Queensland Law Society

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Office of the President

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Mr Scott McDougall
Queensland Human Rights Commissioner
City East Post Shop
PO Box 15565
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By email: [redacted]

Dear Commissioner

Review of Queensland's *Anti-Discrimination Act 1991*

Thank you for the opportunity to provide a written submission to the *Review of the Anti-Discrimination Act 1991* (**ADA**). The Queensland Law Society (**QLS**) appreciates the consultation we have had with the Review team, including the opportunity to participate in the Practitioners Roundtable.

QLS consultation process

In order to respond to this Review, we have convened a working group with members from a number of our legal policy committees, sought comments directly from our committees and also from membership more broadly.

We have also had the opportunity to review material published by our members who are part of other organisations.

We make the following comments in respect of the Discussion and Briefing papers. The below largely follows the format set out in the Briefing Paper.

Meaning of discrimination

The Discussion Paper outlines:

> "a gap between community expectations and understandings of what discrimination means including how it is felt and experienced, and the extent of the protections provided by the Act. Perhaps because inequality is hard to define, the tests for discrimination have become complex and challenging to interpret."

Our members generally agree with this statement.

While some members consider the current definitions and tests are satisfactory, many are of the view they are complex and artificial other than in the clearest of cases, and are particularly difficult to understand in cases involving indirect discrimination.

QLS considers these provisions of the ADA would benefit from reform. However, any revision to definitions and tests will need to provide sufficient legislative guidance to decision-makers. For example, whilst the "unfavourable treatment" test for direct discrimination and "unreasonable disadvantage" test for indirect discrimination may seem appropriate in the view of many of our members, regard should be had to how these terms have been dealt with by jurisdictions such as the ACT and Victoria.

Any changes to the tests will also need to consider the impacts of the changes on both parties to a claim to ensure there is appropriate balance.

Discussion question 1

We consider the current demarcation between direct and indirect discrimination to be unclear. Direct and indirect discrimination are part of continuum, and may occur together. We do not consider the two should be be mutually exclusive concepts.

QLS therefore supports a change, as proposed in the Discussion Paper, to ensure the interpretation reflects that discrimination and indirect discrimination are not mutually exclusive.

Discussion question 2

- **Should the test for direct discrimination remain unchanged, or should the 'unfavourable treatment' approach be adopted?**
- **Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach?**

The majority of our members who provided feedback on this point submit the test for direct discrimination should be changed. In the experience of these members, the requirement to prove you were treated less favourably than someone else, using a comparator, is difficult to establish and in many cases, can be artificial and unhelpful. These views are supported by some authority.[1]

We note there are some in the profession who see value in retaining the comparator test, believing it is fundamental to determining whether discrimination occurred because it allows the consideration of different treatment.

However, our members who deal with disability discrimination cases, for example, consider that the comparator test is problematic because different types of disability might not be well-understood, and that you are often comparing like with unlike. Relying on a fictitious person to compare with is often difficult to conceptualise and give advice on. Further, there are often debates between the parties about the comparator being used, which means the focus shifts away from how the complainant has been treated.

[1] See *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62 and

In light of these difficulties, QLS members generally consider alternative options for this test should be considered.

While there is some support for the use of the term 'unfavourable treatment', some of our members query whether this would continue to require some form of comparison.

Other members have found the test in section 9 of the *Race Discrimination Act 1975* (Cth) to be a better approach to the current ADA provision. There may also be benefit to considering section 8 of the *Equal Opportunity Act 2010* (Vic) (**Equal Opportunities Act**) which provides:

> "Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute."

The adverse actions provisions in the *Fair Work Act 2009* (Cth) (**FW Act**), see section 361, may provide some guidance on how a new provision could be set out.

Discussion question 3

- **Should the test for indirect discrimination remain unchanged, or should the 'disadvantage' approach be adopted?**
- **Alternatively, is there a different approach that should be adopted? If so, what are the benefits of that approach?**

Similar to the views expressed on 'direct discrimination', a number of our members agree the test for indirect discrimination should be changed so that it is simpler for parties making and responding to claims. These members say the drafting is problematic and complex and report a general confusion in the community, and even amongst practitioners, about how this form of discrimination is determined. Recently, there have been some queries has to how the test is applied to developing issues such as vaccine mandates.

Therefore, our members generally consider the changes proposed in the Briefing Paper will be beneficial to parties, particularly in claims involving specific groups such older people, as it will be easier to identify the disadvantage that has occurred to a cohort (e.g. where service provides online functions where a group does not have access to technology).

Some members have submitted a 'reasonableness' element should remain in any test and that perhaps different tests or definitions should apply differently to certain types of claims, for example, employment claims. It might be useful to consider the tests in the Victorian Equal Opportunities Act.

Discussion Question 4

- **Do you support a unified test for both direct and indirect discrimination? Why or why not?**

Some QLS members consider a unified test would simplify the law and thus be of benefit to practitioners and their clients on either side of complaint.

Meaning of sexual harassment

The provisions in the ADA relating to sexual harassment are among the most effective in the country as they do not limit the prohibition on sexual harassment to certain settings such as the workplace. Following the recommendations made in the Respect@Work Report, QLS has advocated for amendments to the *Sex Discrimination Act 1984* (Cth) (**SDA**) to similarly reflect section 118 of the Queensland ADA.

Notwithstanding the comparative effectiveness of the Queensland laws, following on from the Respect@Work Report and in the general course of review and reform, QLS would support some changes to these provisions in the ADA as raised in the Discussion Paper.

In respect of all of these discussion questions, our members advocate for consistency, as much as possible, with the SDA to avoid the impacts of competing jurisdictions.

Discussion question 9

- **Should the additional words 'in the presence of a person' be added to the legal meaning of sexual harassment in the Act? What are the implications of this outside of a work setting?**

There is certainly merit in considering this amendment. In our members' experience, they have dealt with these matters in, for example, male-dominated environments where sexual harassment conduct or behaviour may be present, but not necessarily directed towards a particular person. This conduct and behaviour nonetheless causes a hostile environment. In the workplace context, our members are of the view the law should progress with what is acceptable and unacceptable in a workplace.

While the proposed amendments appear to be supported by case law, including by the limited Queensland authorities, some believe because of this, there is no need for legislative change. Other members do not consider any specific change is needed so far as the provisions relate to the workplace.

Outside of the workplace and similar settings, there is a concern that expanding the ADA further may produce unintended consequences, such as any behaviour being captured at any time, which could ultimately undermine the impact of this section for genuine sexual harassment claims. The amendment could mean, for example, that if a group of people were engaging in a sexually explicit discussion in a pub and a person sitting nearby was offended by the discussion, they could seek redress in the Queensland Human Rights Commission (**QHRC** or **Commission**). In this scenario, it would be reasonable to expect that the "victim" can simply walk away if they find the discussion offensive, unlike, for example in a workplace. The extended definition should be designed to assist people who do not have a simple option of walking away (e.g. because they need to remain in school or work etc.)

Accordingly, we are hesitant to recommend the change without further consideration. There is a concern about extending the definition at large because of the potential unintended consequences. In addition, as the ADA prohibition on sexual harassment is currently not limited to a particular setting, it can accommodate the types of workplace sexual harassment our members often see including those that tend to happen in the grey areas around a person's

actual job. If this change is made and limited to a setting such as the workplace, then additional disputes will arise about conduct and behaviour falling outside of the definition.

In relation to another aspect of the definition, we refer to the New South Wales Court of Appeal decision of *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147 which discussed what constitutes this part of the definition of the NSW legislation.[2] The matter dealt with the publication of material involving the applicant that the respondent argued was not sexual in nature. The Court of Appeal importantly noted that, in determining objectively whether particular conduct meets the definition of 'other unwelcome conduct of a sexual nature', 'context is everything'. The meaning of language changes over time as do societal norms, including common understandings about what is and is not conduct of a sexual nature.[3]

The interpretation of the NSW legislation may be useful to consider in the context of reviewing section 119 of the ADA.

- **Should a further contravention of sex-based harassment be introduced? If so, should that be applied to all areas of activity under the Act?**

QLS supports a prohibition on sex and gender-based harassment. We also supported similar amendments in the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth).

We would advocate for consistency across legislation and jurisdictions. We note that a similar recommendation was made in the "Five-year review into Queensland's *Industrial Relations Act 2016*" and was adopted by the Government in its response to the review. These provisions in both acts should be consistent.

- **Should the Act explicitly prohibit creating an intimidating, hostile, humiliating or offensive environment on the basis of sex? If so, should that apply to all areas of activity under the Act?**

Our members consider that "*maintaining* an intimidating, hostile, humiliating or offensive environment on the basis of sex" would be preferable to the term, "creating".

Positive duties

QLS has supported the calls for a positive duty to be inserted into the SDA and some of our members express a similar support for this duty to be included into the ADA.

Others refer to existing WHS laws where there are positive duties on PCBUs (persons conducting a business or undertaking). However, the Respect@Work Report found that these laws and WHS regulators generally were insufficient in this context. A key concern of members

[2] See section 22A of the *Anti-Discrimination Act 1977* (NSW)
[3] See article https://cgw.com.au/publication/workplace-advertising-gone-wrong-a-case-of-unwelcome-conduct-of-a-sexual-nature/

who do not support these further changes relates to the increased cost burden this may place on employers and other entities.

We refer to our comments below about appropriate education and support being necessary if a duty is imposed.

Other issues

Related to the provisions dealing with sexual harassment, some of our members would like the ADA to clarify that discrimination, for all the attributes, includes treatment that is harassing. Further, clarity should also be provided to ensure that speaking to someone is 'treatment' of them. The cases diverge on 'discrimination by comments'. Legislative clarity would assist our members and their clients.

Discrimination on combined grounds

Discussion question 7

- **Is there a need to protect people from discrimination because of the effect of a combination of attributes?**
- **If so, how should this be framed in the Act?**
- **Should other legislative amendments be considered to better protect people who experience discrimination on the basis of combined grounds?**
- **What are some examples of where the current law does not adequately protect people from discrimination on combined grounds?**

QLS members consider there is a need for the ADA to expressly provide that a person must not be discriminated against due to a combination of attributes and their cumulative effect. We note the difficulties with the current legislation and processes outlined in the Discussion Paper including that while someone may allege they have been discriminated against due to multiple attributes, one attribute may not be as obvious as another and so they are given advice to choose one or, conversely, they choose one but their claim ultimately fails because in fact, it was the combination which led to the discrimination. Such a change to section 7 of the ADA may also assist a respondent in being able to more comprehensively respond to the claim.

As to the type of amendment required, our members have expressed a preference for the Canadian tests referred to in the Discussion Paper, but consider the UK test also has merit. We also refer to the comments made in the "Ten-Point Plan for a Fairer Queensland" produced by the Alliance of Queensland Lawyers and Advocates which states:

> "(T)here are a range of Commonwealth laws (in Australia) that deal with discrimination on the basis of sex, age, disability and race and that do not require anyone to prove that their protected attribute was the main or only reason for the discrimination. In those laws, it is only necessary to prove that the protected attribute was one of the reasons for the discrimination. We should adopt this position in Queensland, too."

Our members suggest that the effect of any changes be expressly referred to in an objects clause, which we propose should be inserted into the ADA. This may be of assistance to the judiciary when deciding these matters.

Burden of proof

Discussion question 8

- **Should the onus of proof shift at any point in the process?**
- **If yes, what is the appropriate approach?**

This is a complex issue for members of the legal profession. Requiring the complainant, plaintiff or prosecution to bear the onus of proof in a matter is a fundamental tenet of our legal system and this should only be altered where there is significant justification to do so. Over recent years, governments at all levels and of all political persuasions have continued to erode these important principles, which has been of great concern to our members.

However, in specific instances and where there is appropriate justification for a reversal of the onus, QLS will not have an objection. In the experience of many of our members who assist clients to bring claims under the ADA, there are issues with the complainant bearing the onus of proof in all cases. They argue there are often significant power imbalances in favour of the respondent, as a matter of fact, and within the legislation, and the ADA should recognise and address these. Some of our members advocate the appropriate vehicle by which to do this is reversing onus of proof. These members refer to difficulties complainants face when a person or entity has not provided any formal reasons for a decision about a person. In these members' experience, these issues are more difficult at the state level than at the federal level.

Further, proponents of this change argue a reversal of the onus would relieve a decision-maker from making assumptions or drawing inferences which might not be correct and which may adversely affect the complainant.

Some of our members have suggested there may be unintended consequences for the complainant from this reform, including that a respondent may call a number of witnesses/present a number of documents which may be a significant impost on the complainant and result in additional costs. There is also a concern about an increase in unmeritorious and vexatious claims.

As noted in the Discussion Paper, the onus of proof has been reversed, at least in part, in a number of jurisdictions including in industrial law under the FW Act. Section 361 of the FW Act provides:

> **Reason for action to be presumed unless proved otherwise**
>
> (1) If:
>
> (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed, in proceedings arising from the application, that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

In these claims there must be prima facie evidence to enable the claim to be brought and for the onus to shift. Our members have mixed views about the effectiveness of this federal provision.

We note this shift of the burden is also found in other jurisdictions such as Canada, the UK and the EU as noted in the Discussion Paper.

Accordingly, while QLS is not in a position to currently advocate for or against a reversal of the onus of proof, we submit that any amending legislation making this change should do so in a way where there are still some threshold criteria for a complainant to meet before the onus shifts. In addition or in the alternative, the onus could shift for a particular purpose, i.e. as it relates to the reason a person took a particular action such as in a general protections claim.

Further, there may be other measures the Review could consider to rectify the issues identified with the current requirements of the ADA. For example, the requirements to disclose documents at an early stage could remedy some of the issues identified with the current process instead of amendments to reverse the onus of proof.

Time limitation

Discussion question 14

- **Is 1 year the appropriate timeframe within which to lodge a complaint? Should it be increased, and if so, by how long?**
- **Should out of time complaints that have been accepted at the Commission as showing 'good cause' be subjected to the further requirement of proving 'on the balance of fairness between the parties, it would be reasonable to do so' before being dealt with by the tribunal?**
- **Should the tribunal review the Commission's decisions to decline complaints instead of the Supreme Court?**

As with some of the other issues raised by this Review, there are some divergent views amongst our members about whether the 1 year timeframe should be extended. We note extensions of time are already generally granted and there are appropriate and important reasons why someone may require more time to bring a claim.

Some members consider the timeframe of 1 year is onerous and very difficult to meet for some of their clients. This might be due to reasons relating to their attribute/s or other personal circumstances and of course, the trauma experienced from the event or conduct which is giving rise to the cause or action. For example, complainants with a disability may need more time to

make a complaint and prisoners may also have difficulties taking these steps in a closed environment.

Some members consider the timeframe denies access to justice and does not accord with federal timeframe of 6 years for general protections claims or the state timeframe for personal injuries actions of 3 years. However, we also note that for other types of actions, such as those for unfair dismissals, the timeframes are much shorter.

In considering these issues, the Review should be cognisant of the potential prejudice to the respondent caused by the delay in a claim being brought, particularly going forward if the onus of proof is reversed. Over time, it may be difficult to determine the relevant facts, documents and people to contact to make a statement or give evidence. There are also some concerns about the 'creep factor', particularly if the timeframe is extended but applications for further lengthy extensions are also routinely made and granted.

On balance, our members would be supportive of an extension of the timeframe to 3 years to align with the personal injuries timeframe. This extension must also relate to the ability to bring a claim in the Tribunal following the QHRC process.

The QHRC and Tribunal should continue to have the power to accept 'out of time' claims and we would be supportive of a right to seek a review or appeal of these decisions beyond a judicial review.

- **Should there be special provisions that apply to children or people with impaired decision-making capacity?**

Our members consider claims involving children should be examined. Children are unable to make a complaint without assistance from a parent until they turn 18 years and have capacity. There is a detriment to the child if the parent is not willing to make a complaint at the time the discrimination occurs. This also potentially allows the discrimination to continue with respect to that child and potentially other children.

Two-stage enforcement model

Discussion question 10

- **Should the Act include a direct right of access to the tribunals?**
- **Should a complainant or respondent be entitled to refer the complaint directly to a tribunal?**

Our members strongly endorse conciliation as an effective form of dispute resolution. They consider it is appropriate that all matters be conciliated before proceeding to a hearing in a court or tribunal. Even in those matters where conciliation is unlikely to resolve the matter, it can assist the parties to understand the matters in dispute and to narrow the issues.

However, some members have raised concerns, similar to those outlined in the Discussion Paper, about the process being cumbersome and costly to parties where matters do not resolve.

In addition, the prospect of going through the Commission's processes, and then to the Tribunal, can be daunting and off putting for our members' clients who feel they are unable to face the prospect of reliving their trauma on multiple occasions.

Some members, on the other hand, are of the view that two conciliations at different stages of a matter may still be helpful. Members also note the style of conciliation in the QHRC is different to that in the Queensland Industrial Relations Commission (**QIRC**) and that due to resourcing restraints, there are currently very long delays in reaching conciliation at the QHRC, and then further delays in the Tribunal.

On balance, we consider there is merit in investigating whether either the Commission, upon receipt of a complaint, or the Tribunal can make a decision allowing a party to proceed directly to the Tribunal. However, regard should be had to the appropriateness of a party's request and the impost this will have on Tribunal resources. Removing the "gatekeeper" function of the QHRC could result in a significantly increased workload for the Courts and tribunals.

- **Should a person be entitled to apply directly to the Supreme Court where the circumstances of a complaint raise matters of significant public interest? If so:**
    - **Should it be confined to certain matters?**
    - **What remedies should be available to the complainant?**
    - **Who would have standing to bring the complaint?**

We refer to our response to the above question. It is appropriate that the Commission or Tribunal make a decision as to whether a party can apply to the Supreme Court.

Our members consider there is benefits to allowing complainants to apply for injunctive relief. In the employment jurisdiction, for example, damages may not be an adequate remedy where the allegation is that someone's employment is going to be terminated for discriminatory reasons. Injunctive relief in this scenario may be appropriate. In other matters, injunctive relief may be of little utility as such an order would simply preserve the status quo, which could mean a continuation of the discrimination.

We note that applications to the Supreme Court are costly to make and respond to, and also expose a party to an adverse costs order. This might be a barrier to use for some. Further, while the Court of Appeal hears matters from the Tribunal, the Supreme Court does not typically hear matters in the discrimination jurisdiction, particularly those relating to the workplace. These matters would ordinarily proceed through the QIRC and Industrial Court. This court would be the more appropriate forum for injunctive relief in these matters.

Finally, on the issue of standing, we consider that the victim complainant or someone with a sufficient connection to them should be able to bring the action.

Question 13

QLS supports early intervention by the Commission where appropriate and as stated above. It should have a discretion to fast-track some cases where the circumstances warrant.

The Fair Work Commission is trialling a more flexible approach to triage and conciliation of unfair dismissal claims. This process is worth considering in the QHRC context. Timeframes are helpful because experience demonstrates that further delays may occur where there are no timeframes. The ability for the Commission to individually assess the best way of dealing with a complaint (before proceeding to the QIRC or Tribunal) with input from all parties, would be useful. Unfortunately, it is likely to be more resource intensive.

Role of the tribunals

Discussion question 23

- **Should there be a specialist list for the tribunals?**
- **If so, what would the appropriate qualifications be for a tribunal decision-maker?**
- **Should a uniform set of procedural rules be developed to apply across both tribunals?**

Our members have been supportive of the QIRC hearing employment-related claims.

Our members agree with the views expressed in the Discussion Paper about the lack of expertise that can be present in a general tribunal. A specialist list could assist in the determination of these often complex matters as well as aid the development of jurisprudence in this area. It might be prudent to consider a panel approach, including a legal member and person with lived experience (e.g. person with disability etc).

We consider that better resources for both the Commission and Tribunal will be key to addressing some of the issues identified in the Discussion Paper. We also strongly advocate for unfettered rights to legal representation in all proceedings.

- **Should the tribunals be required to publish all decisions/substantive decisions?**

Our view is that all decisions should be published unless there is a specific reason for not doing so.

Special measures

Discussion question 20

- **Should welfare measures and equal opportunity measures be retained or changed? Is there any benefit to collapsing these provisions into a single special measures provision?**
- **Should special measures provisions continue to be an exemption to discrimination, or incorporated into the meaning of discrimination?**

There should be alignment between the ADA and the *Human Rights Act 2019* in this regard.

It should also be noted that 'special measures' in international human rights are based on the use different terminology. Queensland is currently using an old test and we agree that there should be consideration of other jurisdictions.

Positive duty and regulatory powers

Discussion question 21

- **Do you support the introduction of a positive duty in the Anti-Discrimination Act?**
- **Should a positive duty cover all forms of prohibited conduct including discrimination, sexual harassment, and victimisation? Why, or why not?**
- **Should a positive duty apply to all areas of activity in which the Act operates, or be confined to certain areas of activity, such as employment?**
- **Should a positive duty apply to all entities that currently hold obligations under the Anti-Discrimination Act?**
- **What is the extent of the potential overlap between WHS laws and a positive duty in the Anti-Discrimination Act? If a positive duty is introduced, what considerations would apply to the interface between existing WHS laws and the Anti-Discrimination Act?**
- **What matters should be considered in determining whether a measure is reasonable and proportionate?**

We refer to our comments in relation to sexual harassment.

QLS acknowledges there is a cultural shift towards the imposition of positive obligations as a means to avoid the wrong being done in the first place. Positive duties have been recommended by a number of inquiries and reports including in the Respect@Work Report. The imposition of positive duties also aligns with United Nations conventions.

While there is an existing positive duty under the *Work Health and Safety Act 2011*, we do not consider that this duty is currently being discharged in a way that adequately deals with the causes and impacts of discrimination and sexual harassment in the workplace. Further, we do not consider that a breach of this duty which involves sexual harassment or discrimination is readily investigated or pursued by the workplace/duty holders, regulators or other enforcement bodies in all cases and in a manner consistent with obligations under the WHS laws. There is often a focus by these bodies on acts or omissions in the workplace that cause physical injuries, whereas discrimination and sexual harassment more often result in psychiatric or psychological injuries.

Many of our members support positive obligations and consider that the requirement to take proactive steps to prevent discrimination will be of benefit to those people who would struggle to make a complaint as a result of conduct or an event. As noted in the QCOSS submission, the introduction of positive duties could play a dual role in the prevention and protection of those who experience discrimination. Positive obligations may also assist to stop discrimination even where there has been a successful claim, given the difficulty in enforcing agreements reached between complainants and respondents.

Despite the potential benefits of a positive duty, we note that this may not be well understood by businesses, groups and individuals, even if businesses and other groups are already subject to WHS laws. There will need to be appropriate guidance from the QHRC on what a positive

duty is, how it is discharged and some assistance with meeting obligations. This will require appropriate funding and resourcing.

The duty will need to be carefully drafted and capable of being discharged by those subjected to it. There should be a focus on compliance, rather than actions for breach. There should be extensive consultation on any proposed duty.

We note from the Discussion Paper that the impact on vicarious liability will also need to be considered.

As to the coverage of a positive duty, and in addition our comments about to the burdens on particular groups, we consider that for employers, businesses and educational institutions and other similar bodies, imposing a duty is appropriate.

Discussion question 22

- **Should the laws be changed to incorporate a role in regulating compliance with the Anti-Discrimination Act and eliminating discrimination?**

QLS agrees this would be an appropriate step and such a function can be included in an objects clause as well as in separate provisions. However, regard should be had to other regulators including Work Health and Safety, SafeWork Australia and other industry-specific bodies. The needs to be a clear delineation of roles and functions of different bodies. There should also be regular performance reviews.

- **Should a regulatory role be undertaken by the Commission or is there a more appropriate entity?**

As stated above, any role undertaken by the Commission will need consider the existing roles performed by other bodies. It might be appropriate for the Commission to have a role, but only where there is not existing coverage by another body. In those circumstances, it might be more efficient for the QHRC to defer or delegate to that body.

- **What key features should a regulatory approach adopt to ensure it achieves the right balance between supporting organisations to comply with the Act and ensuring organisations, particularly small and medium-sized entities, are not unnecessarily burdened with regulation?**
- **What factors justify any expansion of the Commission's functions and powers?**

As stated in respect of a positive duty, the provision of guidance and resources to organisations is essential to improving compliance and addressing the prevalence and impacts of discrimination, particularly for small entities and not-for-profits. The Commission should proactively provide guidance and resources and should focus on assisting bodies to comply, rather than solely focusing on breaches of the ADA and consequences thereof.

Other issues

Question 6

Some of our members support a positive duty to make 'reasonable adjustments' or provide 'reasonable accommodations' being introduced into the ADA, as outlined in the Discussion Paper. This should either be a standalone duty or separate principal in the legislation and should apply to all attributes, rather than limiting it to just disability. This is supported by the United Nations Convention on the Rights of Persons with a Disability and the United Nations Declaration on the Rights of Indigenous Peoples.

If this proposal is adopted, consideration should be given to how any amendment would interact with the remainder of the ADA and what exemptions are required to achieve balance. If these changes to the ADA were made, there may be resolution of some of the issues raised in question 5 of the Discussion Paper.

Question 12 – written complaints

We note the difficulties some people face in making written complaints and doing so in a way that will enable the Commission to assess these and a respondent to respond. There are circumstances in which a non-written claim or request for assistance should be accepted.

There also needs to be more clarity around process of making a complaint for persons with cognitive impairment, as well as a right of representation for these persons. It should also not be assumed that every respondent would prefer a copy of the complaint in writing. There should be accessible avenues to make/understand the complaint available for both parties.

We also query whether there is merit in allowing a video recorded complaints in certain circumstances. This may allow a complainant to outline their claim with less difficulty, depending on the circumstances. We are aware of legislation before the Parliament which will allow a pilot of video recorded evidence-in-chief in some criminal matters. The QHRC may be able to review the success of the pilot to inform a similar system for discrimination claims.

Such a tool may also be useful where there is video evidence. Pursuant to section 136 of the ADA, complainants currently must make a transcript of the audio for this to be an accepted part of the complaint at the QHRC stage. It is not until the QCAT/QIRC stage that the actual video evidence can be formally provided.

Providing video evidence at an early stage can assist in early resolution of the matter and we note some conciliators allow this to be used in the conference on an informal basis. Making a transcript can be difficult for unrepresented people and any errors in transcription can then be used as evidence of credibility later.

Whatever process is used, it is important that a respondent knows the case against them in a relatively succinct way to enable an appropriate response to be made.

Finally, some of our members consider there may be a perception of bias if the Commission provides anything more than basic assistance to complainants to make their complaint. Guidance kits about relevant points may be useful. Otherwise, there could be a referral to private practitioners, Legal Aid or another CLC or pro bono program where lawyers might be able to assist. The legal assistance sector is crucial to this process and sufficient funding is needed to enable complaints to be made and resolve.

Questions 15 and 16 – Representative and Organisation complaints

A relevant entity should have standing to make complaints of discrimination, particularly for public interest matters, to ensure the burden of systemic change does not only fall on individuals.[4]

Representative bodies are already permitted to bring claims under section 134 of the ADA and therefore QLS does not object to an expansion to include trade unions. We do not see a reason for these bodies not to be involved in the Tribunal process if they are permitted by the ADA to be involved in a claim.

Question 17 - complaints by prisoners

We note the impacts on individuals from the current provisions, outlined in pages 64 and 65 of the Discussion Paper. QLS a supports a repeal of the additional requirements for prisoners making complaints under the ADA. These impact prisoners' ability to access justice which compound other barriers often faced by these people in any legal or administrative process. It may be appropriate for some internal complaint requirement to remain if these do not affect rights under the ADA.

Question 19 – Objects clause

QLS strongly supports the inclusion of an objects clause in the ADA. An objects clause sets the tone for the legislation and can outline a purpose, or purposes, that every other provision in the legislation relates back to and supports. If the ADA is to be materially reformed following this Review, an objects clause will be important to convey the intention behind the reform.

Attributes

Part 2 of Chapter 2 of the ADA identifies 'Prohibited grounds of discrimination'. Section 7 prohibits discrimination on the basis of various defined 'attributes'.

We note some stakeholders have reported the need for the definitions of the current attributes to be reviewed to ensure they are inclusive and effective. QLS supports this review.

We also note these stakeholders have suggested some additional attributes be added such as:

- Low social-economic status or who are from disadvantaged social origin;
- People with diverse immigration status;
- Sex workers;
- Individuals subjected to domestic and family violence;
- Medical choices;
- People with irrelevant criminal history or medical records;
- People with low literacy or numeracy;

[4] This may have been appropriate in matters such as *Cocks v State of Queensland* [1994] QADT 3

- People with diverse genetic characteristics; and
- Health conditions.

If these or any other additional attribute were to be added, the definitions ought to be clearly drafted to ensure certainty for complainants and respondents and to give guidance to the judiciary. The use of these attributes in other jurisdictions should also be considered.

Further, some of our members submit there needs to be flexibility in the legislation to enable attributes to be added in the future.

Discussion question 25:

- *Should the attribute of impairment be replaced with disability?*

Some of our members have indicated a preference for 'disability' over 'impairment' on the basis that many people with disability find the term 'impairment' to be insulting and it is not in keeping with the Convention on the Rights of Persons with Disabilities. QLS submits that either term should be interpreted broadly.

In relation to terminology generally, the terminology used in the ADA should reflect the seriousness of the potential consequences. In a case which may result in significant damages ultimately being awarded, some of our members consider that softening the use of the terminology may have the effect of understating the seriousness of the matter for both parties.

- *Should a separate attribute be created, or the definition amended to refer specifically to mental health or psychosocial disability?*

We refer to above comments about attributes generally. It might be that specifically referring to mental health or psychosocial disability would better recognise the stigma and discrimination around these areas.

- *Should reliance on a guide, hearing or assistance dog be broadened to be reliance on an assistance animal? Should it only apply to animals accredited under law? How would this approach work with the Guide, Hearing and Assistance Dogs Act 2009?*

QLS members have expressed the scope should be broadened.

Question 26

The definition of 'gender identity' in the ADA is not inclusive of non-binary people. Our members consider the SDA has better definitions which could be adopted.

Question 27

This definition needs to be amended. Our members refer to definitions in the *Public Health Act 2005* and in the SDA which are more appropriate.

Question 30:

> • *Is there a need to cover discrimination on the grounds of irrelevant criminal record, spent criminal record, or expunged homosexual conviction?*

QLS considers there is a need to cover discrimination on these grounds. This is particularly damaging for persons on forensic orders with irrelevant/spent criminal histories that continue to be considered by the Mental Health Review Tribunal.

Question 31

- *Is there a need for the Act to cover discrimination on the grounds of irrelevant medical record?*

Our members consider this is form of discrimination should be included in the ADA. This discrimination can often be detrimental for persons who have experienced, or continue to experience, questioned capacity.

Question 32:

> • *Is there a need for the Act to cover discrimination on the grounds of immigration status? If so, should it stand alone or be added as another aspect of 'race'?*

Our members consider there is need for this attribute and it should be distinct from race.

Question 36

An attribute of "sex characteristics" should be considered.[5]

Question 38:

> • *Should an additional attribute of accommodation status be introduced? Should it be defined, and if so, how?*

Members have expressed support for this attribute given the growing issues with the rental market and securing accommodation.

Exemptions

We note some stakeholders have called for the removal of all discriminatory exemptions that allow unfair treatments. We have reviewed this section of the Discussion Paper and agree that some reforms to these provisions of the ADA is warranted. We do not object to the Tribunal having a power to grant a specific exemption. However, consultation with affected communities would be advisable to understand the full impacts of granting an exemptions.

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[5] See the Darlington Statement: https://ihra.org.au/wp-content/uploads/key/Darlington-Statement.pdf

We respond to the questions in this section as follows:

Question 41

Our members are generally of the view that discrimination in relation to a recognised attributes under the ADA, on the basis of religious grounds, should not be permitted.

Question 42

QLS does not consider religious bodies should be permitted to discriminate when providing services on behalf of the state such as aged care, child and adoption services, social services, accommodation and health services. This exemption should be removed.

Question 43

We consider the exemption allowing religious bodies to discriminate when providing accommodation on a commercial basis including holiday, residential and business premises should be reviewed.

Question 44

We do not consider this exemption is appropriate. The current meaning given to 'genuine occupational requirements' in section 25, example 4. is too broad.

We support the Tasmanian provision referred to at page 117 of the Discussion Paper.

Question 45

We agree that the work with children exemption should be removed.

Question 46

QLS calls for the repeal of section 45A of the ADA which purports to allow providers of assisted reproductive technology to discriminate on the basis of sexuality or relationship status. Discrimination in the provision of services on the basis of sexuality and relationship status is otherwise prohibited under the ADA. This exemption for assisted reproductive technology clinics to discriminate on the basis of relationship status and sexuality is only included in three jurisdictions in Australia: Queensland, South Australia and Northern Territory.

Presumably this section came about following the case of JM v QFG [1998] QCA 228, whereby QFG was allowed to discriminate against a single lesbian. As a reminder is this statement by Thomas J about lawful sexual activity:

> "The true basis of the doctor's refusal to provide services to the patient was not because of her lesbian activity but because of her heterosexual inactivity. Minds may differ on the question, but common sense suggests that many lesbians are also prepared to engage

> in heterosexual activity. One can only include the quality of heterosexual inactivity in a particular individual if one overworks the term "lawful sexual activity" by adding personal relationship factors such as "exclusive relationship" to the concept."

QFG and the other clinics have moved on. Fertility clinics no longer discriminate on the basis of sexuality and relationship status in the provision of these services. This has in part been because LGBTIQ people make up a large part of their work, but also because one clinic, City Fertility, set up a new brand Rainbow Fertility

However, the section remains in the ADA despite the removal of the exemptions in section 22 of the SDA. Following the cases of *Pearce v SA* [1996] SASC 6233; *McBain v Victoria* [2000] FCA 1009, we consider that section 22 of the SDA will override the ADA provision.

Maintaining this provision is out of step with community expectations and the actual practice of clinics. It puts Queensland out of step with the majority of other state and territories anti-discrimination legislation.

Question 48

The "Correct Services Act" modifications should be reviewed to determine whether the additional burdens placed on claims and complainants is justified.

Costs orders

Costs orders in discrimination claims are extremely rare, and where they are ordered, it is almost always against a respondent. This is not always appropriate in cases where a complainant makes an unmeritorious or vexatious claim.

Respondents need to spend considerable time and cost defending those claims. These costs are very infrequently recovered if a complainant's claim is dismissed.

Whilst acknowledging there is an access to justice issue and that complainants with legitimate claims should not be dissuaded from pursuing their claims due to fear of an adverse costs order, some of our members submit there should be a greater ability for respondents to achieve costs orders against complainants who unreasonably reject offers of settlement, or who pursue claims which are deemed to be vexatious or have no reasonable prospect of success.

Any change to the ADA in this regard will need to be carefully considered to ensure additional barriers to bringing claims are not created.

Job seekers – section 124

We refer to the recent decision of *Grimsey v Laketrend Pty Ltd & Ors* [2022] QIRC 32 where the QIRC found that a complainant sought to be considered for employment when no vacancy existed at the time. The complainant argued the respondents discriminated against her in the area of pre-work under sections 14(a) and (b) and/or (d) of the ADA. However, in deciding to dismiss the complainant's claim, Industrial Commissioner Powell relied on the Queensland Court of Appeal decision of *Tully v McIntyre* [2000] QCA 115 which also concerned a person

seeking work where no vacancy existed. The Court of Appeal case held that in relation to sections 14(a), (b) and (d), these sections relied on work or a position being offered or available.

The ADA should be amended so that protections for discrimination in the area of work are extended to all job seekers.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

Kara Thomson
President