EOAV recognises the disadvantage discrimination causes, that equal or same treatment can lead to unequal outcomes, and that it is necessary to use positive measures to achieve substantive equality (s 3(d)). The Victorian courts and tribunals have used the objects clause to interpret the Act beneficially. For example, in *Owners Corporation OC1-POS539033E v Black* (2018) 56 VR 1, Richards J said:

> *"it was well established before the enactment of the EO Act that equal opportunity statutes are remedial legislation that are to be given a beneficial, liberal interpretation.45 While this is not a licence to strain the legislative language or to disregard the balance struck between competing interests,46 the EO Act should generally be interpreted to give the widest possible effect to provisions that prohibit discrimination and promote equality. Correspondingly, courts should be slow to read down general provisions in the EO Act by implication, in the absence of express words of limitation."*[7]

In the *Black* case the Court said that the new objects clause was "emphatic" about the Act's purpose and there was "little if any room" to read it down. Taking this into account, the Court found that the prohibition of discrimination in the provision of services and the obligation imposed on a service provider to make reasonable adjustments for a person with a disability applied to an owner's corporation in the context of common property.[8]

Recommendations

- An objects clause should be introduced into the ADAQ which includes the objectives noted in the discussion paper, namely eliminating discrimination, sexual harassment, and other objectionable conduct to the greatest extent possible; further promoting and protecting the right to equality set out in the *Human Rights Act* 2019 (Qld); encouraging the identification and elimination of systemic causes of discrimination; recognising the cumulative effect of discrimination based on a combination of attributes; promoting and facilitating the progressive realisation of equality, as far as reasonably practicable, and progressing the aim of substantive equality.
- The objects clause should include that in order to achieve substantive equality it may be necessary to take positive measures such as reasonable accommodation and special measures.
- If the QHRC's functions are expanded, the Act's objectives should make reference to this.
- If the ADAQ is re-orientated towards promoting equality, the Act should be renamed '*The Equality Act*'.

5. Special Measures

To move beyond the individualised complaints-based model of addressing discrimination, the law needs to contain mechanisms which encourage employers and goods and service providers to comply from the outset, rather than once a person has experienced discrimination, and to identify policies and practices that contribute to inequality. Simply put, the law needs to be positive and proactive.

Special measures have long been used as a means of addressing past disadvantage by taking an attribute into account to promote equality. For example, an employer might attempt to recruit more women in an historically male-dominated environment or an organisation which has not employed many Indigenous people might advertise for Indigenous applicants. Special measures are discriminatory in the sense that they take an attribute into account and so they are often regarded as an exception to the non-discrimination principle. This is how they are framed in the ADAQ. But if the purpose of a special measure is to redress historic inequality, then they should be regarded as a means of achieving equality for members of defined groups and organisations should be encouraged to use them for that purpose. To do this the legislation needs to make the purpose of special measures clear.

The EOAV clearly articulates that special measures must be undertaken in good faith for achieving a defined purpose; be reasonably likely to achieve and be a proportionate means of achieving that purpose; and be justified because the members of the group need advancement or assistance (s 12).

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[7] [57].
[8] [61]-[63].

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Recommendations

- The special measures provisions should be reframed so that they are not considered as an exception to the principle of non-discrimination but rather as a way of achieving substantive equality.

6. Positive Duties

Positive duties are another mechanism of promoting equality from the outset. A positive duty represents a shift in thinking. Although organisations should be taking action to detect and address discrimination at the outset to avoid being vicariously liable, many do not. A positive duty requires them to do so and to consider the impact of policies and practices on equality much earlier on.

The Victorian government attempted to include a positive duty in the EOAV. Duty holders are required to take "reasonable and proportionate measures to eliminate… discrimination, sexual harassment or victimisation as far as possible" (s 15). I interviewed lawyers and VEOHRC staff about the impact of this provision and my research showed that it is being used by the VEOHRC as an educative tool and to 'set the tone' for the Act (which takes a substantive approach to equality) including in conciliation conferences to suggest that respondents bear an obligation to promote equality. It is very valuable in this regard, as a symbolic statement of how the law is intended to operate. However, s 15 is not enforceable and that is a failing.[9]

The Victorian experience shows the potential of a positive duty but it needs to be accompanied by the means of enforcing it otherwise the QHRC will not be able to use it for anything other than education.[10] This may involve training and education to encourage voluntary compliance, conducting investigations into compliance and, ultimately, imposing sanctions for failing to comply.

Recommendations

- The ADAQ should contain a positive duty to promote equality and it should apply across all attributes and areas covered by the Act and to anyone who has an obligation under the Act.
- The positive duty should be enforceable by the QHRC through a range of escalating powers including working with organisations to encourage voluntary compliance, investigating allegations of non-compliance and court imposed sanctions for failing to comply.
- The QHRC should be properly resourced to fulfil its additional functions in educating the community about the positive duty and so that it can effectively enforce compliance.

7. The Regulatory Approach

The legal framework for addressing discrimination relies on the individual who has been discriminated against for enforcement. To address discrimination effectively, the burden should not be borne by the individual alone; it is necessary to give the QHRC the power to enforce the law. I explore the utility of a statutory agency performing an enforcement function in detail in the attached articles. As I have noted above, if a positive duty is introduced, it will be necessary for the QHRC to be able to enforce it using the powers and approached discussed herein.

Giving the QHRC a role in enforcing the law would complement its current role in providing education and training. These are essential functions in any enhanced regulatory model – organisations need to be given the information they need to comply with their obligations and, ideally, they will do so voluntarily without the Commission needing to take any further action. To supplement is existing functions at this level, the Commission should be given the power to produce guidelines. While not enforceable by the tribunal, guidelines are intended to supplement the law by explaining obligations and outlining what organisations can do to comply.[11]

The QHRC's educative functions could be strengthened by giving it the ability to review an organisation's practices and policies to determine if they are compliant with the ADAQ (in a sense, conducting an audit) and working with organisations

[9] The enforcement mechanisms were removed before the Act came into force following a change of government: See further Dominique Allen, 'Unfinished Business – Victoria's New Equal Opportunity Act' (2011) 36(4) *Alternative Law Journal* 273.
[10] See further Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2) *Melbourne University Law Review* 459, from 494.
[11] See eg https://www.humanrights.vic.gov.au/for-organisations/guidelines/

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to develop action plans to meet their obligations under the Act, both of which the VEOHRC is empowered to do (ss 151, 152). The VEOHRC's extensive review of Victoria Police and its current review of Ambulance Victoria shows how effective this function can be in leading to broader change.[12] However, this work is resource intensive and so if the QHRC is given this power, it needs to be given adequate funding and/or be able to recoup the costs of doing this work, like the VEOHRC can (s 151(1A).

The VEOHRC's power to conduct an investigation has also proved to be a useful power. It can conduct an investigation into matters of a serious nature which affect a group and cannot be resolved effectively through an individual complaint in circumstances where there are reasonable grounds for suspecting that the EOAV has been contravened and the investigation would advance the Act's objectives (ss 127, 128). The VEOHRC has only conducted one investigation to date into the travel insurance industry, as you note in the discussion paper. As a result of this investigation, all of the insurers that participated in the investigation removed or took steps to remove the blanket mental health exclusions from their travel insurance policies. This was a significant consequence of the investigation but it is worth noting that the VEOHRC does not have the power to require them to do this; this action was voluntary. The power to conduct an investigation would be strengthened if the QHRC could reach enforceable undertakings with an organisation in the absence of voluntary compliance or – going further – issue a compliance notice or seek the imposition of sanctions, such as a fine, from the tribunal.

This type of enhanced enforcement model was what was originally envisaged for the VEOHRC when the EOAV was enacted and this may well provide a useful model for Queensland. Originally, if the VEOHRC found discrimination had occurred at the conclusion of an investigation, it could take no further action or enter into an agreement requiring the organisation to take action to comply. Depending on the severity of the alleged breach, the VEOHRC could accept enforceable undertakings or issue a compliance notice setting out action the organisation had to take. All of its actions were reviewable by the tribunal.

Recommendations

- The ADAQ should be re-orientated to give the QHRC a role in enforcing the law by investing it with an escalating range of regulatory and compliance powers starting with providing information and advice, through to developing guidelines and action plans, conducting audits/reviews of organisations, and conducting investigations into an industry or organisation.
- The QHRC should be invested with a range of powers to ensure compliance such as enforceable undertakings, action plans and seeking the imposition of sanctions by the tribunal.
- The QHRC should be adequately resourced to perform its additional enforcement functions and it should be permitted to recoup its costs in reviewing or auditing an organisation's policies and procedures to assess compliance.

8. Tribunal Decisions and Data about Discrimination

Discrimination claims and their resolution are privatised due the fact that most are settled via conciliation rather than a court determination, and confidentiality clauses are commonly included in settlement agreements.[13] The combination of these factors mean that there is gap in publicly available information about the type of discrimination that persists and how it is being resolved. Court decisions are used by lawyers to inform the advice that they provide their clients with and in settlement negotiations, and by the QHRC to educate the community. They are often also used in other jurisdictions and may influence the development of the law more broadly. Given that there are so few cases heard each year, it is imperative that the tribunals publish written, publicly available reasons for their decisions.

Very little is available publicly about the nature of discrimination, how it is being addressed, and the remedies negotiated at settlement. There is a strong need for the community to have access to more information, and to understand that discrimination still exists and what is being done to address it.

In general, equal opportunity agencies do not release very much information to the public about claims or their resolution (including in a de-identified form). It is commendable that the QHRC's most recent annual report includes extensive vignettes and case studies, and that it includes substantial information about tribunal decisions. QCAT does not publish

[12] See further Simone Cusack, 'The Equal Opportunity Act 2010 (Vic) Review Function: 'Soft' Regulation or an Effective Tool to Promote Transparency and Equality?' 37(2) (2021) *Law in Context* 132-144 (available at https://journals.latrobe.edu.au/index.php/law-in-context/article/view/159).

[13] Dominique Allen, Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne University Law Review* 385.

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the equivalent information and it releases very little data about discrimination claims in its annual report, nor does the QIRC. There is thus a significant information gap about the type of complaints the tribunals are receiving and how they are being dealt with. It is noted that collecting and sharing information requires resources and so it is essential that the QHRC and the tribunals are given funding to perform this important function.

Recommendations

- The QCAT and the QIRC should be required to publish written reasons for their decision.
- The QCAT, the QIRC and the QHRC should be given adequate resources to collect and publish rigorous de-identified data and case studies about the prevalence and nature of discrimination, and the outcomes negotiated when claims are settled.
- Greater data sharing should be encouraged between the three institutions.

I have attached five journal articles in which I explore many of these issues in more detail and report on my findings about the EOAV. I am happy to provide the inquiry with additional information should you require it.

Yours sincerely,

Dominique Allen

Attachments

1. Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579-605
2. Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2010) 36(3) *Monash University Law Review* 103-137
3. Dominique Allen, 'Barking and Biting – the Equal Opportunity Commission as an Enforcement Agency' (2016) 44(2) *Federal Law Review* 311-335
4. Dominique Allen, '"Thou Shalt Not Discriminate" Moving from a Negative Prohibition to Imposing a Positive Obligation on Business to Tackle Discrimination' (2020) 26(1) *Australian Journal of Human Rights* 110-123
5. Dominique Allen, 'An Evaluation of the Mechanisms Designed to Promote Substantive Equality in the *Equal Opportunity Act 2010* (Vic)' (2020) 44(2) *Melbourne University Law Review* 459-501

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