



ANTI DISCRIMINATION
COMMISSION QUEENSLAND

SUBMISSION

**CONSOLIDATION OF
COMMONWEALTH
ANTI-DISCRIMINATION LAWS**

1 February 2012

Introduction

1. The Anti-Discrimination Commission Queensland (Commission) is an independent statutory authority established under the Queensland *Anti-Discrimination Act 1991* (AD Act).
2. The functions of the Commission include promoting an understanding, acceptance and public discussion of human rights in Queensland, as well as inquiring into and where possible effecting conciliation of complaints of contraventions of the AD Act. Complaints that are not resolved through conciliation can be referred to the Queensland Civil and Administrative Tribunal for hearing and determination.
3. This submission is additional to the submission of the Australian Council of Human Rights Agencies (ACHRA) to which the Commission has contributed and has endorsed. The Commission does not repeat the content of the ACHRA submission in this submission, but rather makes comment on the issues arising specifically from the Commission's observations in Queensland, and arising from its consultation with stakeholders in December 2011.¹

Objects and purpose of the consolidated Act

4. The Commission supports the proposal to consolidate Commonwealth anti-discrimination legislation into one Act. Stakeholders of the Commission, in general, welcome a consolidated Act on the understanding it will make it easier for all, and simplify compliance.
5. The Commission has received feedback to the effect that the layout of the Queensland AD Act is much easier and logical for users, as opposed to the layout of the current Commonwealth legislation where the obligations are broken up between areas and attributes.

¹ The Anti-Discrimination Commission Queensland hosted a forum at its Brisbane office on 8 December 2011 to hear stakeholder and community views on the proposed consolidation of the legislation. The Commission also invited comments and submissions to the project, and receives and responds to feedback in the usual course, as part of its ongoing commitment to human rights.

6. The Commission suggests that any new Act should contain a clear objects and purposes provision.
7. The Queensland AD Act contains a preamble as well as purposes clauses. The preamble recognises the need to protect and preserve the principles of dignity and equality for everyone, refers to the principles reflected in a number of international human rights instruments, and describes the Parliament's intention that:
 - everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination;
 - the protection of fragile freedoms is best effected by legislation that reflects the aspirations and needs of contemporary society; and
 - the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone.
8. The main objective of the Queensland AD Act is to promote equality of opportunity for everyone. The means of achieving this objective are described at the commencement of each of the relevant chapters, as:
 - by protecting them from unfair discrimination on certain grounds, in certain areas of activity, including work, education and accommodation, unless particular exemptions apply, and allowing a complaint to be made against a person who has unlawfully discriminated (Chapter 2, section 6);
 - by protecting them from sexual harassment and allowing a complaint to be made against a person who has sexually harassed (Chapter 3, section 117);

- by prohibiting certain objectionable conduct that is inconsistent with the other purposes of the Act and allowing a complaint to be made against a person who has engaged in that conduct (Chapter 4, section 121);
 - by prohibiting and penalising certain highly objectionable conduct that is inconsistent with the other purposes of the Act and allowing a complaint to be made against a person who has engaged in that conduct and by making that conduct an offence (Chapter 5, section 125);
 - by making a person civilly liable for acts of the persons' workers or agents (Chapter 6, section 132).
9. Despite the principle that particular statutory provisions must be read in light of their purpose, and the rule of construction that beneficial and remedial legislation is to be given a 'fair, large and liberal' interpretation², commentators argue that the decision in *Purvis*³ confirms 'that Australian law embraces formal equality or same treatment – as opposed to substantive equality, which requires difference to be taken into account and focuses on equality of outcomes'⁴.
10. The new consolidated legislation is an opportunity for the Australian Parliament to clearly state its intent with a preamble and objects or purposes provisions. This would greatly assist the courts in deciding cases of discrimination, as well as assisting employers, businesses, educators, government and other service providers in understanding and implementing their human rights obligations.

Recommendation 1: That the consolidated Act contain clear objects and purposes provisions.

² *IW v City of Perth* (1997) 191 CLR 1 at 12 per Brennan CJ and McHugh J, 39 per Gummow J; [1997] HCA 30, referring to *Coburn v Human Rights Commission* [1994] 3 NZLR 323 at 333; *AB v Western Australia* [2011] HCA 42 at para 24

³ *Purvis v New South Wales* [2003] 217 CLR 92

⁴ Allen D (2011) 'Removing barriers to substantive equality: a case study of remedying disability discrimination complaints' 17(2) *Australian Journal of Human Rights* 159

Meaning of discrimination

11. In this section the Commission seeks to highlight some of the issues that have arisen in the Queensland experience.

Distinction between direct and indirect discrimination

12. In Queensland, the distinction between direct and indirect discrimination has received some criticism. For example, in *Perry v State of Queensland & Ors* [2006] QADT 46, President Dalton SC (as she then was) of the former Anti-Discrimination Tribunal Queensland said, at paragraphs 135 and 136:

135. The distinction between direct and indirect discrimination is in my view fallacious and undesirable – see the discussion in *Waters* (above) at p 351 *et seq.* Furthermore, having determined to make a distinction between direct and indirect discrimination, it seems to me wrong in principle, and inequitable, that different requirements, in substance, are required to be shown to establish the different types of discrimination and that the availability of moderators, such as reasonableness – s.11(1)(c), should differ as between the two types of discrimination. This is what Mason CJ and Gaudron J were commenting on in *Waters* at 364:

Just why the legislature should intend to draw such a distinction between direct and indirect discrimination does not appear. And there is nothing to indicate that the consequences of direct discrimination are more objectionable and harmful to society than the consequences of indirect discrimination.

136. Nevertheless, the Act does in fact make the distinction and the elements and considerations which comprise and inform the two types of discrimination are different. The Act obliges me to proceed without undue technicality – s.208(1)(c). In cases where parties are not legally represented the tribunal often dispenses with pleadings; simply hears the factual circumstances of the case, and makes a determination as to the applicable law on the facts which the parties present. However, there are a wide range of cases within the tribunal and this one is at the other end of the spectrum. Both parties have been represented by senior counsel at the hearing and the matter has proceeded on pleadings and detailed statements drawn by lawyers.

13. The distinction between direct and indirect discrimination can be difficult for complainants, particularly those that are self-represented. In *Perry*

(above) the complainant's claim of sex discrimination associated with posters in the workplace was lost because the complainant presented her case on the basis of direct discrimination rather than indirect discrimination.⁵

Direct discrimination

14. The definition of direct discrimination in the Queensland legislation (the comparator model) can be difficult conceptually for some attributes, and is not without difficulty in application in some cases.
15. The element of treatment of 'a person with an attribute less favourably than another person without the attribute', taken literally, is impossible for the attributes of sex, age and race. This is because, most people have a gender, and we all have an age and race, so in reality the comparator can only be a person with a different subset of the attribute. For impairment, sometimes the appropriate comparator is a person with a different impairment rather than a person without impairment at all.
16. The difficulty in identifying the comparator for a worker with an impairment that meant he could only work for a certain number of hours, is demonstrated in *Cockin v P & N Beverages Aust Pty Ltd & Ors* [2006] QADT 42, where Member Rangiah of the former tribunal said, at paragraphs 64-68:
 64. P & N Beverages acted upon Dr Edward's view that Mr Cockin's impairment made him unsuitable to work shifts other than day shifts of not longer than 10 hours. Ordinarily, an appropriate comparison might be with another worker employed by the same employer in a similar job without an impairment who was only able to work day shifts of not more than 10 hours.
 65. The difficulty with using such a comparator is that it is difficult to imagine a situation in which another worker could have the same restrictions for a reason other than impairment. The present situation is quite unlike *Purvis* where the appropriate comparison was between a person with the complainant's disability and another person without the disability and where the relevant circumstances included each person engaging in

⁵ Both parties in that case were represented by senior counsel

violent behaviour. Violent behaviour could be engaged in by a person without the disability of the complainant, just as it was engaged in by the complainant because of his disability.

66. In the present case, the comparison is required to be between the way in which Mr Cockin was treated and another worker without an impairment was or would have been treated in circumstances that are the same or not materially different. In my view, *Purvis* does not compel a comparison which takes into account circumstances which are entirely improbable. It is entirely improbable that another worker without an impairment *could* only work day shifts of 10 hours or less.

67. I should add that a comparison between Mr Cockin and another worker who *chooses* to only work day shifts of not more than 10 hours is not appropriate. The circumstances would be materially different because Mr Cockin did not work fewer hours by choice. Rather, he was only able to work day shifts of not more than 10 hours a week because of his impairment.

68. In my view, therefore, the appropriate comparison is between the way in which Mr Cockin was treated and the way in which another employee of P & N Beverages without an impairment was or would have been treated as to the amount of work offered. The circumstances that are the same or not materially different for the purpose of [s.10\(1\)](#) are merely that the comparative employee was employed by P & N Beverages as a cleaner and machine operator, as Mr Cockin was.

17. Difficulties in identifying the attribute for the purposes of direct discrimination was commented on by President Dalton SC of the former tribunal in *Edwards v Hillier & Educang Ltd* [2006] QADT 34 at paragraph 86:

86. Philosophically there is a risk that in closely defining attributes within the meaning of s7 of the Act and conceptually separating them from their sequelae, the notion of what an attribute comprises will be stripped of meaning, so that s10 of the Act [meaning of direct discrimination] will only operate to prohibit the grossest kind of discrimination. To take a hypothetical example, s10 would operate if an employer received an application for a job from a parent and immediately discarded the application on the basis that it would not employ parents. However, it would not operate in circumstances where the employer granted the parent an interview, ascertained that the parent preferred to work part-time because of their family responsibilities, and on that basis discarded the application. Be that as it may, I think that the facts of this case fall to be considered as indirect discrimination on the basis of the authority above. The case may have been different in this respect if the complainant had attempted to prove that a

characteristic which a parent with family responsibilities generally has is the ability only to work part-time – see s8(a) of the Act. There was no attempt made to prove this. Indeed it may not be the case, I am not prepared to take judicial notice of it. In this respect the question is different from that which arises in considering s11(1)(b) of the Act.

18. Attributes defined on ‘status’ or ‘belief’ also present problems in identifying the comparator for direct discrimination. In the Queensland legislation these attributes include:

- *parental status* – defined as meaning ‘whether or not a person is a parent’;
- *relationship status* – defined as meaning whether a person is single, married, separated, divorced, widowed or a de fact partner;
- *religious belief* – defined as meaning ‘holding or not holding a religious belief’; and
- *lawful sexual activity* – defined as meaning ‘a person’s status as a lawfully employed sex worker, whether or not self-employed’.

19. This difficulty with ‘status’ attributes is demonstrated in a recent decision of the Queensland Civil and Administrative Tribunal on a complaint by a lawful sex worker relating to extra charges and denial of motel accommodation, where the tribunal found that the appropriate comparator was a person who was not a lawful sex worker but with the same desire to obtain a room for the purpose of prostitution.⁶ The tribunal found that the complainant was not treated less favourably than another person, who is not a lawfully employed sex worker, in circumstances where that person seeks a room for the purpose of engaging in prostitution, and not subjected to direct discrimination.⁷ (The decision is under appeal.)

Indirect discrimination

20. Whilst the concept of indirect discrimination is broadly consistent across the Australian jurisdictions and the Commonwealth legislation, it is expressed differently, with two main groups of provisions, identified in the Discussion Paper. Clearly, a common provision applying to all

⁶ *GK v Dovedeen Pty Ltd & Anor (No. 3)* [2011] QCAT 509 at paragraph 76

⁷ At paragraph 79

protected attributes is necessary in a consolidated Act (as is the case in the Queensland legislation).

21. If substantive equality is to be achieved, it is important that indirect discrimination is not only proscribed, but that it is understood by employers, service providers, educators and those upon whom the obligations rest, as well as those who are subjected to it.
22. The common elements in the legislative expressions of indirect discrimination are:
 - a condition, requirement or practice;⁸
 - which disadvantages a group with a protected attribute, being a group to which the complainant belongs; and
 - is not reasonable in the circumstances.

The Queensland legislation contains the additional element of 'inability of the complainant to comply' with the 'term', and 'term' is defined as including 'condition, requirement or practice, whether or not written'.

23. Case law has assisted with the issues of identifying the term, interpreting the element of ability to comply, and in determining reasonableness. However the issue of whether a term has been imposed in the case of a woman wishing to return to her workplace after maternity leave but on different terms because of her family responsibilities (e.g. part-time or flexible hours) is not necessarily clear. In *Kelly v TPG Internet Pty Ltd*⁹ the Federal Magistrates Court held that a refusal of part-time work after returning from maternity leave was a refusal of a benefit, which the Court distinguished from the imposition of a requirement, condition or practice. Although this reasoning was criticised in a subsequent case before the

⁸ Currently, this element is expressed differently across the 4 Commonwealth Acts: 'condition, requirement or practice' – SDA & ADA; 'term, condition or requirement' – RDA; 'requirement or condition' – DDA

⁹ (2003) 176 FLR 214

Federal Magistrates Court,¹⁰ and is inconsistent with earlier decisions and opinion,¹¹ the principle has not been overturned. The Senate Standing Committee on Legal and Constitutional Affairs has also stated that it considers that the phrase ‘condition, requirement or practice’ was incorrectly interpreted in *Kelly*.¹²

24. For complainants, the ‘proportionality’ element of indirect discrimination has also been difficult to prove, and consequently was removed from the *Sex Discrimination 1984* in 1995 and from the *Disability Discrimination Act 1992* in 2009. Alternate definitions of indirect discrimination that include ‘disadvantage of persons with the same attribute’ are still conceptually based on one group being disadvantaged compared to another group.
25. The notion that indirect discrimination can only occur when a ‘group’ of people are disadvantaged creates an anomalous distinction between direct and indirect discrimination. If the objective of eliminating discrimination is to achieve substantive equality for everyone, why is it that an individual can seek redress if directly disadvantaged, but if indirectly disadvantaged that person must show that others with the same attribute are also disadvantaged? If an individual is disadvantaged by a requirement because of their attribute, that should be sufficient to establish prima facie discrimination, and it should then be for the person imposing the requirement to establish that the requirement is reasonable in the circumstances, including that the complainant is the only person affected by the requirement.

¹⁰ See *Howe v Qantas Airways Ltd* (2004) 188 FLT 1 and

¹¹ See for example AHRC *Federal Discrimination Law* (2011) Chapter 4 at 4.3.1; and articles referred to by the AHRC in its submission to the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the Effectiveness of the Sex Discrimination Act 1984, at paragraph 176

¹² The Senate Standing Committee on Legal and Constitutional Affairs: *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (December 2008) at 11.14

Conclusion

26. Whilst expressing unlawful discrimination in a unified way might be appealing philosophically, it does not necessarily provide the level of clarity so that people are able to understand what it is that is unlawful. Abandoning the concepts that have been tested and developed so that we are in a position to identify problems and solutions, puts us back into a position of uncertainty and the loss of jurisprudence.
27. The preferred option is to modify the current definitions of direct and indirect discrimination, and provide that discrimination encompasses direct discrimination, indirect discrimination, failing to make reasonable adjustments, and harassment based on an attribute. It should also be made clear that these facets of discrimination are not mutually exclusive.
28. The modified definition of direct discrimination should encompass:
- treating, or proposing to treat, a person unfavourably on the basis of one or more attributes, or a combination of attributes.
29. The modified definition of indirect discrimination should encompass:
- imposing, or proposing to impose, a condition, requirement or practice that has the effect of disadvantaging a person, or a group of people, on the basis of one or more attributes, or a combination of attributes.

Recommendation 2: That discrimination be defined as encompassing modified versions of direct and indirect discrimination, failure to make reasonable adjustments, harassment based on an attribute, each facet of which is not mutually exclusive.

Burden of proof

30. As identified in the Discussion Paper, the burden of proving causation in direct discrimination requirements the complainant to prove matters

relating to the state of mind of the respondent, and matters within the knowledge of the respondent but not necessarily within the knowledge of the complainant. This can be extremely difficult for a complainant and often unfair.

31. In all of the Australian jurisdictions, a complainant is required to make a complaint to a statutory administrative body such as this Commission, before the complaint can be determined by a court or tribunal exercising a judicial function. This first 'commission' stage of the process is intended, properly so, to be accessible to people without the need for legal representation. Complaints at the commission stage are generally not required to be in the form of a pleading nor required to set out every detail to be relied on if the complaint is not resolved and proceeds to the judicial body for determination. Often all the complainant knows is that they have been treated unfavourably and it seems the reason is one or more of the protected attributes. The reason for the conduct is often only uncovered or disclosed after the complaint has been made.
32. An example of how this can unfairly impact on a complainant is a complaint referred to the Queensland Civil and Administrative Tribunal. The complainant was suspended from school and she suspected that this occurred because the school presumed, incorrectly, that she was homosexual. The complaint alleged that the school had told other students and parents that the complainant had been suspended because of her mental health, and so was accepted as indicating alleged impairment discrimination. At the tribunal, the complainant was prevented from arguing sexuality discrimination, notwithstanding that the conduct complained of was the suspension, and it was the characterisation of the reason for that conduct that was in issue.¹³ It effectively means that a complainant must be able to demonstrate at an early stage the state of mind of the respondent.

¹³ *Smith v The Lutheran Church of Australia District t/a St Peters Lutheran College (No. 2)* [2011] QCAT 304

33. The Commission considers that the burden of proof in discrimination should be structured so that for direct discrimination, the complainant is required to establish the unfavourable treatment and the attribute, the reason is presumed, and it is up to the respondent to rebut the presumption by proving otherwise. For indirect discrimination the complainant would need to establish the requirement, the attribute and the effect on the complainant, and it is then for the respondent to demonstrate that the requirement is reasonable in the circumstances.
34. The Queensland AD Act came into effect in mid-1992, and has always provided for the respondent to carry the onus of proving reasonableness in indirect discrimination.¹⁴ This has worked well in Queensland.

Recommendation 3: The burden of prove for direct discrimination should follow the Fair Work Act model, and the respondent should carry the burden of proving reasonableness in indirect discrimination and any exemptions or exceptions relied on.

Protected attributes

Sexual orientation and gender identity

35. The Commission welcomes and supports the government's commitment to introducing sexual orientation and gender identity as new protected attributes in the consolidation bill. The Discussion Paper asked how sexual orientation and gender identity should be defined.
36. The Queensland AD Act includes *gender identity*¹⁵ and *sexuality*¹⁶ as protected attributes, and defines those terms as:

gender identity, in relation to a person, means that the person –

- (a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or

¹⁴ *Anti-Discrimination Act 1991* (Qld), section 205; the respondent also carries the burden of raising and proving any exemptions relied on – section 206

¹⁵ *Anti-Discrimination Act 1991* (Qld), section 7(m)

¹⁶ *Anti-Discrimination Act 1991* (Qld), section 7(n)

(b) is of indeterminate sex and seeks to live as a member of a particular sex.

sexuality means heterosexuality, homosexuality or bisexuality.

The Queensland AD Act also provides that discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of a characteristic of an attribute, both generally had or imputed, a presumed attribute, and a past attribute.¹⁷

37. Members of the relevant communities have expressed to the Commission that gender identity and sexuality are evolving concepts, and need to be expressed in an inclusive, open and non-restrictive manner to provide for both existing and evolving diversity, rather than 'boxing' people in terms of their sexuality and how people identify.
38. The concepts of both gender and sexuality must include how a person chooses to express themselves, without the limitations of a sex binary approach. Importantly, it must cover people who are androgynous or of indeterminate sex, in a way that is not confined to them identifying as one of two sexes.
39. Further, in order to adequately eliminate discrimination of transgender people, the inability for married transgender people to have their sex change recognised in official records must be rectified. Currently, the law (in Queensland and elsewhere) requires a transgender person to be single if they wish to obtain an amended birth certificate. This means a transgender person who is married must divorce to obtain a certificate. This denies the human rights of a transgender person and their spouse to remain married and part of a family.¹⁸
40. It is noted that the government does not intend to alter its position on altering the *Marriage Act*. While both the *Marriage Act* and State laws regulating the issuing of birth certificates fall outside this review of

¹⁷ *Anti-Discrimination Act 1991* (Qld), section 8

¹⁸ Article 16 of the *Universal Declaration of Human Rights* concerns the right to marry and have a family.

Commonwealth discrimination laws, the government must however, ensure that the exception in section 40(5) of the *Sex Discrimination Act 1984* is not included in the consolidated Act.

Recommendation 4: That the consolidated Act fully protect human rights associated with gender identity and sexuality, and that these attributes be given broad and inclusive definitions.

Intersectional discrimination

41. The Discussion Paper describes intersectional discrimination as discrimination experienced because of two or more aspects of a person's identity.
42. Where alleged discriminatory conduct might be based on more than one attribute, the Commission would generally deal with the complaint as one complaint covering both (or more) relevant attributes.
43. The legislation however does not necessarily protect against a combination of attributes, for example, poorer working conditions imposed on a worker because she is an immigrant woman (a combination of race and sex) or unfair treatment of a woman because she is experiencing menopause (sex and age).
44. The consolidated Act should expressly prohibit discrimination on the basis of one or more attributes and/or a combination of attributes.

Recommendation 5: That the consolidated Act provide that discrimination on the basis of an attribute includes more than one attribute as well as a combination of attributes.

Areas of public life

Articulating areas to which the law applies

45. The Discussion Paper discusses the distinctions between the ADA, DDA and SDA on the one hand, and the RDA on the other, in the coverage of the legislation in terms of areas of public life.
46. On the objective of human rights legislation having a broad coverage, the RDA approach is appealing: making unlawful discrimination which interferes with the enjoyment of ‘any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life’.
47. This also accords with the definition of discrimination on the basis of disability in the *Convention on the Rights of Persons with Disabilities* at Article 2:

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.
48. However, the general public needs to be able to understand and appreciate the areas of public life to which the Act applies. Identifying the areas by words such as ‘work’, ‘education’, providing ‘goods and services’ and ‘accommodation’ means that people can readily understand what is meant by ‘public life’. The scope can be further clarified with provisions that describe the areas in an inclusive way, as occurs in the Queensland AD Act.¹⁹

Recommendation 6: That the consolidated Act describe the areas covered in a broad and inclusive way.

¹⁹ See for example, *Anti-Discrimination Act 1991* (Qld), sections 15 and 46

Voluntary workers

49. Both voluntary and domestic workers make a significant contribution to Australian society, and in principle they should not be excluded from protection from discrimination. However, the distinction between public and private life recognises the competing interests of people having the freedom to select who they wish to engage to work in their private homes.
50. The Commission recommends adopting the terms ‘work’ and ‘worker’ and defining them inclusively, as occurs in the Queensland AD Act:

work includes –

- (a) work in a relationship of employment (including full-time, part-time, casual, permanent and temporary employment); and
 - (b) work under a contract for services; and
 - (c) work remunerated in whole or in part on a commission basis; and
 - (d) work under a statutory appointment; and
 - (e) work under a work experience arrangement within the meaning of the Education (Work Experience) Act 1996, section 4; and
 - (ea) work under a vocational placement under the Vocational Education, Training and Employment Act 2000; and
 - (f) work on a voluntary or unpaid basis; and
 - (g) work by a person with an impairment in a sheltered workshop, whether on a paid basis (including a token remuneration or allowance) or an unpaid basis; and
 - (h) work under a guidance program, an apprenticeship training program or other occupational training or retraining program.
51. The Queensland AD Act has covered volunteers since it came into operation in mid-1992, and the Commission has not observed any difficulty for organisations with voluntary workers dealing with existing laws in Queensland. If the organisation is very small or has limited

resources, it is generally able to rely on an exemption if it believes unreasonable or unrealistic expectations are being made of the organisation by its voluntary workers. The Commission therefore recommends voluntary workers be covered in the consolidated Act.

Recommendation 7: That the consolidated Act protect voluntary workers.

Domestic workers

52. In the Commission's consultation with stakeholders, the majority of the group were of the view that it is reasonable to allow people to choose who they engage and employ to perform domestic services, and care for their children, in their own home. The Queensland AD Act provides an exemption that covers the arrangements made for deciding who should be offered work, deciding who should be offered work, failing to offer work and dismissing a worker where the work is to perform domestic services at the person's home or to care for the person's children at the person's home.²⁰

53. An exemption of this nature needs to be given careful consideration, particularly in light of the growth in this service industry. Consideration also needs to be given to the effect of the engagement of workers by organisations whose business it is to provide domestic and/or childcare workers to consumers in their homes.²¹

Recommendation 8: That careful consideration be given to exempting domestic and child care services provided in the home.

Clubs

54. One of the areas of coverage under the Queensland AD Act is club membership and affairs, including prospective membership.²² The

²⁰ See for example, *Anti-Discrimination Act 1991* (Qld), sections 26(1) and 27(1)

²¹ The Commission has been informed (anecdotally) that some organisations whose business is to provide domestic service workers, allegedly have discriminated in the hiring of workers, so as to suit the demands of clients, relying on the exemption in the Queensland AD Act.

²² *Anti-Discrimination Act 1991* (Qld), sections 93 - 95

definition of club is essentially a 'for-profit' association. There are specific exemptions for:

- clubs established for minority cultures and disadvantaged people;
- limiting benefits on the basis of sex in certain circumstances;
- excluding membership of a minor if there is reasonable risk of injury;
- excluding membership of a person with an impairment if special services or facilities would be required, the supply of which would impose unjustifiable hardship.²³

55. There is also a specific exemption in the area of the supply of goods and services for clubs that are essentially 'not-for-profit'.²⁴ The Commission has called upon the Queensland Government to repeal this provision.²⁵

56. A decision of the Queensland Civil and Administrative Tribunal in 2010²⁶ has made it clear that sporting and other 'not-for-profit' associations are free to discriminate in the provision of goods and services on any of the grounds covered by the Act because of the provision. A basketball team comprised of young African migrants alleged it had been excluded from the competition because of the race of the players. The issue of whether or not there had been unlawful race discrimination could not be decided because the tribunal found that the competition was run by 'not-for-profit' associations, which were exempt from the Act because of the provision.

57. Sport is an integral part of Australian society, with many Australians participating in sport through clubs from an early age. If Australia is serious about eliminating discrimination and promoting substantive

²³ *Anti-Discrimination Act 1991* (Qld), sections 96 - 100

²⁴ *Anti-Discrimination Act 1991* (Qld), section 46(2)

²⁵ *Fairness needed in work and play*, Media release of the Anti-Discrimination Commission Queensland, 11 October 2010, <http://www.adcq.qld.gov.au/media/10FairnessNeeded.html>

²⁶ *Yohan v Queensland Basketball Incorporated & Anor (No. 2)* [2010] QCAT 471

equality, sporting and social engagement is an ideal place to set the example, particularly to the young, so that inclusiveness and freedom from unfair discrimination becomes the norm.

58. Organisations that provide services or other benefits for members of certain groups, for example seniors, would still have the benefit of welfare measure or equal opportunity exemptions.
59. The Commission's view is that the consolidated Act should apply to all clubs and associations, regardless of size and profit status, with appropriate exceptions for activities that are properly welfare measures or equal opportunity measures.

Recommendation 9: That the consolidated Act apply to all clubs and associations.

Sport

60. Sport is all about fair play, playing by the rules and having a fair go. Discrimination has no place in the sporting arena, and the consolidated Act must apply to sport.
61. Some exceptions are necessary to acknowledge and respect differences and ensure a level playing field. The Queensland AD Act provides exceptions for competitive sporting activities for people over 12 years of age, that allow age and competitive ability restrictions, and restrictions based on sex and gender identity where strength, stamina or physique are involved. It also allows restricting a competition to people with a specific or general impairment so that people with disabilities can participate and compete more fairly.
62. There was general acceptance of this model by the participants in the Commission's forum.

Recommendation 10: That the consolidated Act apply to sport, with limited exceptions in sporting competitions.

Exceptions and Exemptions

63. The Commission's comments in this section of the submission are confined to the suggestion of a general limitations clause, identified in the Discussion Paper as clarifying that conduct which is necessary to achieve a legitimate objective and is a proportionate means of achieving that objective, is not discrimination. In other words, an exemption which is 'legitimate and proportionate'.
64. The Commission agrees with the Discussion Paper that such a general limitations clause could result in increased uncertainty, and its application would depend on the interpretation and application of the test by the courts. The Commission is also concerned that a general limitations clause would be perceived by both duty holders and people subjected to discrimination as much wider than is intended and how courts might ultimately interpret and apply the clause. This approach of relying on how it is interpreted by the courts or other adjudicators places the onus on those who may be subjected to unfair discrimination to enforce their rights in order to have an interpretation and understanding of the provision. This is inconsistent with the objective of achieving substantive equality for everyone.
65. In Queensland, there is a general exemption that allows a person to do an act that is reasonably necessary to protect the health and safety of people at a place of work.²⁷ In our experience it is common for organisations to answer concerns by workers and consumers with 'workplace health and safety' without fully understanding and appreciating how the workplace health and safety requirements operate with anti-discrimination requirements. We fear that the next catchphrase answer to legitimate concerns will be 'legitimate and proportionate' without a proper analysis of objectives and means, and with those in the lesser position of power feeling intimidated and unwilling to challenge the response.

²⁷ *Anti-Discrimination Act 1991* (Qld), section 108

66. While the 'legitimate and proportionate' provision might be appealing to lawyers, it is important for the drafters of the legislation to consider how it might be perceived by the ordinary person.
67. At the Commission's forum there was consensus amongst the participants that the 'legitimate and proportionate' general exemption is too vague. Advocates representing both complainant and respondent groups want as much clarity as possible as they undertake everyday activities about what is and is not prohibited.
68. If a general limitations provision is to be adopted, it needs to be clear and specific about the scope and application of the provision to guide duty holders and complainants in applying the provision. What is 'legitimate and proportionate' should be consistent with the objects and purposes of the legislation.

Recommendation 11: That any general limitations provision be clear and specific about its scope and application, and be consistent with the objects and purposes of the Act.

Complaints and compliance framework

69. The Commission's comments in this section are confined to four issues raised by stakeholders; time-frames, the process for starting proceedings in court, damages and costs.

Time frames

70. Stakeholders with experience in both the Queensland and Federal jurisdictions report that the conciliation process in the Federal jurisdiction can take four to six months. They prefer the Queensland model which contains time-frames for deciding whether to accept or reject a complaint (28 days)²⁸ and for allocating a date for a conciliation conference (42

²⁸ *Anti-Discrimination Act 1991* (Qld), section 141

days from notifying the respondent of acceptance)²⁹. Additionally, if the Commission has not finished dealing with a complaint after six months from acceptance, either party can request referral to the tribunal.³⁰

71. Although it is not always possible to strictly comply with the requirement to decide whether to accept or reject a complaint within 28 days,³¹ the court has applied the principle in *Project Blue Sky*³² and interpreted this provision as not precluding the Commissioner from further dealing with the complaint if a decision is not made in the 28 days.³³ The Commission strives to comply with the time-frames as best as possible, with the result that the majority of accepted complaints are brought to conference efficiently without prejudicing either party.

Recommendation 12: That the consolidated Act provide reasonable time-frames for accepting or rejecting complaints, and for taking accepted complaints to conference.

Process for commencing court proceedings

72. In the Federal jurisdiction, if a complaint is unresolved after conciliation the complainant can apply to the Federal Magistrates Court or the Federal Court, within a specified time. This is a relatively formal process and requires the complainant to file the application and complaint documents.
73. Some stakeholders have expressed a preference for the Queensland model where the complaint is referred to the tribunal, and it is the Commission that provides the complaint and relevant documents to the tribunal. This is particularly helpful where one or more of the parties is self-represented. Nothing said or done during conciliation can be recorded in documents sent to the tribunal or adduced in evidence

²⁹ *Anti-Discrimination Act 1991* (Qld), sections 143(2)(d), 143(2)(g) & 143(5)

³⁰ *Anti-Discrimination Act 1991* (Qld), section 167

³¹ For example, where the complaint is made outside the 1 year time limit and it is necessary to decide whether to the complainant has shown good cause under section 138(2)

³² *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355

³³ See *State of Queensland v Walters* [2007] QSC 12

before the tribunal.³⁴ This referral process, with the Commission determining which documents are sent to the tribunal, is a safeguard against infringing this important principle.

Recommendation 13: That the consolidated Act provide a simplified process for moving a complaint from the Federal Commission to the Court, such as the referral process.

Damages

74. As discrimination law is statutorily based, so too are damages. The wording of the statute determines the basis for assessment of damages. The development of case law in the federal jurisdiction has resulted in a general understanding that while aggravated damages may be awarded under the relevant provision of the statute, the provision does not extend to allowing an award for exemplary or punitive damages.
75. This is also how the statute has been interpreted in Queensland, with the tribunal expressing reluctance to award aggravated damages when an award of damages is made for hurt and humiliation. For example:

The complainant asked for aggravated or exemplary damages. I do not have power to award the later – see s.209(1) of the Act - I have power to compensate, not punish. Even if I had power, I do not regard the circumstances of this case as justifying an award of exemplary damages. Aggravated damages are in theory regarded as compensatory damages, but I am not persuaded that the circumstances here warrant any award. I think it would be a rare case in which the Tribunal would award aggravated damages in circumstances where it compensated for feelings of hurt and humiliation. At general law – for example in a tort claim – feelings of hurt and humiliation which do not amount to a recognisable psychiatric injury are not compensable. There may be more scope in such an action to award aggravated damages. In the Tribunal, complainants recover for hurt feelings which fall short of psychiatric injury, and if an award is made which compensates a complainant in that regard it is difficult to see how an award of aggravated damages could be anything but punitive in fact, whatever the position in legal theory.³⁵

³⁴ *Anti-Discrimination Act 1991* (Qld), sections 164AA & 208(2)

³⁵ *Edwards v Hillier & Educang Ltd* [2006] QADT 34 at paragraph 136

76. Aggravated damages are compensatory in nature, and in the federal jurisdiction, courts have held that circumstances where the harm to the complainant has been aggravated and might warrant an award for aggravated damages include:

- the behaviour of the respondent in committing the act (high-handed, malicious, insultingly or oppressively);³⁶
- the circumstances in which the conduct took place (such as the relationship of employer and employee);³⁷
- the manner in which the respondent conducts proceedings.³⁸

77. Notwithstanding these authorities, aggravated damages are not often awarded. In Queensland, an award of \$3,000 for aggravated damages, in respect of conduct of the respondent in preparation and presentation of his case, was overturned on appeal on the basis that the damages were exemplary or punitive, and not available to the tribunal. The Supreme Court said:

Despite the reference to causing the [complainant] ‘the extended stress of these hearings’ these were findings of reprehensible conduct which might perhaps have warranted punishment, rather than findings of the infliction of hurt, insult and humiliation. In short, there was an error of law in the awarding of aggravated damages, and that part of the damages award must be set aside.³⁹

78. The High Court has stated (and cited in *Hehir v Smith*, above):

Aggravated damages, in contrast to exemplary damages, are compensatory in nature, being awarded to injury to the plaintiff’s feelings caused by insult, humiliation and the like. Exemplary damages, on the other hand, go beyond compensation and are awarded ‘as punishment to the guilty, to deter from any such proceedings for the future, and as proof of the detestation of the jury to the action itself.’⁴⁰

³⁶ *Hall v Sheiban* (1989) 20 FCR 217 at 239;

³⁷ *Hall* (supra) at 240

³⁸ *Elliott v Nanda* (2001) 111 FCR 240

³⁹ *Hehir v Smith* [2002] QSC 92 at paragraph 42

⁴⁰ *Lamb v Cotogno* (1987) 164 CLR 1 at 8

79. Discriminatory conduct has generally been characterised by the courts and tribunals as a tort (a civil wrong), and the approach to assessment of damages has been to start with tort principles. Although the 'hurt and humiliation' in discrimination has been likened to the hurt to feelings and reputation in defamation, awards of damages in discrimination cases tend to be lower than those in defamation cases. Awards of damages in discrimination cases are reputedly low. This can be a strong disincentive to a complainant in pursuing a complaint, particularly in 'no-costs' jurisdictions where the costs incurred by a complainant in pursuing their case can out-weigh the compensation awarded.⁴¹
80. Feedback to the Commission during the delivery of training to workers, has included comments to the effect that awards of damages in cases for conduct such as sexual harassment would provide little or no inducement for certain organisations to protect female workers from sexual harassment and sex discrimination. This is of particular relevance to industries such as the mining industry which is experiencing high growth and returns and employing large numbers of workers, including male and female workers in remote areas.
81. Sexual harassment by its nature would involve elements and circumstances of aggravation, particularly where there is a relationship of employer and employee.
82. Even outside discrimination law, exemplary damages are rarely awarded. The High Court has said that 'the remedy is exceptional in the sense that it arises (chiefly, if not exclusively) in cases of conscious wrongdoing in contumelious disregard of the plaintiff's rights'.⁴² It has been held to be available for intentional torts as well as wilful negligence,

⁴¹ See for example the costs decision of the Queensland Civil and Administrative Tribunal where a successful complainant recovered \$28,550 (after taking into account WorkCover payments) and incurred costs of \$46,600, and the tribunal declined to make any order for costs - *Irvine & Porter v Mermaids Café and Bar Pty Ltd & Ingall (No. 3)* [2011] QCAT 461

⁴² *Gray v Motor Accident Commission* (1998) 196 CLR 1

but will not be available where the respondent has been punished under the criminal law.⁴³

83. Although unlawful conduct under discrimination law can be unintentional, much of the unlawful conduct that does occur is intentional, and sometimes malicious. An express discretionary power to award both aggravated and exemplary (or punitive) damages would not be inconsistent with the policy objective of discrimination law of changing community attitudes.

If discrimination legislation is intended to have a normative effect on the community, the awarding of punitive damages would seem a logical means to achieve this.⁴⁴

Recommendation 14: That the consolidated Act specifically authorise orders awarding aggravated as well as exemplary or punitive damages.

Costs

84. Queensland has had the experience of both a costs jurisdiction and a jurisdiction where there is a presumption against awarding costs.⁴⁵ In light of its experience the Commission favours a hybrid model where costs do not necessarily follow the event, costs may not be awarded at all, and the criteria for determining whether to award costs is prescribed by the legislation to take into account the following:

- the objects and purposes of the Act and whether those objects and purposes would be compromised or defeated in ordering the party to pay costs;
- the relative strengths of the claims made by each of the parties;
- whether a party reasonably believed there had been a contravention of the Act;

⁴³ As above

⁴⁴ Andrades, C (1998) *What Price Dignity? – Remedies in Australian Anti-Discrimination Law* Parliament of Australia, Parliamentary Library. Research Paper 13 1997-98

<<http://www.aph.gov.au/library/pubs/rp/1997-98/98rp13.htm>> accessed 25 January 2012

⁴⁵ The presumption against awarding costs came into effect in December 2009.

- the fairness of a costs order, having regard to whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding, including, for example, by-
 - i. failing to comply with an order or direction of the Court without reasonable excuse; or
 - ii. attempting to deceive another party or the tribunal; or
 - iii. vexatiously conducting the proceeding;
- the nature and complexity of the proceeding;
- whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;
- whether the complaint raised in the public interest;
- whether the complaint identified conduct with alleged systemic discriminatory effect; and
- the impact of making a costs order on any remedies awarded if a claim was successful.

Recommendation 15: That the consolidated provide that costs do not necessarily follow the event, and specify criteria for exercising the discretion whether to award costs.

Concluding remarks

85. As noted in the Discussion Paper, the consolidation of the Commonwealth anti-discrimination laws is an opportunity to improve the effectiveness of the legislation and to make it clearer and easier to understand and implement.
86. It is of utmost importance that the new legislation does not detract from existing protections, not only in the Commonwealth legislation, but also in the legislation of the states and territories. Ideally the new legislation should be of the highest standard, a model to which the state and territory laws can be harmonised.

Recommendations:

1. That the consolidated Act contain clear objects and purposes provisions.
2. That discrimination be defined as encompassing modified versions of direct and indirect discrimination, failure to make reasonable adjustments, harassment based on an attribute, each facet of which is not mutually exclusive.
3. The burden of proof for direct discrimination should follow the Fair Work Act model, and the respondent should carry the burden of proving reasonableness in indirect discrimination and any exemptions or exceptions relied on.
4. That the consolidated Act fully protect human rights associated with gender identity and sexuality, and that these attributes be given broad and inclusive definitions.
5. That the consolidated Act provide that discrimination on the basis of an attribute includes more than one attribute as well as a combination of attributes.
6. That the consolidated Act describe the areas covered in a broad and inclusive way.
7. That the consolidated Act protect voluntary workers.
8. That careful consideration be given to exempting domestic and child care services provided in the home.
9. That the consolidated Act apply to all clubs and associations.

Recommendations:

- 10. That the consolidated Act apply to sport, with limited exceptions in sporting competitions.**
- 11. That any general limitations provision be clear and specific about its scope and application, and be consistent with the objects and purposes of the Act.**
- 12. That the consolidated Act provide reasonable time-frames for accepting or rejecting complaints, and for taking accepted complaints to conference.**
- 13. That the consolidated Act provide a simplified process for moving a complaint from the Federal Commission to the Court, such as the referral process.**
- 14. That the consolidated Act specifically authorise aggravated and exemplary or punitive damages.**
- 15. That the consolidated provide that costs do not necessarily follow the event, and specify criteria for exercising the discretion whether to award costs.**