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| H:\QHRC-logo-rgb-for-digital-use.pngConsultation paper: Updating the Fair Work Act 2009 to provide stronger protections for workers against discrimination |

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Submission to Department of Employment and Workplace Relations

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# Summary

1. The Queensland Human Rights Commission (**QHRC**) supports updates to the *Fair Work Act 2009* (**FW Act**) to create better alignment and consistency between laws, to improve terminology and ensure coverage of people who experience discrimination because they have been subjected to domestic or family violence.
2. The QHRC’s support for updates to the FW Act aligns with its mandate to promote and protect human rights in Queensland, including the right to work free from discrimination.
3. In responding to the consultation paper, the QHRC has addressed the issues and questions that are of most relevance to its work.

## Recommendations

1. In response to the consultation questions, the QHRC recommends that:
	1. The FW Act should expressly prohibit indirect discrimination and should adopt the ‘disadvantage’ test.
	2. The FWA align its definition of disability with the *Disability Discrimination Act 1992* (Cth) (**DDA**), having regard to improvements as recommended in the QHRC’s report, *Building Belonging – Review of Queensland’s Anti-Discrimination Act 1991.*[[1]](#footnote-2)
	3. The FW Act’s inherent requirements exception should be subject to the requirement to make ‘reasonable adjustments’ to accommodate a person’s disability.
	4. The FW Act include an express provision for attribute extensions.
	5. The FW Act include ‘experiencing family or domestic violence’ as a protected attribute.
	6. The FW Act should prohibit discrimination on the basis of one or more attributes or because of the effect of a combination of attributes.

# Introduction

1. As the consultation paper notes, various civil frameworks prohibit discrimination in the workplace in Australia. The primary laws dealing with discrimination in employment and related areas are Commonwealth, State and Territory anti-discrimination laws.
2. The QHRC is a statutory authority established under the Queensland *Anti-Discrimination Act 1991* (**Queensland** **AD Act**)*.*
3. The QHRC has functions under the Queensland AD Act and the *Human Rights Act 2019* (**HR Act**)to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
4. The QHRC deals with complaints of discrimination, sexual harassment vilification, and other objectionable conduct under the Queensland AD Act*,* reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the HR Act*.*
5. The QHRC has over three decades of experience working within the Queensland legislative framework and access to 14 years of complaints data.
6. Like other jurisdictions, the Queensland AD Actoutlines the characteristics that are protected from discrimination and the areas in which discrimination is unlawful - for example, at work or school - and the other types of behaviours made unlawful by the Act, including sexual harassment and vilification.
7. Discrimination complaints can only be accepted if the discrimination is based on one of 16 attributes protected under the Act.
8. The attribute of impairment is usually the most common subject in accepted complaints.[[2]](#footnote-3) For example, for the 2021-22 financial year, 60 per cent of accepted complaints were about impairment discrimination.
9. The Queensland AD Act prescribed 9 areas of public life. Most complaints to the QHRC about impairment discrimination are in the area of work.[[3]](#footnote-4) In fact, across all attributes, workplace fairness has historically been the most significant area of complaint.[[4]](#footnote-5)

# Recent review of Anti-Discrimination Act

1. Following extensive consultation and research, the QHRC recently published its report *Building Belonging* *Report – Review of Queensland’s Anti-Discrimination Act 1991* (*Building Belonging)*.[[5]](#footnote-6)
2. The QHRC recommended five key reforms:
* **Eliminate discrimination**. Introduce a new Act to protect and promote the right to equality and eliminate discrimination and sexual harassment to the greatest extent possible.
* **Refine the key concepts**. Ensure the legal tests for discrimination respond effectively to the problems they are seeking to address and are easy to understand and apply.
* **Shift the focus to prevention**. Promote compliance by shifting the focus to preventing discrimination and sexual harassment before it happens.
* **Improve the complaints system**. Reorientate the dispute resolution process to ensure it is flexible and efficient, and to enhance access to justice.
* **Increase protection.** Ensure all people who require protection under the Act are included, and that coverage of the law extends to all contexts and settings where unfair discrimination occurs, subject to reasonable exceptions.
1. During the Review, the QHRC was repeatedly told that people and communities continue to experience discrimination in Queensland, even where the conduct is unlawful.
2. The impact of discrimination and sexual harassment can be profound and devastating at an individual and societal level. It can damage psychological health and wellbeing, create social exclusion, and have financial and economic consequences for the person themselves as well as for organisations, businesses, and industry.
3. The QHRC also heard that discrimination can be deeper, wider, and more structurally embedded than one-off individual experiences. However, systemic discrimination is more difficult to identify, report and prove.
4. Through consultations and submissions, the QHRC identified a complex relationship between ongoing or perpetual discrimination and social and economic disadvantage.
5. The QHRC considered recent inquiries and reforms of federal discrimination law, and the terms of reference required the QHRC to consider the implementation of relevant recommendations from the Respect@Work report.
6. Feedback received by the QHRC during the *Building Belonging* review reflect the conclusions in the consultation paper, that the array of Commonwealth, state and territory laws generally overlap and can apply in slightly different ways. This results in a complex and fragmented scheme that is confusing and difficult for both employers and employees to understand and navigate.
7. During the *Building Belonging* review, the QHRC was often told that the current law is too complex and can be hard to understand and apply, particularly when there are differences between the federal and state law. The difficulties are magnified for under-resourced small business owners, who already feel the weight of having to comply with other industrial and work health and safety laws, as well as running their business. As far as possible, the recommendations of *Building Belonging* aim to minimise inconsistency between state and federal laws.
8. Most duty holders want to ‘do the right thing’ and actively support the elimination of discrimination, but don’t always know what they are required to do or not do. *Building Belonging* found that further mechanisms to support and guide organisations in their obligations are required to ensure that preventing and responding to discrimination is a shared responsibility, and becomes ‘everyone’s business’.
9. Other findings and recommendations from *Building Belonging* are discussed in relation to specific questions posed in the consultation paper.

# Q1: Indirect discrimination

1. The consultation paper indicates that employers may be uncertain about the obligations under section 351 of the FW Act, despite case law confirming that it includes indirect discrimination.
2. To ensure consistency between state and federal laws and eliminate confusion, the QHRC suggests that the FW Act should have separate provisions for direct and indirect discrimination. These provisions should follow separate legal tests, as recommended in *Building Belonging*.[[6]](#footnote-7)
3. While the consultation paper does not request input on the legal definition for indirect discrimination, the QHRC recommends that the Federal government should carefully consider its framing. The QHRC cautions against embedding overly complex and impractical technicalities that create barriers to justice for disadvantaged groups, as seen in some state and federal indirect discrimination acts. [[7]](#footnote-8)
4. Based on its evaluation of options in Australian and international jurisdictions, the QHRC recommends the use of the 'disadvantage test' for indirect discrimination, which has variations in federal and state legislation.[[8]](#footnote-9) The QHRC suggests retaining the objective element of reasonableness as a critical factor for ensuring fairness and balance in assessing indirect discrimination. However, the non-exhaustive list of factors to determine reasonableness should be expansive and contemporary.
5. In *Building Belonging*, the QHRC recommended that:

The definition of indirect discrimination should include the following aspects:

* a person imposes a condition, requirement, or practice
* which has or is likely to have the effect of disadvantaging the other person
* because the person has one or more protected attributes, or because of the effect of a combination of attributes, and
* the condition, requirement, or practice is not reasonable.

The Act should incorporate a non-exhaustive list of factors to determine reasonableness based on the Equal Opportunity Act 2010 (Vic).[[9]](#footnote-10)

# Q2: Meaning of disability

1. The consultation paper questions whether the *Fair Work Act 2009* should be aligned with the DDA and include a definition of ‘disability’?
2. There is value in having alignment with definitions of disability, to avoid incorrect choices of legal forum, improved public understanding on the scope of disability discrimination, and support the growth of jurisprudence. Further, duty holders must already comply with obligations imposed under the DDA and therefore alignment of these definitions will reduce complexity and assist to improve compliance.
3. The Queensland Government has accepted in principle recommendations in *Building Belonging* that the definition of disability be aligned with the federal definition, but removing references to outdated or inappropriate language such as ‘disfigurement’, ‘malnutrition’ or ‘malfunction’, and clarifying that disability is intended to cover people with addiction.[[10]](#footnote-11) The DDA definition of disability includes disability that presently exists, previously existed but no longer exists, may exist in the future (for example, because of a genetic predisposition to that disability) or is imputed to a person. To avoid doubt, disability also includes behaviour that is a symptom or manifestation of the disability.[[11]](#footnote-12)
4. *Building Belonging* also noted the importance of continued public guidance and education regarding the scope of the disability attribute and who it protects.[[12]](#footnote-13)

# Q3: Requirement to consider reasonable adjustments

1. It is the QHRC’s view that the FW Act’s inherent requirements exception should be subject to the requirement to make ‘reasonable adjustments’ to accommodate a person’s disability. As pointed out in the consultation paper, this is already a common requirement under workers compensation laws and best supports the achievement of substantive equality and the protection of human rights for people with disability.
2. Both Victoria and Northern Territory anti-discrimination legislation create a standalone positive duty to make reasonable adjustments. For example, in Victoria, it is an exception to disability discrimination in employment if the person requires reasonable adjustments to perform the genuine and reasonable requirements of employment, the employer complies with their obligations to make reasonable adjustments, but the adjustments are either not reasonable, or the person is unable to perform the genuine and reasonable requirements of the employment even after the adjustments are made.[[13]](#footnote-14) The legislation sets out factors for assessing whether an adjustment is reasonable, such as the nature of the disability, the nature of the adjustment, the financial circumstances of the employer and the effect on the workplace in making the adjustment.[[14]](#footnote-15)
3. In contrast, the DDA incorporates the requirement to make reasonable adjustments in its definition of direct discrimination. Difficulties in applying this provision have led to the Australian Human Rights Commission recommending that the Australian Government amend the DDA to create a new standalone positive duty.[[15]](#footnote-16) Under the DDA, an adjustment is reasonable unless it imposes an ‘unjustifiable hardship’, which takes into account factors similar to the assessment of reasonableness under Victorian legislation.[[16]](#footnote-17)
4. Under current Queensland anti-discrimination legislation, it is an exception to workplace discrimination to impose genuine occupational requirements. This allows employers to advertise and have positions that can only be filled by a person with a particular attribute, for example, only employing women for a position involving body searches of women.[[17]](#footnote-18) The obligation to make reasonable adjustments for people with disability can be found:
	1. implicit in the definition of ‘indirect discrimination‘;[[18]](#footnote-19)
	2. in the exception to workplace disability discrimination where the employee would require special services or facilities which would impose an unjustifiable hardship on the employer;[[19]](#footnote-20) and
	3. in the exception to workplace disability discrimination if the circumstances of the disability would impose unjustifiable hardship on the employer.[[20]](#footnote-21)
5. In *Building Belonging*, the QHRC recommended that ‘unjustifiable hardship’ exceptions be replaced with a positive, stand alone duty to make reasonable accommodation for a person with disability in all areas, including employment. A non-exhaustive list of criteria for assessing whether an accommodation is reasonable should be included in the Act.[[21]](#footnote-22) Any assessment of whether a person can perform the inherent requirements or genuine occupational requirements of a role should be subject to such a duty.

# Q4: Attribute extension provisions

1. The consultation paper notes that most anti-discrimination laws clarify that protection extends to characteristics that people who have a protected attribute (such as race, sex, age or disability) generally have or are generally assumed to have. This includes having attributes (or characteristics of the attribute) in the past, present, or future. For example, these provisions clarify that it is unlawful to discriminate against a woman because she may become pregnant in the future. These clarifications are often referred to as attribute extensions.
2. Section 8 of the Queensland AD Act states:

Discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of—

(a) a characteristic that a person with any of the attributes generally has; or

(b) a characteristic that is often imputed to a person with any of the attributes; or

(c) an attribute that a person is presumed to have, or to have had at any time, by the person discriminating; or

(d) an attribute that a person had, even if the person did not have it at the time of the discrimination.

1. While not explicitly considered by the QHRC in its *Building Belonging* review, the QHRC has not identified any reason why the approach currently taken in the Queensland AD Act in this respect should be changed.
2. The QHRC agrees with AHRC, that discrimination frequently occurs because of concerns about characteristics which members of a group either often have or have attributed to them, and that without provision for attribute extensions the definition of direct discrimination can have a much-reduced effect.
3. For example, section 8 was crucial to the Queensland Court of Appeal’s decision in *Woodforth v State of Queensland*.[[22]](#footnote-23) That case concerned a woman who relied on Auslan to communicate because of a hearing impairment, claiming she was subjected to impairment discrimination in her dealings with police, because they failed to provide an Auslan interpreter and failed to investigate her complaints in a timely manner. The effect of section 8 in combination with section 10 (meaning of direct discrimination), was to proscribe discrimination on the basis of the woman's ability to communicate by speech. That proscription would be ineffective if the characteristic of the impairment was also treated as a circumstance in the comparison for the purpose of section 10.
4. The QHRC therefore supports the Fair Work Act including an express provision for attribute extensions.

# Q10: Domestic and family violence attribute

1. The QHRC recommends that the attribute of ‘experiencing family or domestic violence’ be included as a protected attribute under the FW Act.
2. In recent years, governments at all levels have prioritised addressing family violence, implementing significant policy, law reform and funding measures to tackle this pervasive issue. [[23]](#footnote-24) The complexity of domestic and family violence requires a multifaceted approach, with a range of strategies needed to address the challenges faced by our society. [[24]](#footnote-25)
3. Individuals who experience family and domestic violence are a vulnerable social group that have suffered marginalisation. This group can be seen as comparable to those currently protected under the FW Act*.* Whilst the current protected attributes provide some protection to victims of domestic and family violence,[[25]](#footnote-26) these attributes will not protect all persons who are experiencing domestic and family violence.[[26]](#footnote-27)
4. In *Building Belonging,* the QHRC examined whether the experience of family and domestic violence should be added as a prohibited ground of discrimination under the Queensland AD Act. Following extensive consultation, the QHRC found that:-[[27]](#footnote-28)
	1. People who have experienced domestic or family violence are subject to unfair treatment in areas that are protected under the Queensland AD Act, including work and accommodation; and
	2. A gap in protection exists for people who have experienced domestic and family violence and the attribute was of a comparable nature to those already protected under the Queensland AD Act.
5. The QHRC recommended adding ‘subjection to domestic and family violence’ as a new attribute under the Queensland AD Act, and the Queensland Government has expressed support for this recommendation in principle.
6. Domestic or family violence can have significant impacts on a person's ability to work and maintain employment. It is important that the FW Act recognises and provides protections for those who have experienced domestic or family violence to prevent discrimination in the workplace. This includes provisions for leave entitlements, flexible working arrangements, and other reasonable adjustments to support employees who have experienced domestic or family violence.
7. Domestic and family violence affects all people, but women are disproportionately impacted. International human rights law recognises gender-based violence, including domestic and family violence, as a form of discrimination that impedes women’s ability to enjoy equal rights and freedoms. [[28]](#footnote-29) Employment protections can help address this inequality and ensure that people experiencing domestic violence aren’t marginalised further.

# Q11: Combined grounds discrimination

1. The consultation paper recognises that discrimination can arise because of a person’s intersecting attributes. This issue was dealt with in detail in the *Building Belonging* report after substantial stakeholder feedback that the lack of recognition of intersectional or combined grounds discrimination has reduced the effectiveness of the current Queensland AD Act.[[29]](#footnote-30)
2. QHRC has recommended that combined grounds discrimination should be included in discrimination legislation because:
* recognition of combined grounds discrimination would better reflect the reality of people’s experiences, which are different for people who experience discrimination because of multiple, rather than a single attribute.
* people who have experienced combined grounds discrimination can find it more difficult to prove discrimination, which can put them at a disadvantage when bringing a complaint.
* changing the law to explicitly recognise discrimination on combined grounds would ensure that people with multiple attributes know they are protected by the law and close a gap in protection.
1. The QHRC recommends an intersectional approach in the FW Act to capture the diversity of experiences with combined grounds discrimination, as reflected in Canadian legislation. The QHRC suggests that the direct and indirect discrimination provisions contain language that recognises and includes discrimination based on the combination of attributes, such as 'one or more attributes or because of the effect of a combination of attributes.'’[[30]](#footnote-31)

# Conclusion

1. Thank you for the opportunity to comment on potential updates to the *Fair Work Act 2009*.
1. Queensland Human Rights Commission, *Building Belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022). [↑](#footnote-ref-2)
2. In *Building Belonging,* the QHRC recommended the attribute ‘impairment’ should be replaced with ‘disability’. [↑](#footnote-ref-3)
3. In 2021-22, the largest number (100) were in relation to goods and services, a reflection of the high numbers of complaints lodged from people denied access to goods and services because they were unable to wear a face mask. This trend is unlikely to continue. [↑](#footnote-ref-4)
4. In 2021-22, 40 per cent of accepted discrimination complaints area in the workplace or when seeking work. This was a smaller percentage than usual, again due to the short-term trend of complaints about face masks. For example, in 2020-21, nearly half (48.8%) of accepted discrimination complaints arose in the workplace or when seeking work. [↑](#footnote-ref-5)
5. Queensland Human Rights Commission, *Building Belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022). [↑](#footnote-ref-6)
6. Queensland Human Rights Commission, *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022), 86 – 88. [↑](#footnote-ref-7)
7. Queensland Human Rights Commission, *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022), 97. [↑](#footnote-ref-8)
8. *Equal Opportunity Act 2010* (Vic), *Discrimination Act 1991* (ACT), *Age Discrimination Act 2004* (Cth) and *Sex Discrimination Act 1984* (Cth) all contain variations of the ‘disadvantage’ approach, but the QHRC preferred the ACT approach overall. [↑](#footnote-ref-9)
9. Queensland Human Rights Commission, *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022), 110. [↑](#footnote-ref-10)
10. Queensland Human Rights Commission, *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022), 272. [↑](#footnote-ref-11)
11. *Disability Discrimination Act 1992* (Cth) s 4(1) (definition of ‘disability’). [↑](#footnote-ref-12)
12. Queensland Human Rights Commission, *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022), 263, 272. [↑](#footnote-ref-13)
13. *Equal Opportunity Act 2010* (Vic) s 23. [↑](#footnote-ref-14)
14. *Equal Opportunity Act 2010* (Vic) s 20. [↑](#footnote-ref-15)
15. *Disability Discrimination Act 1992* (Cth) s 5(2). See *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128; Australian Human Rights Commission, *Information concerning Australia’s compliance with the Convention on the Rights of Persons with Disabilities,* Submission to the UN Committee on the Rights of Persons with Disabilities (25 July 2019). [↑](#footnote-ref-16)
16. *Disability Discrimination Act 1992* (Cth) ss 4(1) (definition of ’reasonable adjustment’), 5(2), 11. [↑](#footnote-ref-17)
17. *Anti-Discrimination Act 1991* (Qld) s 25. [↑](#footnote-ref-18)
18. Indirect discrimination occurs if a term is imposed, which a person cannot comply with because of their attribute, and the term is not reasonable, see: *Anti-Discrimination Act 2019* (Qld) s 11. [↑](#footnote-ref-19)
19. *Anti-Discrimination Act 1991* (Qld) s 35. [↑](#footnote-ref-20)
20. *Anti-Discrimination Act 1991* (Qld) s 36. [↑](#footnote-ref-21)
21. Queensland Human Rights Commission, *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022), 129, recommendations 5.1 - 5.2. [↑](#footnote-ref-22)
22. [2018] 1 Qd R 289; [2017] QCA 100 [↑](#footnote-ref-23)
23. The Justice Project final report, Part 1 (August 2018), People who Experience Family Violence, 15. [↑](#footnote-ref-24)
24. Not Now, Not Ever: Putting an end to domestic and family violence in Queensland, Final report, Special Taskforce on Domestic and Family Violence in Queensland (2015) 11. [↑](#footnote-ref-25)
25. For example; physical or mental disabilities and family or carer responsibilities are both protected attributes. [↑](#footnote-ref-26)
26. See *Wright v Callvm Vacheron Wallace Bishop* [2018] QIRC 7. [↑](#footnote-ref-27)
27. Queensland Human Rights Commission, *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022), 333. [↑](#footnote-ref-28)
28. Committee on the Elimination of Discrimination against Women, General recommendation No 19, 11th session (1992) [1]. [↑](#footnote-ref-29)
29. Queensland Human Rights Commission, *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022), 103-110. [↑](#footnote-ref-30)
30. Queensland Human Rights Commission, *Building belonging – Review of Queensland’s Anti-Discrimination Act 1991* (July 2022), 110. [↑](#footnote-ref-31)