Submission:
Review of the Anti-Discrimination Act (Qld)

February 2022

The Public Advocate
Influencing change to empower lives

Introduction

Thank you for the opportunity to provide feedback regarding the review of the *Anti-Discrimination Act 1991* (the Act).

This work represents an important opportunity to thoroughly update this legislation that was initially drafted over 30 years ago. There has been a greater focus in the community towards the impact of harmful discrimination and a move towards the recognition of the rights of all, a change encapsulated by the enactment of the *Human Rights Act 2019*. It is an important exercise to review the Act from this lens.

As the Public Advocate for Queensland, I undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making capacity.[1]

There are a range of conditions that may impact a person's decision-making ability. These include intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or problematic alcohol and drug use. While not all people with these conditions will experience impaired decision-making ability, it is likely that many may, at some point in their lives. For some, impaired decision-making ability may be episodic or temporary, requiring intensive supports at specific times in their lives, while others may require lifelong support with decision-making and communicating choices and decisions.

Discrimination can occur in many contexts, and certainly affects people with impaired decision-making ability. Given the range of difficulties that people with impaired decision-making ability experience in society, it is important that any new anti-discrimination laws are comprehensive and robust to cater towards all Queenslanders, no matter their abilities.

The Public Advocate's position

This submission will be structured around some of the questions as found in the *Discussion Paper, Review of the Anti-Discrimination Act* (November 2021), and the issues that are relevant to my role as the Public Advocate.

Discussion question 1 – Direct and indirect discrimination
I recommend that the Act clarify that direct and indirect discrimination are not mutually exclusive. The legislation from the Australian Capital Territory (ACT) provides a strong example for a relatively simple change in wording, by stating that discrimination can involve conduct that is direct, indirect or both.[2] Such a change could assist in the Act being less complex and more accessible, removing a potential barrier for people who wish to take action against discrimination.

Discussion question 2 – The test for direct discrimination
The test for direct discrimination should be changed; I suggest the 'unfavourable treatment' approach be adopted. As noted in the Discussion Paper, the current test of using a 'comparator' can result in an insurmountable position for a person with disability where their disability results in certain behaviour being compared to a hypothetical person being treated in the same way. The use of a 'comparator' without a disability in that situation can result in an unjust outcome and arguably does not reflect our understanding and the rights of people with disability today.

The use of an 'unfavourable treatment' approach focuses upon the actual experience of the individual and the impact that discrimination has upon the person. Again, this would likely be more accessible and understandable to the community than the use of a hypothetical 'comparator' in many situations.

[1] *Guardianship and Administration Act 2000* (Qld) s 209.
[2] *Discrimination Act 1991* (ACT) s 8.

Alternatively, I agree with the proposal made by the Alliance of Queensland Lawyers and Advocates' *Ten-Point Plan for a Fairer Queensland*.[3] The Alliance proposes the model found under the *Racial Discrimination Act 1975* (Cth) to make it unlawful to discriminate based upon an attribute of a person.[4] As noted by the Alliance, the key to a fairer and better system would be removing the technical and complex need for a comparison for a case to be made for discrimination.[5]

Discussion question 4 – A unified test for direct and indirect discrimination
I support a unified test for both direct and indirect discrimination. This would be the logical outcome if both of the issues asked in discussion questions 1 and 2 result in changes as suggested above, and direct and indirect discrimination are no longer mutually exclusive, and the 'unfavourable treatment' approach is adopted, or alternatively discrimination is made unlawful.

Not only would this be the logical outcome, having two separate tests for direct and indirect discrimination is confusing and could be perceived as arbitrary. Unifying the test would make the system more accessible for everyone so that it can be better understood by complainants as well as those who may be inadvertently creating situations that may be discriminatory.

Discussion question 6 – A positive duty to make 'reasonable adjustments' or 'reasonable accommodations'
I consider that the Act should adopt a positive duty to make 'reasonable adjustments'/'reasonable accommodation', especially for those with a disability. This would be in line with the United Nations *Convention on the Rights of Persons with Disabilities* (the Convention),[6] in which 'reasonable accommodation' is an overarching principle. In other words, supports, modifications and adjustments must be made so that people with disability can exercise their rights on the same basis as others. Article 5 of the Convention states that 'reasonable accommodation' must be provided for discrimination to be eliminated.

Therefore, creating a duty to make reasonable accommodation should be considered as a positive duty in the amended Act. Such an approach is reflected in other legislation regarding people with disability including the *Guardianship and Administration Act 2000*.[7]

Discussion question 7 – Intersectional discrimination
In relation to whether there is a need to protect people from discrimination because of the effect of a combination of attributes, I recommend that the Act be amended to recognise intersectional discrimination as noted in the Discussion Paper. This better reflects the reality of people who have experienced discrimination and would further assist in making the legislation more accessible.

The ACT model provides an example of how this could be framed, defining discrimination as being because the person has 'one or more' protected attributes.[8]

Discussion question 8 – Onus of proof
The burden of proof being upon the complainant to establish discrimination is extremely difficult to meet, especially for people who are in a vulnerable or disadvantaged position. To collect the necessary evidence can be difficult, and this evidence may reside with the respondent (the example given in the Discussion Paper being that in cases of discrimination in gaining employment, the respondent often simply points to 'merit').

With this in mind, consideration should be given to shifting the burden once a prima facie case of discrimination has been established. The *Fair Work Act 2009*(Cth) is provided as an example in the

[3] The Alliance of Queensland Lawyers and Advocates, *Ten-Point Plan for a Fairer Queensland* <https://www.communitylegalqld.org.au/wp-content/uploads/2021/11/Ten-Point-Plan-1.pdf>.
[4] *Racial Discrimination Act 1975* (Cth) s 9(1).
[5] The Alliance of Queensland Lawyers and Advocates (n 3) 4.
[6] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008).
[7] See, for example, the General Principles: *Guardianship and Administration Act 2000* (Qld) s 11B.
[8] *Discrimination Act 1991* (ACT) ss 8(2) and 8(3).

Discussion Paper, where a complainant only needs to establish that an adverse action was taken and that they had a relevant attribute.

This is arguably a more accessible approach, and potentially simpler and more straightforward for people who have experienced discrimination to bring a claim under the Act.

Discussion question 10 – Direct access to tribunals or courts
I recommend that additional options be available to a complainant, rather than the two-stage model currently in place, where compulsory conciliation is required before being able to proceed to a tribunal. The Discussion Paper outlines concerns about the lack of transparency and public exposure during the conciliation phase, and the limits this places on community awareness and education about how anti-discrimination laws work.

Direct access to the tribunal would be one way to address this issue, which also has the advantage of reducing the amount of time required for an ultimate resolution of a complaint. This is especially relevant when the complainant is seeking a declaration that policies or practices are discriminatory on a systemic level.

An option for the tribunal to refer matters back to conciliation in appropriate cases could be included for situations where this approach is felt to be more appropriate.

Whether there should be an option to refer a matter directly to the Supreme Court may depend upon whether there are people who have experienced discrimination who believe that such an option would have improved their situation and in what ways. If a component of this is that the Supreme Court has the ability to hear matters quickly, then provisions could be made for the tribunal to also expedite and hear matters quickly.

Both the tribunal and the Supreme Court already have procedures in place to deal with vexatious or misconceived claims, but should direct access be granted in a revision of the Act, it could be made possible through the legislation to allow those jurisdictions to dismiss such claims should they arise.

Discussion question 11 – 'complaint-based' terminology
I recommend that the word 'complaint' be replaced with the word 'dispute' as per the Victorian legislation.[9] The change away from the word 'complaint' would assist in removing any negative connotations that may come from the term, as noted in the discussion paper. Further, the term 'complaint' is generally legalistic and may be misunderstood by some people in the community. The change of the term to 'dispute' would be unlikely to cause any disadvantage or negative consequences and would be a relatively minor amendment.

Discussion question 12 – Form of complaints
I consider that there should be as many options as practicable in terms of how and in what form a complaint can be made (including audio and video recordings in lieu of written complaints). This would reflect the provision of 'reasonable accommodation' as discussed above, allowing a complainant to exercise their autonomy to the best of their ability.

Balancing these rights with those of respondents would be essential, so that they are able to understand complaints. This could be achieved through the Commission assisting the complainant if the complaint is not relatively easily understood.

Discussion question 15 – Representative complaints
As per the submission of the Alliance of Queensland Lawyers and Advocates, consideration should be given to the adoption of a class action model. The model found in the *Federal Court of Australia Act 1976* (Cth) and the *Racial Discrimination Act 1975* (Cth) has been successfully used in Queensland.[10]

[9] *Equal Opportunity Act 2010* (Vic).
[10] The Alliance of Queensland Lawyers and Advocates (n 3) 6.

Under current laws, it is extremely difficult to bring a group action,[11] and any changes to improve accessibility in this regard would be positive.

Discussion question 21 – Introduction of a positive duty
I recommend that positive duties to eliminate discrimination be introduced into the Act. The current legislation is designed to generally deal with harm after it has occurred, and does not compel a safe environment to be created for people who may experience discrimination.

A proactive approach would reduce the potential for discrimination to occur, and encourage positive and preventative actions. As proposed by the Alliance of Queensland Lawyers and Advocates, positive duties should include the need to 'make reasonable adjustments for people with disabilities, older persons and others'.[12]

Discussion question 22 – The role of the Commission
I recommend that the Commission's powers be expanded to enable it to enforce compliance with the Act, take legal action if necessary and run compliance campaigns. The Alliance of Queensland Lawyers and Advocates cites a number of examples of other enforcement bodies or regulators with a combination of duties to support compliance with laws, such as the Fair Work Ombudsman and the Australian Competition and Consumer Commission.[13]

The Commission is the entity that is best placed to understand and enforce actions that relate to discrimination under the Act. Such powers would assist in the proactive approach required to reduce discrimination, and to ensure discrimination is addressed when complainants may be too fearful or lack the capacity to bring actions themselves.

Discussion question 25 – Grounds of discrimination
I support the proposal to replace the use of the term 'impairment' with 'disability'. This is consistent with other legislation, as well as being used and understood in international instruments such as the Convention. I also support the concept of the 'social model' of disability, which recognises that disability is a social construct, the result of a society that places physical, social and attitudinal barriers in the way of people with disability.

Discussion question 41-51 – Exemptions to the Act
The Alliance of Queensland Lawyers and Advocates have cited many examples of how exemptions found under the Act are now outdated and not in line with contemporary community expectations,[14] such as insurance companies discriminating against people with a history of mental illness even if that illness (eg. anxiety) has negligible effect on risk.

After 30 years, perspectives of disability, mental illness and other conditions have changed, and a thorough review is required of any and all exemptions in the Act to ensure that unfair or unjust conduct is not allowed to occur under a modern *Anti-Discrimination Act*.

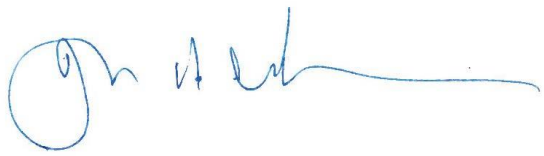
[11] The Alliance of Queensland Lawyers and Advocates (n 3) 5.
[12] The Alliance of Queensland Lawyers and Advocates (n 3) 5.
[13] The Alliance of Queensland Lawyers and Advocates (n 3) 6.
[14] The Alliance of Queensland Lawyers and Advocates (n 3) 1.

Conclusion

Thank you for the opportunity to provide feedback regarding the review of the *Anti-Discrimination Act 1991*.

I look forward to hearing about any further opportunities to be involved in further consultation as the review progresses.

Yours sincerely



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