Community Legal Centres Queensland

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1 March 2022

Queensland Human Rights Commission (QHRC)
Anti-Discrimination Act Review Team

By email only: adareview@qhrc.qld.gov.au

Dear ADA Review Team,

Community Legal Centres Queensland – Submission on the Anti-Discrimination Act Review

Community Legal Centres Queensland (CLCQ) is the peak body representing 34 funded and unfunded community legal centres (CLCs) across Queensland. Our vision is for a fair and just Queensland. Our mission is to be a voice for the sector, to lead and support CLCs to deliver quality and accessible services to vulnerable and disadvantaged people, and bring about change. Our objectives are to work with Queensland CLCs to:

- Continually improve organisational sustainability and service quality
- Increase the accessibility, profile and resourcing of the sector
- Unite around common objectives to bring about change.

We welcome the opportunity to provide a submission on the QHRC's review of the *Anti-Discrimination Act 1991* (Qld). While we understand the QHRC published and is seeking responses to its November 2021 Discussion Paper, as a peak body, we do not provide direct legal services and are therefore not best placed to respond directly to the discussion questions therein. We anticipate that many of our member centres, who are working on the frontline with clients interacting with the ADA on a daily basis, will provide more detailed and targeted submissions.

Instead, our submission seeks to provide support for the *10 Point Plan for a Fairer Queensland* (the *10 Point Plan*), developed by legal advocates including representatives from our member centres: Caxton Legal Centre, Queensland Advocacy Inc, Townsville Community Law, LGBTI Legal Service, Prisoners Legal Service and Basic Rights Queensland, as well as legal academics from the University of Queensland.

In addition to supporting the *10 Point Plan* CLCQ have consulted with members of the First Nations Employee Network in order to ensure their voices are heard and elevated around the specific suggestion surrounding changes which may be appropriate for improved cultural safety from a First Nations perspective. These points **appear below** the *10 Point Plan* points.

The *10 Point Plan* is **attached** and the headline points are summarised below:

1. No more excuses for discriminating

There are many dated, discriminatory exemptions and excuses in anti-discrimination laws that are out of step with contemporary society and reinforce harmful social constructs, stereotypes

and stigmas. The best solution is to simply remove all the discriminatory exemptions that allow unfair treatment.

2. Expand who is protected

The list of people protected by anti-discrimination law in Queensland is out of date and does not deal well with intersectionality (when a person has a combination of attributes, such as an Indigenous woman). Firstly, the list of people who are protected needs expanding and greater flexibility to better match the way people live and interact, including:

- survivors of domestic and family violence and other forms of interpersonal violence
- people with diverse immigration status
- people with low socio-economic status or who are from disadvantaged social origin
- people with irrelevant criminal history or medical records
- people with diverse genetic characteristics
- people with low literacy and numeracy.

Secondly, the law should allow people to combine attributes to protect people experiencing intersectional disadvantage. Thirdly, people should only need to provide that the protected attribute was one of the reasons for the discrimination, rather than the main or only reason.

Lastly, the law needs to be future-proofed by making it possible for the courts to find that other protected attributes exist in the future, given they relate to systemic or historical disadvantage, similar to the protected attributes on the existing list.

3. Make it easier for people to access adjustments and flexibility

Sometimes true equality means people need to be treated differently or have access to special services to 'level the playing field'. The law about this is complicated and there are too many excuses for not adjusting to accommodate difference.

A fairer balance is needed, and we need to have the advantages of inclusion and diversity written into the law. This would include positive statements to remind people that there are specific benefits to certain individuals and groups that they need to think about when accommodating people with protected attributes, well beyond the negative considerations of the direct cost. This reflects a human rights approach.

4. Remove the requirement to compare how people are treated

Treating someone badly because of their race, sex, disability, age, gender identity etc. should be prohibited outright. Currently it is necessary to compare how people are treated; this should be changed by removing the need to compare.

5. When unfair treatment happens, make respondents show it wasn't discrimination

Instead of making victims prove why they were mistreated, the badly-behaved party should have to explain themselves and show it wasn't discrimination, by partially reversing the onus of proof. Having a reverse onus of proof in Queensland law would mean that we would not need to rely so much on assumptions and instead hear real evidence about reasons.

6. Spell out the positive change we want to see in Queensland

The current law mostly deals with remedies for the harm caused by discrimination rather than the positive steps needed to make Queensland fairer. The law should set out who has duties to prevent discrimination and protect others from harm, and what those duties are.
Positive duties in Queensland should include a duty to:

- make reasonable adjustments for people with disabilities, older persons and others
- maintain a policy and provide training to prevent and stop sexual harassment in controllable environments such as schools and workplaces
- monitor and take down hateful and racist speech that is posted to social media and similar places.

7. People, especially children, need more time to complain

Currently discrimination complaints can only be made in the year following the discrimination occurring. This is not long enough, especially if there has been trauma, and for children who do not have parents or carers capable of stepping in. The time to complain should be extended to at least two years, and the time should not commence running for children until they turn 18.

8. People who experience the same discrimination should be able to work together

The current provisions for representative actions were intended to deliver systemic change but in 30 years have never done so. We need a best-practice class–action regime. Hiding settled outcomes behind confidentiality clauses should be discouraged.

9. An enforcement body to make sure anti-discrimination law is followed

At the moment people who have experienced discrimination have to bring their own case if they want things changed. We need an enforcement body that is a proactive, more powerful statutory body, such as the QHRC, that is resourced and empowered to conduct investigations, enforce breaches of the laws, make sure all parties comply with agreed obligations or decisions, and make more rulings and reports.

10. Have experts making decisions about discrimination cases

We need specialist decision makers deciding anti-discrimination cases, as we previously had in Queensland with the Anti-Discrimination Tribunal, or as a second option, a specialist division within the generalist QCAT and/or QIRC.

Generous contributions from a First Nations perspective provided by members of the CLCQ First Nations Employee Network

There were some clear themes emerging from discussions with the First Nations Employee Network when discussing meaningful reform within the Anti-Discrimination framework more broadly and specifically related to the *Discussion Paper*.

These themes included **preventative action; allyship; intersectional discrimination; truth-telling; cultural competency, representation and access to justice- specifically defining justice in a First Nations context.**

Preventative Action

It was clear when speaking to the group members that 100% had experienced discrimination at some point in their lives that was related to race in the first instance, and often accompanied by another protected attribute.
It was also clear that when these instances of discrimination were reported either to authorities or directly to the Queensland Human Rights Commission (QHRC) that any preventative action could not be taken. Any meaningful intervention could not be done prior to a formal complaint being made.
This places a huge burden on the victim of discrimination, who in First Nations communities is often a 3rd or 4th generation victim of systems abuse, discrimination, and oppression. There is a need for focus on preventative action plans and an ability for the QHRC to be able to step in with education and warnings prior to a complaint being made if it is safe to do so, and in a deidentified way. Early intervention and community education is the key to changing the hearts and minds of those partaking in discriminatory actions.
It is entirely inappropriate to rely on a complains-based model, reliant on a 'good victim'. Without preventative outcomes there is limited capacity to create meaningful systemic change.

Allyship

The focus on the concept of allyship across systems reform is ever increasing and applying a strong 'ally' lens will ensure changes being considered are able to be discussed in an open way. One example of allyship being applied to the discrimination setting is the suggestion of organisational response in place of an individual.
By allowing an organisation to make the submission in a case management role on behalf of the individual, with explicit permission and direct instructions from the client, it would potentially free up QHRC resources and front line organisational resources by decreasing the pressure on the client to be able to accurately relay information and limiting the risk of lack of communication and/or contact with the QHRC, particularly in remote communities where contact can be limited by technological and cultural factors.
This would come with a need for additional funding for those organisations and be reliant on their capacity and require specialist training for front line workers to ensure all instructions and communications with clients are done in a client centric- and trauma-informed way. Additionally, a cultural liaison may be used, this is discussed in more detail below.

Intersectional Discrimination

There is a demand for improved access to justice for victims of discrimination, particularly First Nations peoples, and those who suffer at the crossroads of intersectional disadvantage points/intersectionality.
Currently a First Nations person must choose only one protected attribute to file in a discrimination case, limiting the lived experience of those who suffer multiple forms of disadvantage through several protected attributes and does not acknowledge the compounding nature of discrimination.

To mitigate the invisibility of discrimination, we must allow honestly to flow through the system; particularly if this process is to be reformed into an empowering process for the victim.

Truth-Telling

Another important aspect of empowerment through the complaints process if the QHRC process is to be truly reformed is to use truth-telling as both a response process and to be integrated as part of the conciliation process.

It is critical that we introduce the historical context into cases where race is (one of) the protected attributes as seen currently in the Murri Court of Queensland, the Queensland Drug and Alcohol Court and outlined in the Bugmy decision in *Bugmy v The Queen* [2013] HCA 27.[1] This idea was also used in the class action brought against the State of Queensland in *Wotton v Queensland* [2016] FCA 1457.[2]

By allowing a process of truth-telling, it recognises the experiences of First Nations peoples who have suffered intersectional discrimination or repeated discrimination and allows that experience to inform the decisions made in conciliation.

It would provide valuable insight into the culture of broader systems abuse, rather than limiting the lived experience to a single incident related to a single protected attribute. It could also be revolutionary in exposing the intergenerational disadvantage, particularly where intersectionality is allowed into the process. If we are to expose and meaningfully address sstructurally embedded discrimination and systemic discrimination, it must be considerate of the pattern experience of First Nations people.

Cultural Competency, Representation and Access to Justice

Across the conversations with members of the FNEN, it was clear that on all fronts there is a need for improved cultural safety. This will require significant change from initial contact by victims, through the complaints process, and the need for introduction of a ‘check out’ process.

Many people do not want to make a complaint, or experience barriers to accessing the process due to the lack of cultural safety. This is true of the requirement of a written complaint; the impact on victims who are not adequately protected through the process; and the lack of follow-up support by the QHRC or any other organisation once the matter has been resolved.

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[1] *Bugmy v The Queen* [2013] HCA 27. The impact of Aboriginality was considered during sentencing and the High Court found that the fact that Aboriginal Australians “as a group are subject to social and economic disadvantage measured across a range of indices” says “nothing about a particular Aboriginal offender” but held that a background of social deprivation remains a relevant consideration for repeat offenders.

[2] *Wotton v Queensland* [2016] FCA 1457. Class action arising out of the police response to the riots following the death in custody of Mulrunji Doomadgee in 2004. Historical incidents of racial discrimination by police were allowed into evidence, after police were found to have been in breach of the *Racial Discrimination Act 1975* (Cth).

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This is particularly prevalent in rural and remote communities, where confidentiality can be a cause for concern and safety. We heard stories where the breach of victimisation clause was not enforced or followed up and was reliant on a further complaint by someone already being further victimised and potentially traumatised by the process and not afforded protection. Without allowances made fir the particular cultural context of First Nations peoples the QHRC is asking them to repeatedly, and knowingly put their holistic safety at risk.

It is recommended that the QHRC:

- Allow flexible engagement with the complaints process and move away from the requirement of a written complaint
- Introduce an optional cultural liaison officer role (team) to assist First Nations complainants
- Introduce a First Nations team to deal specifically with racial discrimination cases. The underlying understanding of racial discrimination is crucial in developing trust for First Nations victims looking to proceed.
- Introduce a tailored response for First Nations people including:
    - Check in and check out with follow up support provided regardless of the outcome
    - Trauma informed questioning techniques
    - Strengths based framework applied

Additionally, introducing a framework which allows victims to choose what support can look like through the complaints process is also critical. The concept of choice is important to Fist Nations people who have suffered generations of oppression where choice was often ripped away. This may involve resolutions such as a restorative justice approach if the victim feels that what is required is an opportunity to face their abuser and speak their truth.

It is clear that an outcome of ‘justice’ is not often afforded by the QHRC process, and that justice often comes from the courage to proceed with the complaint and to force accountability.

Thank you for the opportunity to provide our comments on the review of the *Anti-Discrimination Act 1991* (Qld). Please feel free to contact us should you require any further information.

Kind Regards,

Rosslyn Monro
Director