Submission to the Queensland Human Rights Commission Review into the Anti-Discrimination Act

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to the

Queensland Human Rights Commission

Review of Queensland's Anti-Discrimination Act

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Australian Discrimination Law Experts Group

This submission is made on behalf of the undersigned members of the Australian Discrimination Law Experts Group ('ADLEG'), a group of legal academics with significant experience and expertise in discrimination and equality law and policy.

This submission focuses on key questions raised in the discussion paper released November 2021 by the Queensland Human Rights Commission for the Review of the Queensland Anti-Discrimination Act 1991 ('the Qld ADA').

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry, by contacting Alice Taylor at altaylor@bond.edu.au.

This submission may be published.

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Glossary

Federal and state laws

RDA	*Racial Discrimination Act 1975* (Cth)
SDA	*Sex Discrimination Act 1984* (Cth)
AHRCA	*Australian Human Rights Commission Act 1986* (Cth)
DDA	*Disability Discrimination Act 1992* (Cth)
Age DA	*Age Discrimination Act 2004* (Cth)
FWA	*Fair Work Act 2009* (Cth)
2021 SDA Amending Act	*Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth)
DA (ACT)	*Discrimination Act 1991* (ACT)
HRA (ACT)	*Human Rights Act 2004* (ACT)
ADA (NT)	*Anti-Discrimination Act 1992* (NT)
Qld ADA	*Anti-Discrimination Act 1991* (Qld)
ADA (Tas)	*Anti-Discrimination Act 1998* (Tas)
EOA 2010 (Vic)	*Equal Opportunity Act 2010* (Vic)
EOA 1995 (Vic)	*Equal Opportunity Act 1995* (Vic)
EOA 1984 (SA)	*Equal Opportunity Act 1984* (SA)

International laws

ICCPR	*International Covenant on Civil and Political Rights*
ICESCR	*International Covenant on Economic, Social and Cultural Rights*
CERD	*International Convention on the Elimination of All Forms of Racial Discrimination*
CEDAW	*Convention on the Elimination of All Forms of Discrimination against Women*
CRC	*Convention on the Rights of the Child*
CRPD	*Convention on the Rights of Persons with Disabilities*
ILO No 111	*Discrimination (Employment and Occupation) Convention*

Organisations

AHRC	Australian Human Rights Commission
Disability Royal Commission	Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability
ILO	International Labour Organization
QCAT	Queensland Civil and Administrative Tribunal
QHRC	Queensland Human Rights Commission
QIRC	Queensland Industrial Relations Commission
VCAT	Victorian Civil and Administrative Tribunal

1. Summary

This submission is made in response to the Queensland Human Rights Commission's ('QHRC') *Review of Queensland's Anti-Discrimination Act: Discussion Paper* ('the Discussion Paper') in relation to the QHRC's review into the *Anti-Discrimination Act 1991* (Qld) ('Qld ADA'). As set out in further detail below, our recommendations are as follows:

Key Definitions

1. ADLEG recommends that a single definition of discrimination that is inclusive of both direct and indirect discrimination should be adopted to provide greater clarity in the legislation.

   ADLEG recommends the following legislative approach to be adopted:

   Meaning of discrimination

   (1) For this Act, discrimination occurs when a person:

   (a) discriminates either directly or indirectly, or both, against someone else; or

   (b) engages is sexual harassment or harassment on any other ground.

   (2) For this section, a person directly discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has one or more protected attributes, imputed attributes, characteristics of the attribute or attributes, or characteristics imputed to the attribute or attributes.

   (3) For direct discrimination to take place, it is not necessary –

   (a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or

   (b) that the person who discriminates regards the treatment as unfavourable; or

   (c) that the person who discriminates has any particular motive in discriminating.

   (4) For this section, a person indirectly discriminates against someone else if the person imposes, or proposes to impose, a rule, condition, requirement or practice that has, or is likely to have, the effect of disadvantaging the other person because the other person has one or more protected attributes or characteristics of an attribute or attributes.

(5) For indirect discrimination to take place, it is not necessary that the person who discriminates is aware that the condition, requirement or practice disadvantages the group of people.

(6) A condition or requirement does not give rise to indirect discrimination if it is reasonable in the circumstances.

(7) The person who imposes, or proposes to impose, the requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable.

(8) In deciding whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include—

(a) the nature and extent of any disadvantage that results from imposing the condition or requirement; and

(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is disproportionate to the result sought by the person who imposes, or proposes to impose, the condition or requirement.

2. ADLEG recommends the inclusion of a positive obligation to make reasonable adjustments for persons with impairments. ADLEG recommends that the following stand-alone positive duty be incorporated into the Qld ADA:

Discrimination by failing to provide reasonable adjustments

(1) For the purpose of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of an impairment of the aggrieved person if:

(a) because of the impairment, the aggrieved person requires adjustments; and

(b) the discriminator does not make, or proposes not to make, reasonable adjustments for the person.

For the avoidance of doubt, it is not necessary for there to be a causal connection between the failure or proposal not to make reasonable adjustments and the impairment of the aggrieved person.

(2) For the purpose of this Act, an adjustment to be made by a person is a reasonable adjustment, unless making the adjustment would impose an unjustifiable hardship on the person.

3. ADLEG recommends that further consideration be given to including a positive duty of accommodation on the basis of all attributes captured by the Qld ADA. Such a provision would be modelled on s 24 of the ADA (NT):

Failure to accommodate need arising as a result of an attribute

(1) In addition to the obligations under section Z [Discrimination by failing to provide reasonable adjustments for people with impairments], for the purposes of the Act a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of an attribute if:

(a) because of the attribute, the aggrieved person requires adjustments; and

(b) the discriminator does not make, or proposes not to make, reasonable adjustments for the person.

For the avoidance of doubt, it is not necessary for there to be a causal connection between the failure or proposal not to make reasonable adjustments and the attribute of the aggrieved person.

(2) For the purposes of subsection (1):

(a) a failure or refusal to accommodate a ~~special~~ need of another person includes making inadequate or inappropriate provision to accommodate the ~~special~~ need; and

(b) a failure to accommodate a ~~special~~ need takes place when a person acts in a way which unreasonably fails to provide for the ~~special~~ need of another person if that other person has the ~~special~~ need because of an attribute.

(3) Whether a person has unreasonably failed to provide for the ~~special~~ need of another person depends on all the relevant circumstances of the case including, but not limited to:

(a) the nature of the ~~special~~ need; and

(b) the cost of accommodating the ~~special~~ need and the number of people who would benefit or be disadvantaged; and

(c) the financial circumstances of the person; and

(d) the disruption that accommodating the ~~special~~ need may cause;

(e) the nature of any benefit or detriment to all persons concerned; and

(f) the important public purpose of eliminating discrimination.

Burden of Proof

4. ADLEG recommends that the Qld ADA adopt the rebuttable presumption modelled on section 136 of the *Equality Act 2010* (UK).

Sexual Harassment

5. ADLEG recommends that the further contravention of 'sex-based' harassment be introduced and should be applied to all areas of activity under the Act.

Complaints Process

6. ADLEG recommends that Queensland adopt a modified form of the process found in the *Equal Opportunity Act 2010* (Vic).

7. ADLEG recommends that existing provisions of the Qld ADA be reviewed to ensure the QHRC has sufficient scope in its communications with parties to a complaint to avoid setting up an adversarial context that interferes with the conciliation of complaints.

8. ADLEG recommends that the Qld ADA specifically permit complaints to be made other than in writing and that the QHRC be resourced to ensure authorised translation of complaints from community language (whether or not in writing) into written English, and access to qualified interpreting services.

9. ADLEG recommends that the Qld ADA require the QHRC to take reasonable steps to provide assistance similar to the requirement in section 46P(4) of the *Australian Human Rights Commission Act 1986* (Cth).

10. ADLEG recommends that the Qld ADA be amended to remove any legislative barriers to early dispute resolution, including removing the language of 'accept or reject' found in section 141, and time frames for responses, etc.

11. ADLEG recommends that the Qld ADA require notification to a complainant that their complaint is not covered by the Act to set out the reasons for this decision.

12. ADLEG recommends that factors affecting legal capacity should be able to be considered by the Commissioner in determining whether or not a complaint can be accepted beyond the statutory time limits. The Qld ADA should also expressly permit complaints to be made by people under the age of 18 years.

13. ADLEG recommends that the Qld ADA permits the complainant to elect to proceed either by way of complaint to the QHRC or direct to QCAT or QIRC. The Qld ADA should provide that where the complainant as elected to proceed to QHRC, if their complaint is not resolved through dispute resolution, they are permitted to proceed to QCAT. The Qld ADA should ensure that the QHRC has the following powers:

    1. to determine whether or not a full investigation of the issues raised in a complaint is necessary; and

    2. if so, to undertake such an investigation; and

3. compel production of information, etc, in the course of any investigation.

14. The QHRC should be resourced to undertake investigations of complaints.

15. ADLEG recommends that the time-frame for making complaints be increased to 3 years in line with what is available for personal injury claims.

16. ALDEG recommends that the Qld ADA adopts a more flexible approach to time limits and the QHRC should be able to accept out of time claims without 'good cause'.

17. ADLEG recommends that decisions of the Commission to decline or not accept a complaint that is made 'out of time' be reviewable by QCAT rather than the Supreme Court of Queensland at first instance.

18. ADLEG recommends that the representative complaints provisions be simplified to ensure that a representative complaint can be made either by a member of the class of people similarly affected or by an organisation on behalf of members of that class. If there are concerns about the binding nature of the QHRC's decision in this regard, it could be made subject to the right of review by the Tribunal at the time of the decision.

19. ADLEG recommends that the decision by the QHRC to deal with a complaint as a representative complaint should not be subject to change by the Tribunal other than through a review at the time of the decision.

20. ADLEG recommends that organisations including trade unions should be able to make a complaint on behalf of an affected person about discrimination.

21. ADLEG recommends that representative complaints should be able to proceed to tribunal.

22. The additional requirements for prisoners to make complaints should be removed.

23. ADLEG recommends the adoption of comprehensive data management systems by Australian statutory equality agencies including the QHRC.

Eliminating Discrimination

24. ADLEG proposes the following objects and interpretation clause be added to the Qld ADA:

> **Objects**
>
> The objects of this Act are —
>
> (a) to eliminate discrimination, attribute-based harassment, including sexual harassment, and victimisation, to the greatest possible extent;

(b) to promote and protect the right to equality set out in international human rights law, including:

(i) the right to enjoy a person's human rights without distinction or discrimination of any kind; and

(ii) the right to the equal protection of the law without discrimination; and

(iii) the right to equal and effective protection against discrimination on any ground; and

(c) to encourage the identification and elimination of systemic causes of discrimination, attribute-based harassment, including sexual harassment, and victimisation;

(d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—

(i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;

(ii) equal application of a rule can have unequal results or outcomes;

(iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;

(e) to recognise that all forms of behaviour resulting from prejudice and stereotyping undermine the right to equality and damage social cohesion.

Interpretation

This Act must be interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so consistently with—

(a) the objects of this Act; and

(b) human rights under international human rights law.

25. ADLEG recommends that the list of international instruments that the Qld ADA refers to should be updated for accuracy.

26. ADLEG supports the approach taken in the EOA 2010 (Vic) to 'special measures' noting the need to ensure that the measures are supported by members of the affected group.

Positive Duties

27. ADLEG recommends that positive duties be adopted across all attributes.

28. ADLEG recommends that the Qld ADA embed a requirement on all private and public organisations to publish on a specified timetable standardised, comparable and disaggregated information regarding fulfilment of positive duties through specific equality practices, across all protected grounds. This should require organisations to draw on intersectional data in developing goals and assessing progress.

29. ADLEG recommends that the positive duty should apply in respect to all grounds, areas, prohibitions and entities that currently hold obligations under the Qld ADA.

30. ADLEG recommends that Qld adopt a positive duty similar to that in the *Gender Equality Act 2020* (Vic), but which applies to all grounds.

Role of the Queensland Human Rights Commission

31. ADLEG recommends that the QHRC be given the power to enforce the Qld ADA by initiating complaints on behalf of individuals and groups.

32. ADLEG recommends that the QHRC be given the power to seek the imposition of preventative or corrective orders and civil penalties on non-compliant organisations (in addition to seeking remedies for the individual/s).

33. ADLEG recommends QHRC be empowered to work with respondents to resolve matters using enforceable undertakings.

34. ADLEG recommends that the QHRC receive additional resources so that it can perform the compliance and enforcement functions effectively.

Role of QCAT and QIRC

35. ADLEG recommends that decision making in discrimination cases should be undertaken by specialists with relevant expertise in both discrimination law and the experience of discrimination and prejudice in impacted communities.

36. ADLEG recommends that the tribunals be required to publish all decisions made in respect of matters under the ADA.

Attributes Protected Under the Act

37. ADLEG recommends that the protections in the ADA be reformed to include a reliance on assistance animals as defined by the DDA.

38. ADLEG recommends that the Qld ADA adopt the definition of gender identity which appears in the *Equal Opportunity Act 2010* (Vic):

    a. a person's gender-related identity, which may or may not correspond with their designated sex at birth, and includes the personal sense of the body

(whether this involves medical intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal reference.

39. ADLEG recommends that the name of 'sexuality' should be amended to refer to sexual orientation and the Qld ADA should be amended to adopt the definition in the *Equal Opportunity Act 2010* (Vic) which is as follows:

a. a person's emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender

ADLEG notes that this is the same definition that appears in the *Public Health Act 2005* (Qld) in section 213E.

40. ADLEG recommends that the attribute of 'lawful sexual activity' remains in the Qld ADA but that the attribute should be undefined.

41. ADLEG recommends that the attribute of 'criminal record' be added to the Qld ADA. This should be based upon the definition of irrelevant criminal record in the *Anti-Discrimination Act 1998* (Tas) ('ADA (Tas)') but with amendment:

criminal record, in relation to a person, means a record relating to arrest, interrogation or criminal proceedings where –

(a) further action was not taken in relation to the arrest, interrogation or charge of the person; or

(b) a charge has not been laid; or

(c) the charge was dismissed; or

(d) the prosecution was withdrawn; or

(e) the person was discharged, whether or not on conviction; or

(f) the person was found not guilty; or

(g) the person's conviction was quashed or set aside or is a spent conviction for the purposes of the *Criminal Law (Rehabilitation of Offenders) Act 1986*; or

(h) the person was granted a pardon; or

(i). the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises; or

(j) the person's charge or conviction was expunged under the *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017*

and includes:

(k) the imputation of a record relating to arrest, interrogation or criminal proceedings of any sort;

(l) a record relating to arrest, interrogation, criminal proceedings or criminal conviction of an associate of the person.

42. ADLEG also supports the inclusion of protection against discrimination on the ground of medical record in the Qld ADA.

43. ADLEG supports the inclusion of protection against discrimination on the ground of immigration status within the protection provided on the ground of race.

44. ADLEG supports the inclusion of physical features as a ground in the Qld ADA.

45. ADLEG supports the inclusion of the attribute of sex characteristics with the following definition:

sex characteristics means a person's physical features relating to sex, and includes:

(a) the person's genitalia and other sexual and reproductive parts of the person's anatomy; and

(b) the person's chromosomes; and

(c) the person's hormones; and

(d) secondary features emerging as a result of puberty.

46. ADLEG recommends that being subject to domestic or family violence be included as an attribute

47. ADLEG recommends that the attribute of accommodation status be included in the Qld ADA with the following definition:

accommodation status includes being—

(a) a tenant, including a tenant within the meaning of the *Residential Tenancies and Rooming Accommodation Act 2008*; and

(b) in receipt of, or waiting to receive, financial or housing assistance from the Housing Authority under *Housing Act 2003*; and

(c) homeless or without stable housing.

48. ADLEG recommends that the attribute of 'social origin' be included in the Qld ADA.

Exemptions

49. ADLEG recommends that the term 'defences' be used throughout the Qld ADA rather than 'exemptions'

50. ADLEG recommends that a provision be added to the Qld ADA which clarifies that the person relying on the defence must prove it on the balance of probabilities.

51. ADLEG recommends that the religious exemptions in the Qld ADA be further limited in accordance with the recent amendments to the *Equal Opportunity Act 2010* (Vic) and be in the following terms:

- require that conduct be reasonable and proportionate in order to be permitted under religious body and religious educational authority exemptions;
- require that discrimination only be permitted on the ground of religious belief or activity of the employee or service user under religious body and religious educational authority exemptions, and not on the basis of any other attributes;
- require that employment discrimination only be permitted under religious body and religious educational authority defences where conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the role and the person cannot meet those genuine occupational requirements because of the person's religious belief or activity.

52. ADLEG recommends that the 'work with children' exemption be repealed.

53. ADLEG recommends that the Qld ADA should apply to the provision of assisted reproductive technology services.

54. ADLEG recommends that the sex worker accommodation exemption should be repealed.

55. ADLEG recommends that the modifications to the Qld ADA contained in Part 12A of the *Corrective Services Act 2006* (Qld) be removed.

56. ADLEG recommends that the exemption on the basis of citizenship and visa status is removed.

57. ADLEG recommends that the Qld ADA exemptions for superannuation and insurance be limited to circumstances in which the discrimination is based on actuarial or statistical data from a reliable source and on which it is reasonable to rely, and the discrimination should be shown to be reasonable having regard to that data and any other factors.

58. ADLEG recommends that guidance be included in the provision or as a note to the provision on what actuarial and statistical data can be used.

59. ADLEG recommends that the Qld ADA provision go further in requiring the providers of insurance and superannuation to provide consumers with the data on which decisions about them are based and a meaningful explanation of that data.

Areas of Activity

60. ADLEG recommends that the areas of activity in which discrimination is prohibited in the Qld ADA be listed in a single provision and expressly include coverage of any activity that is not in private.

61. ADLEG recommends that there be express prohibition against discrimination and other related conduct 'by or against a person in connection with an area of activity' however defined in the Qld ADA.

62. ADLEG recommends that goods and services should be defined as inclusive of all providers of goods and services, whether for a fee or not and whether for profit or not.

63. ADLEG recommends that the Qld ADA be amended to ensure that clubs, whether for profit or otherwise, and whether incorporated or otherwise, are obliged to comply with the act in all regards.

2. Key definitions

The following section responds together to all of the following questions asked about definitions of discrimination including the specific questions about direct and indirect discrimination.

Q1 Should the Act clarify that direct and indirect discrimination are not mutually exclusive?

Q2 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?

Q3 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?

Q4 Do you support a unified test for both direct and indirect discrimination? Why or why not?

A single definition of discrimination that is inclusive of both direct and indirect discrimination provides a more accessible legislative form. The approach taken in the ACT provides clarity and clearly encompasses the concepts of both direct and indirect discrimination.

The definition of unlawful discrimination in the Act should be a streamlined statement that abandons reliance on a comparator and avoids a mutually exclusive distinction between direct and indirect discrimination.

Unlawful discrimination in Australia is currently defined in two ways, as 'direct' and 'indirect' discrimination. This distinction is conceptually difficult for parties to complaints and sometimes for decision makers. Difficulty in determining which type of discrimination is applicable in a particular matter has led to complainants pleading both types, which adds unnecessarily to the complexity of complaints. Nor does the definition of indirect discrimination adequately cover systemic discrimination.[1]

The distinction between direct and indirect discrimination has shown itself not to be workable. It is a costly and time-consuming technical barrier to an inquiry into what actually happened. We recommend that the definition be streamlined to express the general underlying idea of discrimination and make clear that the concepts can overlap and are not mutually exclusive. The direct/indirect distinction does not appear in the *Racial Discrimination Act 1975* (Cth)

1 Julian Gardner, *An Equal Opportunity Act for a Fairer Victoria: Equal Opportunity Review Final Report* (2008, Department of Justice, Victoria) 11–12.

('RDA'),[2] and we recommend that an approach similar to that of the RDA should be applied more broadly; the RDA definition, based on the *International Convention on the Elimination of All Forms of Racial Discrimination*,[3] follows the international law approach and provides a model that already exists in Australian legislation.

A single definition will ease the regulatory burden and will assist understanding and compliance. As well as making compliance easier, a single definition of discrimination will more closely align the Qld ADA with internationally recognised definitions of discrimination, better fulfilling our international human rights treaty obligations. Such an approach is similar to section 9(1) of the RDA and reflects the current approach in Canada, New Zealand and the USA, which makes no formal definitional distinction between direct and indirect discrimination.

Accordingly, ADLEG notes the following definition, based on the International Labour Organization *Discrimination (Employment and Occupation) Convention*[4] ('ILO No 111') (which appears in section 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) ('AHRCA')) and the *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW'), while in its terms clearly encompassing, in an inclusive approach, what has been known as direct and indirect discrimination:[5]

> ***Discrimination*** includes:
>
> (a) any distinction, exclusion, preference, restriction or condition that is made on the basis of a protected attribute which has the purpose or effect of, and
>
> (b) any condition, requirement or practice that has or may have the effect of, impairing or nullifying the recognition, enjoyment or exercise, on an equal footing, of equality of opportunity or treatment.

Recognition in this definition of the discriminatory effect of requirements and conditions reflects the wording of section 5(2) of the *Sex Discrimination Act 1984* (Cth) ('SDA').

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2 Although a definition of indirect discrimination was added to the *Racial Discrimination Act 1975* (Cth) ('RDA') in s 9(1A), the definition of discrimination in s 9 is not in its terms confined to direct discrimination.

3 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 1, Australian Treaty Series 1975 No 40 (entered into force 4 January 1969, entered into force for Australia 30 October 1975 except Article 14 which entered into force for Australia 28 January 1993) ('CERD')

4 *Discrimination (Employment and Occupation) Convention, opened for signature 25 June 1958, 362 UNTS 31, Australian Treaty Series 1974 No 12 (entered into force 15 June 1960, entered into force for Australia 15 June 1974) ('ILO No 111') (entered into force for Australia 15 June 1974).*

5 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 1, Australian Treaty Series 1983 No 9 (entered into force 3 September 1981, entered into force for Australia 27 August 1983) ('CEDAW'). See also *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3 (known as *Meiorin*, after the applicant).

The Qld ADA should provide that discrimination occurs when what is done has more than one 'purpose or effect' (see section 10 of the *Disability Discrimination Act 1992* (Cth) ('DDA'), provided that the discriminatory purpose or effect is substantial. For consistency with current case law, it should also make clear that the respondent's intention or awareness of the discriminatory purpose or effect is not an element of the action.

Proposed definition and test

Meaning of discrimination

(1) For this Act, discrimination occurs when a person:

(a) discriminates either directly or indirectly, or both, against someone else; or

(b) engages is sexual harassment or harassment on any other ground.

(2) For this section, a person directly discriminates against someone else if the person treats, or proposes to treat, another person unfavourably because the other person has one or more protected attributes, imputed attributes, characteristics of the attribute or attributes, or characteristics imputed to the attribute or attributes.

(3) For direct discrimination to take place, it is not necessary –

(a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or

(b) that the person who discriminates regards the treatment as unfavourable; or

(c) that the person who discriminates has any particular motive in discriminating.

(4) For this section, a person indirectly discriminates against someone else if the person imposes, or proposes to impose, a rule, condition, requirement or practice that has, or is likely to have, the effect of disadvantaging the other person because the other person has one or more protected attributes or characteristics of an attribute or attributes.

(5) For indirect discrimination to take place, it is not necessary that the person who discriminates is aware that the condition, requirement or practice disadvantages the group of people.

(6) A condition or requirement does not give rise to indirect discrimination if it is reasonable in the circumstances.

(7) The person who imposes, or proposes to impose, the requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable.

(8) In deciding whether a condition or requirement is reasonable in the circumstances, the matters to be taken into account include—

(a) the nature and extent of any disadvantage that results from imposing the condition or requirement; and

(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is disproportionate to the result sought by the person who imposes, or proposes to impose, the condition or requirement.

The inclusion of a comparator in the definition of direct discrimination has made analysis of complaints cumbersome and has distorted the definition of direct discrimination.[6] It is also likely to deter intersectional discrimination complaints.[7] Establishing that a comparator without an attribute has been treated more favourably is merely one way of providing evidence that a decision has been based on a prohibited ground or attribute. It should not obscure the real question, which is simply whether there has been discriminatory treatment.

The existing definitions of indirect discrimination in the Qld ADA are in the 'original' form that was adopted around Australia in the legislation of the 1970s. Since then definitions have been amended in many jurisdictions as a result of advancing understandings of the nature of indirect discrimination and the difficulty of making proof under the original definition. That definition tends to divert inquiry into marginal questions such as the degree of disproportionate impact that must be proved, and whether it is substantial, and what is required for the claimant to prove non-compliance with the requirement. More modern formulations of indirect discrimination such as those in the SDA[8] focus instead on the effect of disadvantage that flows from an apparently neutral requirement for people with a particular attribute. In this formulation there is no need to show inability to comply, for two main reasons. First, the disproportionate impact on the affected group is in itself a concern the law should address by assessing its reasonableness. Secondly, a claimant who can comply with the requirement is unlikely to take the time and trouble to litigate to challenge it, so that non-compliance can be assumed in a situation of litigation. ADLEG **strongly recommends** the adoption of the modern definition of indirect discrimination as discussed at above. This does not include a requirement to prove non-compliance.

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6 As a result of the High Court's decision in *State of NSW v Purvis* [2003] HCA 62; 217 CLR 92; 202 ALR 133; 78 ALJR 1 (11 November 2003) ('*Purvis*'), a court's decision on whether the comparator must have the attribute-related features of the complainant now often determines whether a complaint of discrimination can succeed. This wrongly elevates an issue that, while relevant, should be only one of the factors considered in a discrimination case. This issue is partially resolved with respect to the Qld ADA due to the decision in *Woodforth v Queensland* [2018] 1 Qd R 289 (23 May 2017) with the Queensland Court of Appeal indicating that the approach adopted with respect to the comparator issue in *Purvis* was not applicable given the different wording of the Qld ADA. Nevertheless, ADLEG suggests removal of the need for comparison for greater legislative clarity.

7 See, eg, Shreya Atrey, *Intersectional Discrimination* (OUP, 2019).

8 See, eg, *Sex Discrimination Act 1984* (Cth) s 5(2).

Q5 and 6 Should the Act adopt a positive duty to make 'reasonable adjustments' or 'reasonable accommodations'?

If you consider that this approach should be adopted:

- *Should this be a standalone duty?*
- *What factors should be considered when assessing 'reasonableness' of accommodations?*
- *Should it apply to disability discrimination, other specific attributes, or all attributes?*
- *Should it apply to specific areas of activity or all areas? For example, should it apply to goods and services, work, education, and accommodation?*
- *How would any amendments interact with exemptions involving unjustifiable hardship? Would there be a need to retain the concept of unjustifiable hardship at all?*

Should an exemption of unjustifiable hardship relating to the supply of special services or facilities be retained? Is so, in which areas? Should the factors relevant to determining unjustifiable hardship be redefined, and if so how? How can the compliance costs for business and organisations be appropriately considered and weighed?

ADLEG supports the inclusion of a positive obligation to make reasonable adjustments for persons with impairment. ADLEG notes the decision of the Full Federal Court in *Sklavos v Australian College of Dermatologists* [2017] FCAFC 128 (16 August 2017) ('the *Sklavos* case') and its interpretation of the positive duty found in sections 5 and 6 of the DDA. ADLEG is, along with key disability and human rights groups, seeking amendment to the DDA to address that interpretation, which limits the scope of the protection to situations where the reason for refusing to make an adjustment is the person's disability.

ADLEG supports the positive obligation being a stand-alone obligation that, in and of itself, can found a claim of unlawful discrimination. In respect of the DDA, the proposed amendment is to add a new section 6A. Using the proposed framing of that new section, ADLEG recommends that the Qld ADA include the following stand-alone positive duty:

A Discrimination by failing to provide reasonable adjustments

(1) For the purpose of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of an impairment of the aggrieved person if:

(a) because of the impairment, the aggrieved person requires adjustments; and

(b) the discriminator does not make, or proposes not to make, reasonable adjustments for the person.

For the avoidance of doubt, it is not necessary for there to be a causal connection between the failure or proposal not to make reasonable adjustments and the impairment of the aggrieved person.

(2) For the purpose of this Act, an adjustment to be made by a person is a reasonable adjustment, unless making the adjustment would impose an unjustifiable hardship on the person.

Having addressed the need for a positive stand-alone duty to make reasonable adjustments, ADLEG **recommends** that consideration be given to establishing a broader obligation to make adjustments to accommodate needs that arise because of any protected attribute under the Qld ADA. An example of this approach is found in section 24 of the *Anti-Discrimination Act 1992* (NT) ('ADA (NT)'). One potential benefit of extending the obligation is that it allows an effective process to be embedded broadly into processes and practices of organisations that will, over time, help organisations to identify systemic barriers being experienced by people with particular attributes or different attributes. So, for example, flexibility around starting and finishing times for work are an adjustment commonly made by employers to enable people with parental responsibilities or other caring responsibilities to meet those responsibilities while maintaining full-time employment. Flexible work hours do not, however, only benefit these groups. They may also benefit people with disability who, for example, may need to get to work later because they continue to face barriers to accessing public transport, or because they require personal care support in order to prepare for work and have limited control over the time that the care support is available, or because of effects on medication on alertness in the morning.

Another benefit is that such an obligation would normalise the process of asking for adjustments. At present, it is common to hear of situations where people with disability are reluctant to identify they require an adjustment because of their impairment. That reluctance arising from negative experiences of making such requests and a desire not to be seen as different and requiring additional expenditure.

As such, ADLEG **recommends** consider be given to including the following provision, based on section 24 of the ADA (NT):

B Failure to accommodate need arising as a result of an attribute

(1) In addition to the obligations under section Z [Discrimination by failing to provide reasonable adjustments for people with impairments], for the purposes of the Act a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of an attribute if:

(a) because of the attribute, the aggrieved person requires adjustments; and

(b) the discriminator does not make, or proposes not to make, reasonable adjustments for the person.

For the avoidance of doubt, it is not necessary for there to be a causal connection between the failure or proposal not to make reasonable adjustments and the attribute of the aggrieved person.

(2) For the purposes of subsection (1):

(a) a failure or refusal to accommodate a ~~special~~ need of another person includes making inadequate or inappropriate provision to accommodate the ~~special~~ need; and

(b) a failure to accommodate a ~~special~~ need takes place when a person acts in a way which unreasonably fails to provide for the ~~special~~ need of another person if that other person has the ~~special~~ need because of an attribute.

(3) Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to:

(a) the nature of the ~~special~~ need; and

(b) the cost of accommodating the ~~special~~ need and the number of people who would benefit or be disadvantaged; and

(c) the financial circumstances of the person; and

(d) the disruption that accommodating the ~~special~~ need may cause;

(e) the nature of any benefit or detriment to all persons concerned; and

(f) the important public purpose of eliminating discrimination.

It is important to understand the concept of a 'reasonable adjustment' refers to adjustment that does not impose an unjustifiable hardship and that is a 'necessary and appropriate modification and adjustment' to the system in place, 'needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.[9] To be consistent with the general principles set out in Article 3 of the *Convention on the Rights of Persons with Disabilities* ('CRPD'), the process of determining that appropriate adjustment must necessarily involve the person with disability at the centre of the process. As such, an adjustment that was determined without giving significant weight to the view of the person with disability would not be a reasonable adjustment.

ADLEG notes the summary of the concept of "reasonable adjustment" in disability discrimination presented to the Royal Commission into Violence, Abuse, Neglect and

9 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3, Australian Treaty Series 2008 No 4 (entered into force 3 May 2008, entered into force for Australia 16 August 2008) ('CRPD') art 2.

Exploitation of People with Disability ('the Disability Royal Commission') by Senior Counsel assisting, Kate Eastman SC:

> ... the adjective 'reasonable' is completely irrelevant in terms of the way the law is applied in Australia in the DDA. So a reasonable adjustment is any adjustment that does not impose unjustifiable hardship on the employer. It's got nothing to do with the reasonableness of the way somebody might behave, the way somebody might act, or whether an employer thinks what they have done is reasonable.[10]

Disability Royal Commission Chair Ronald Sackville QC noted concern about the continuing confusion about 'reasonable' in terms of adjustments or accommodations, stating:

> … under the Act, 'an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person'.

Arguably, the provisions in discrimination laws dealing with these adjustments could useful exclude the word 'reasonable' and simply refer to the obligation to make those adjustments needed in a particular case, to ensure to persons with disabilities do not experience discrimination of any kind in the circumstance, and that the obligation must be fulfilled up to the point of unjustifiable hardship. That is the fact that fully adjusting, or adopting one form of adjustment would impose an unjustifiable hardship should not preclude a different or modified adjustment being made where it would not impose unjustifiable hardship and would go as far as possible to achieving a non-discriminatory arrangements.

In considering unjustifiable hardship, the first appropriate point of reference is section 11 of the DDA. This provision quite properly places the burden of establishing unjustifiable hardship on the party seeking to rely on this. There are several proposed modifications to this provision. The first would be to ensure that it is clear on the face of the provision that the person claiming unjustifiable hardship needs to provide evidence of efforts taken to identify and secure funding to assist with any financial costs of making the adjustment. The second is that the party claiming unjustifiable hardship should demonstrate that consideration was given to alternative adjustments short of unjustifiable hardship that would reduce the discriminatory effect of the current arrangements. The third is that it must be shown that the question of unjustifiable hardship was considered at the time of the discriminatory conduct, not at a later time. That is, what is at issue is whether a person or entity could, *at the relevant time*, have taken steps to avoid the discriminatory conduct. Finally, in considering benefits, the provision should make it clear that there is an overarching benefit of reducing or removing discrimination.

ADLEG **recommends** that the Qld ADA specify that an adjustment is a reasonable adjustment if it is needed to ensure a person or persons with disability do not experience discrimination and it does not impose unjustifiable hardship at the time of the alleged discrimination ('the relevant time') on the person required to make the adjustment.

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10 Transcript of Proceedings, *Public hearing 19: Measures taken by employers and regulators to respond to the systemic barriers to open employment for people with disability* (Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 22 November 2021) 44–45 (emphasis added).

ADLEG **recommends** that the Qld ADA be amended to ensure that, in respect of unjustifiable hardship, person seeking to rely on the unjustifiable hardship defence must provide evidence of:

(a) efforts made at the relevant time to identify and secure funding or other assistance to meet the obligation to make the adjustment; and

(b) what alternatives were considered to ensure the implementation of the least discriminatory outcome available without imposing unjustifiable hardship, and to ensure that the overarching benefit, consistent with the objects of discrimination law, of reducing or removing discrimination is given sufficient weight.

Q7 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?*

Yes. There is a fundamental disconnect between the legal framework, which focuses on separate and distinct 'grounds' of discrimination, and how people actually experience discrimination in practice, which is multiple and overlapping.[11] Disadvantage is compounded by having multiple protected characteristics; indeed, multiple discrimination, across multiple contexts, affects a substantial proportion of the population.[12] Intersectional discrimination complaints are rare in Australia; the current legal framework means those who bring a discrimination complaint are generally forced to focus on their strongest ground or attribute-based claim.[13] This is inconsistent with individuals' holistic and authentic identities.

ADLEG **recommends** making explicit provision for claims on the basis of two or more protected characteristics. ADLEG **recommends** including a provision modelled on section 3.1 of the Canadian *Human Rights Act*, RSC, 1985, c H-6, which says:

> For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

11 Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) UNSW Law Journal 773.

12 Julia Mansour, 'Consolidation of Australian Anti-discrimination Laws: An Intersectional Perspective' (2012) 21(2) *Griffith Law Review* 533, 545.

13 Alysia Blackham and Jeromey Temple, 'Intersectional Discrimination in Australia: An Empirical Critique of the Legal Framework' (2020) 43(3) UNSW Law Journal 773.

3. Burden of Proof

Q8 Should the onus of proof shift at any point in the process? If yes, what is the appropriate approach?

Yes. Currently the burden of establishing that discrimination has occurred falls solely on a complainant. This leads to considerable uncertainty for both parties as most, sometimes all, of the relevant evidence is held by respondents. A lack of proof—and the burden of proof—are major barriers to discrimination claims in Australia.[14] Shifting the burden of proof in discrimination claims in Australia could therefore be 'incredibly beneficial' to claimants.[15]

Comparable jurisdictions such as Canada, the US, the UK, and all of the European Union require a complainant to establish an arguable case, and then shift to the respondent the evidentiary burden of establishing the reason/s for the impugned conduct or conditions. They do so on the basis of the well-documented and widely appreciated difficulty of one party's having to prove the other party's motivation for acting, where little or none of the evidence about subjective motivation is likely to be in their control. A shifting onus has a long and unremarkable history in Australian industrial law and continues in sections 361 and 783 of the *Fair Work Act 2009* (Cth) ('FWA').

In the UK, the burden of proof shifts once a claimant has established a prima facie case. The *Equality Act 2010* (UK) says:

> **136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

This approach takes an inquiry straight to the issue: what happened and why? It avoids time-consuming and costly preliminary technical issues, and enables a respondent to volunteer what they know about what they are alleged to have done. It ensures that court hearings and conciliation proceedings focus on the central issue of whether what happened was discriminatory, and will lead to clearer case law which will provide better guidance on the law.

To 'prove otherwise', the respondent could provide evidence of a lawful reason for the treatment, or could challenge the allegation that the behaviour was unfavourable. The respondent would also have access to exemptions and defences.

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14 Alysia Blackham, 'Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law' (2020) 42(1) Sydney Law Review 1; Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022).

15 Ibid.

A shifting burden of proof is only likely to be determinative in finely balanced cases with very particular fact scenarios. However, given the respondent typically holds most information, it is appropriate for the burden of proof to shift once a prima facie case has been established.

ADLEG **recommends** that the Qld ADA adopt the rebuttable presumption modelled on section 136 of the *Equality Act 2010* (UK).

4. Sexual Harassment

Q9 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?

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

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?

The inclusion of a prohibition of 'harassment based on sex' in the SDA is of substantial importance as not all harassment of women relates to their own sexuality – much of it is simply misogynist, or anti-woman put downs, etc. This definition[16] is intended to capture those forms of harassment. Unfortunately, it is expressed far too narrowly, such conduct is only caught if it not only falls within the categories listed in the Act, but also meets the threshold of being 'seriously demeaning'.[17] This standard will permit gendered harassment to continue provided it does not meet the 'serious' threshold. But at work, no-one should be required to accept demeaning conduct even if it does fall short of the high threshold. Instead it would be better to provide a lower threshold for conduct to be considered (conduct is 'demeaning' on the ground of sex), and allow the evaluation of the conduct to occur through the second part of the definition assessing:

> ... circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated

In a modern workforce that seeks to provide equal opportunity for everyone, no worker should have to accept conduct which is demeaning, even if it falls short of the threshold of 'seriously demeaning.'

16 *Sex Discrimination Act 1984* (Cth) s 28AA.

17 *Sex Discrimination Act 1984* (Cth) s 28AA(a).

5. Complaints Process

Q10 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?

Should a person be entitled to apply directly to the Supreme Court where the circumstances of a complaint raises 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

What are the risks and benefits of any direct right of access?

What circumstances could this right of access apply to?

How could the process be structured to ensure that tribunals and the Supreme Court are not overwhelmed with vexatious or misconceived claims/

ADLEG **recommends** that Queensland adopt a modified form of the process found in the *Equal Opportunity Act 2010* (Vic) ('EOA 2010 (Vic)'). Victoria has a mechanism whereby the complainant can elect to make their complaint either to the Victorian Commissioner or direct to the Victorian Civil and Administrative Tribunal ('VCAT'). This option, commonly referred to as 'direct access', aligns discrimination complaints with most other areas of personal injuries or similar civil claims whereby there is not a barrier to access to the determinative process. It is notable that the majority of complainants elect to go to the Commissioner and, thereby participate in a dispute resolution process.[18] If this does not succeed, the complainant can still proceed to VCAT.

The modifications to this approach proposed by ADLEG for consideration in Queensland are to ensure that:

- the QHRC can determine that a fulsome investigation is required and if so, undertake such an investigation;
- that the QHRC has the powers to compel production of information, etc, in the course of such an investigation; and
- the QHRC be required to provide the product of any investigation to the Tribunal where a complainant applies to the Tribunal for hearing and determination.

[18] See, eg, the annual reports for VCAT and for the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') for 2018–19, which indicate VCAT dealt with 316 cases under the EOA 2010 (Vic), which would include both direct access and post dispute resolution cases, which the VEOHRC received 890 complaints.

The experience in Victoria has been that direct access does not lead to an overwhelming number of claims. Claimants still typically proceed first to the *Victorian Equal Opportunity and Human Rights Commission* ('VEOHRC'), and often attempt conciliation. It is unlikely that the process needs to be adapted to prevent an overwhelming number of claims.

Q11 Should the 'complaint-based' terminology be changed?

ADLEG acknowledges the need to ensure that perceptual barriers to effective dispute resolution are minimised and removed. To this extent, it is beneficial to ensure that the QHRC has scope to use non-adversarial language in its processes, including statutory processes such as notification of complaints, etc. It is, however, important to ensure that the unlawfulness of discrimination is not undermined by implying that a complaint is simply some form of dispute, rather than an allegation of a breach of statutory provisions.

ADLEG recommends that existing provisions of the Qld ADA be reviewed to ensure the QHRC has sufficient scope in its communications with parties to a complaint to avoid setting up an adversarial context that interferes with the conciliation of complaints.

Q12 Should non-written requests for complaints be permitted, for example by video or audio?

The majority of people who experience discrimination that is prohibited under discrimination laws are also people who experience significant barriers to access to justice. In its Justice Project, the Law Council of Australia considered the barriers faced by thirteen groups that face significant economic and social disadvantage.[19] These include Aboriginal and Torres Strait Islander peoples, people with disability, the elderly, children, members of the LGBTIQ+ community, recent arrivals to Australia, asylum seekers and those experiencing family violence. There is clearly a strong cross over with those who experience discrimination. Indeed, in each of the volumes of the report dealing with these groups, there is extensive discussion about the experiences of discrimination. One barrier to access to justice is the requirement that a complaint be made in writing. The Justice Project noted the recommendation of the Productivity Commission, *Access to Justice Arrangements*,[20] that the requirement that complaints to ombudsmen be made in writing be removed.[21]

This supports the view that complaints should be able to be made in forms other than writing, including video and audio (including in community language), but also through a person detailing their complaint through their main language and it being documented by the QHRC.

ADLEG recommends that the Qld ADA specifically permit complaints to be made other than in writing and that the QHRC be resourced to ensure authorised translation of complaints from

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19 Law Council of Australia, *The Justice Project* (2018) <https://www.lawcouncil.asn.au/justice-project/final-report>.

20 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014).

21 Law Council of Australia, *The Justice Project: Part 2 – Dispute Resolution Mechanisms* (2018) 30.

community language (whether or not in writing) into written English, and access to qualified interpreting services.

Alternatively, should the Commission be allowed to provide reasonable help to those who require assistance to put their complaint in writing?

The absence of clear authority for the QHRC to provide 'reasonable help' to those wanting to make a formal complaint is of great concern. It is notable that other discrimination laws in Australia do permit such assistance. For example, the AHRCA provides in section 46P(4):

> (4) If it appears to the Commission that:
>
> (a) a person wishes to make a complaint under subsection (1); and
>
> (b) the person requires assistance to formulate the complaint or to reduce it to writing;
>
> the Commission **must** take reasonable steps to provide appropriate assistance to the person.[**emphasis** added]

Similarly, section 62(2) of the ADA (Tas) empowers the Anti-Discrimination Commissioner to 'provide procedural advice and assistance to any person who requires assistance to make a complaint'.[22]

ADLEG recommends that the Qld ADA require the QHRC to take reasonable steps to provide assistance similar to the requirement in section 46P(4) of the *Australian Human Rights Commission Act 1986* (Cth).

How would this impact on respondents?

How can the right balance be achieved between ensuring certainty for the respondent about the contents of the complaint while addressing the barriers to access?

If the assistance provided is 'reasonable' as discussed above (eg, ensuring that the content of the complaint is clear and focused on the alleged breach or breaches of the Act) this will enable it to be dealt with as a complaint under the Act and should not be have any negative impact for the respondent. Indeed, in some respects this may greatly assist the respondent to respond to the allegations of a breach as the complaint lodged will be more concise, address or raise relevant issues more clearly.

[22] See also, *Human Rights Commission Act 2005* (ACT) s 44(3) and (4); *Anti-Discrimination Act 1977* (NSW) s 88A.

Q13 How can the law be adapted to allow a more flexible approach to resolving complaints?

Should the current provisions that require set notification and conference timeframes be retained, changed or repealed?

Should all complaints proceed through the same conciliation model, or should early intervention be an option?

What legislative or non-legislative measures should be in place to ensure procedural fairness, timeliness, and efficiency?

To the greatest extent possible the Qld ADA should enable the QHRC to deal with complaints in a timely and flexible manner. The QHRC should not be prevented by legislative provisions from engaging in early intervention and early dispute resolution. This should not, however, result in the removal of provisions that require complaints to be dealt with as quickly as possible. Setting outer limits to the time available can ensure that complaints are dealt with. The time limit for the Commissioner to 'accept or reject' a complaint is not unreasonable if that 'accept/reject' process is retained. Consideration could, however, usefully be given to this language and the requirement as it can set up parties to misunderstand the nature of that initial decision. A less problematic approach may be to refer to a decision by the Commissioner determining whether or not the complaint appears to be within the jurisdiction or covered by the Act.

One important aspect of complaint handling using conciliation is ensuring that the parties come into any conciliation process with a basic understanding of the other party's position. The current time frames in the Qld ADA, including for responding to a complaint, have the potential to delay conciliation until a formal response is received. Consideration should be given to amendments that will enable greater flexibility while ensuring parties are not ambushed in conciliation.

The Qld ADA should also remove the requirement that a complainant have to ask for reasons for 'rejection' (or under a modified approach, reasons the complaint is not covered by the Act). This requirement puts a barrier in place that is inconsistent with an accessible and informal process.

ADLEG recommends that the Qld ADA be amended to remove any legislative barriers to early dispute resolution, including removing the language of 'accept or reject' found in section 141, and time frames for responses, etc.

ADLEG recommends that the Qld ADA require notification to a complainant that their complaint is not covered by the Act to set out the reasons for this decision.

Q14 Is 1 year the appropriate timeframe within which to lodge a complaint? Should it be increased, and if so, by how long?

The time-frame should be increased. Short time periods for filing a claim put an unreasonable burden on claimants, who must undergo a process of 'naming, blaming and claiming' and identify how to make a claim, while also, for example, caring for children or elders, finding new employment, or dealing with problems at work or home. Time pressure compounds the mental burden of bringing a discrimination claim, particularly for members of impacted groups, who are likely to also be experiencing other forms of disadvantage and demands on their time (particularly for those with caring responsibilities). Indeed, for many claimants, managing a discrimination claim is on top of the already onerous process of finding a new job, or navigating a discriminatory or toxic workplace on a day-to-day basis. Managing a discrimination claim is already stressful and demanding, let alone under time pressure; short time limits are likely to affect claimants' mental wellbeing.[23] Claims can also be delayed where claimants try to resolve their disputes via internal grievance processes, as in workplaces or schools. Discrimination law should encourage and support—rather than discourage—this informal resolution of claims.

Discrimination law is exceptional in requiring claims to be submitted in such a short period. The *Limitations of Actions Act 1974* (Qld) has a general limitation period of 6 years, a limitation period for personal injury of 3 years and a limitation period of 12 months for defamation actions. It also allows for the limitation period to be extended in the case of claims by children, and people with disability.

ADLEG **recommends** adopting the same timeframe for discrimination and harassment claims as for personal injuries; that is, that complaints be lodged within 3 years.

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

ADLEG recommends that factors affecting legal capacity should be able to be considered by the Commissioner in determining whether or not a complaint can be accepted beyond the statutory time limits. The Qld ADA should also expressly permit complaints to be made by people under the age of 18 years.

In 2014, amendments were made to the ADA (Tas) in respect of complaints made on behalf of children or people whose decision-making capacity is impaired. These included the addition of specific provisions for the appointment of a litigation guardian: section 60A; and the legal effect of a complaint being made on behalf of another person with the Commissioner's permission: section 60(7). Consideration could usefully be given to whether or not such clarifications would enhance complaint processes and access to justice under the Qld ADA.

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

23 Alysia Blackham, 'Enforcing rights in employment tribunals: Insights from age discrimination claims in a new "dataset"' (2021) 41(3) *Legal Studies* 390; doi:10.1017/lst.2021.11.

fairness between the parties, it would be reasonable to do so' before being dealt with by the tribunal?

No. ADLEG **recommends** that the Qld ADA adopt a more flexible approach to time limits more generally. The Commission should be able to accept claims without the claimant demonstrating 'good cause'. For example, in some other states and territories, there is no fixed time limit on claiming: rather, the statutory equality agency may choose to decline to conciliate if a claim is out of time. For example, in Victoria, the Commission may decline to provide conciliation if the alleged contravention occurred more than 12 months before the claim was brought.[24] This shifts the onus away from the claimant having to show 'good cause' as to why a claim should be accepted out of time; however, the Commissioner can still decline to conciliate a complaint if a delay has made conciliation impracticable or impossible.

Adding a second time-related at the Tribunal for a complaint that has been accepted by the QHRC would add a level of uncertainty and complexity that is inconsistent with the intention of creating a jurisdiction that minimises formalities. The focus at Tribunal should be on the substantive claim.

ADLEG **recommends** adopting a more flexible approach to time limits under the Qld ADA.

Should the tribunal review the Commission's decisions to decline complaints instead of the Supreme Court?

Yes. The current arrangement represents a significant barrier to the complainant having the opportunity to have the decision reviewed. The approach taken in Victoria, the ACT and South Australia to allow such an appeal to the relevant tribunal ensures that the complainant's rights are not excluded without an accessible mechanism of review. We note the decision of the Supreme Court of Tasmania that a decision not to exercise discretion to extend the time available to lodge a complaint is not a 'rejection' and is, therefore, not subject to review by the tribunal.[25] This means that, as with Queensland, the only channel for review is judicial review by the Supreme Court. The Tasmanian Commissioner indicated concern with this outcome in terms of the costs of seeking judicial review in the Supreme Court and her support for an amendment to the *Anti-Discrimination Act 1998* (Tas) ('ADA (Tas)') to ensure tribunal review is available.[26]

ADLEG **recommends** that decisions of the Commission to decline or not accept a complaint that is made 'out of time' be reviewable by the tribunal.

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24 *Equal Opportunity Act 2010* (Vic) s 116(a).

25 *Bullard v Anti-Discrimination Tribunal* [2020] TASSC 15 (19 May 2020).

26 Equal Opportunity Tasmania, *Annual Report 2019–20* (2020) 32.

Q15 Are there any changes that would improve the accessibility and utility of representative complaints?

What factors influence the capacity for affected people to assert their rights as a representative complaint??

The current provisions of the Qld ADA impose a significant burden on members of the class of people who may bring a representative complaint. First and foremost is the requirement that a member of the class must bring the complaint. This precludes, for example, a complaint on behalf a class of people who are unaware of the unlawful nature of the conduct they are experiencing. People with intellectual disability who experience discriminatory treatment in a congregate housing or 'supported' employment setting would potentially be excluded from effective protection because of this requirement. A mechanism that permits an organisation (including but not limited to a trade union) to make a representative complaint would greatly enhance the protections provided.

It is also of concern that a complaint could be dealt with as a representative complaint by the QHRC and then be reverted to an individual complaint by the Tribunal. This is likely to have significant impacts on the members of the represented group in terms of resolution of the allegedly discriminatory situation they are facing or faced.

ADLEG recommends that the representative complaints provisions be simplified to ensure that a representative complaint can be made either by a member of the class of people similarly affected or by an organisation on behalf of members of that class. If there are concerns about the binding nature of the QHRC's decision in this regard, it could be made subject to the right of review by the Tribunal at the time of the decision.

ADLEG recommends that the decision by the QHRC to deal with a complaint as a representative complaint should not be subject to change by the Tribunal other than through a review at the time of the decision.

Q16 Should a representative body or a trade union be able to make a complaint on behalf of an affected person about discrimination? Why or why not?

Yes. Organisations that work with marginalised and disadvantaged group to uphold their rights, such as disability advocacy groups, and trade unions can play an important role in reducing the burden of enforcement on individual claimants.[27] Advocacy bodies are more likely to have the knowledge, expertise and willingness to address discrimination, particularly discrimination that is structural or affects multiple people. Allowing advocacy bodies or trade unions to make complaints on behalf of affected people is an important way of improving the individual

[27] Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022).

enforcement model adopted by discrimination laws,[28] and better reflects the collective nature of inequality and discrimination.

Should representative complaints be confined to the conciliation process, or should they be able to proceed to the tribunal?

ADLEG **recommends** that representative complaints should be able to proceed to the tribunal. Representative complaints are currently rare, and representative mechanisms are unlikely to be utilised if complaints cannot proceed to the tribunal if conciliation is unsuccessful.

Q17 Should the additional requirements for prisoners to make complaints be retained, amended, or repealed?

Do the current provisions strike the right balance in ensuring access to justice while encouraging early resolution?

Should any internal complaint requirements for prisoners be retained, and if so, how can they be simplified to overcome practical concerns?

ADLEG **recommends** that the additional requirements for prisoners to be able to make a discrimination complaint should be repealed. As highlighted by the Discussion Paper, the additional requirements create numerous additional burdens on complainants, requiring them to go through multiple complaint processes which are complex and time-consuming. These burdens are exacerbated due to the intersectional disadvantages experienced by the prison population. As the Discussion Paper highlights, many of those who may want to make complaints struggle with literacy and requiring a more cumbersome written complaint process leads to the exacerbation of discrimination and disadvantage.

Rather than striking a balance 'in ensuring access to justice while encouraging early resolution', the current process has the capacity to extend the complaint process by requiring a complainant to undertake multiple steps to reconcile their complaint before they can make a complaint to the QHRC.

Prisoners have a right to non-discrimination to the same extent as the general public. Their rights should not be diminished through the addition of complex and unnecessary additional procedural barriers in order to make a complaint.

Q18 Are there any aspects of the complaint (dispute resolution) process that should be considered by the Review? If so, what are the issues and your suggestions for reform?

Critical to the success of the dispute resolution process is the effective public communication of conciliated outcomes. This is essential for promoting public understanding of discrimination law, and for emphasising the potential outcomes and remedies that might be achieved through

[28] Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022).

the confidential conciliation process. Effective data collection and communication is critical for identifying gaps in enforcement and trends in conciliated outcomes, which can help to support the QHRC's other enforcement work. (For example, it may be that women are less likely to achieve compensation in conciliation than men; and young workers are less likely to file complaints than older workers under age discrimination law.[29])

We therefore **recommend** the adoption of comprehensive data management systems by Australian statutory equality authorities, and the sharing of de-identified data on complaints and outcomes across Australian jurisdictions. This should allow de-identified conciliation case studies to be published easily online (as on the Australian Human Rights Commission's conciliation register) without demanding additional staff time and resources. While the QHRC has adopted a new data management system, it is essential that these data capabilities are appropriately supported and financed.

29 Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022).

6. Eliminating discrimination

Q19 What should be the overarching purposes of the Anti-Discrimination Act?

Should an objects clause be introduced?

- *If so, what are the key aspects that it should contain?*
- *If the purposes of the Act change, should the name of the legislation change to ensure it reflects those purposes?*

While the Qld ADA currently contains a preamble that denotes some of Parliament's intention in passing the Act and a purpose provision, ADLEG **supports** the Qld ADA specifying broader and more systemic objects that reflect the underlying causes of discrimination and the need for interpretation that is beneficial to both the individual with a protected attribute and to the achievement of the public good of a society founded on the right to equality and equal opportunity for all.

Despite extensive research on the nature of discrimination and its relationship to prejudice and stereotyping, the current objects (as with those found in other discrimination laws) fail to make this link or to identify the important public purpose of discrimination law in terms of promoting social cohesion and ensuring equality of opportunities for all.

The following proposed objects provision is based largely on the drafting found in both the Victorian and ACT discrimination laws, but also includes recognition that actions and conduct founded in prejudice and stereotypes undermines the right to equality and damages social cohesion. The proposed interpretation provision is based on the DA (ACT).

Objects

The objects of this Act are —

(a) to eliminate discrimination, attribute-based harassment, including sexual harassment, and victimisation, to the greatest possible extent;

(b) to promote and protect the right to equality set out in international human rights law, including:

  (i) the right to enjoy a person's human rights without distinction or discrimination of any kind; and

  (ii) the right to the equal protection of the law without discrimination; and

  (iii) the right to equal and effective protection against discrimination on any ground; and

(c) to encourage the identification and elimination of systemic causes of discrimination, attribute-based harassment, including sexual harassment, and victimisation;

(d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—

(i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;

(ii) equal application of a rule can have unequal results or outcomes;

(iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;

(e) to recognise that all forms of behaviour resulting from prejudice and stereotyping undermine the right to equality and damage social cohesion.

Interpretation

This Act must be interpreted in a way that is beneficial to a person who has a protected attribute, to the extent it is possible to do so consistently with—

(a) the objects of this Act; and

(b) human rights under international human rights law.

ADLEG agrees that the list of intentional instruments that the Qld ADA refers to should be updated for accuracy.

Q20 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?

ADLEG supports the approach taken in the EOA 2010 (Vic) to 'special measures' noting the need to ensure that the measures are supported by members of the affected group. It is important to ensure that the assessment include consideration of the views of the affected group about the measure being implemented. Measures implemented without engagement with the affected group are paternalistic and undermine the agency of members of that group.

7. Positive Duties

Q21 Do you support the introduction of a positive duty in the Anti-Discrimination Act?

Yes. Positive equality duties are a 'fourth generation' of equality law that seek to encourage proactive and preventative approaches to achieving equality. Positive duties represent a 'radical strategy for tackling deep-seated discrimination'[30] that could revolutionise 'the whole landscape of discrimination law'[31], integrating equality into organisational decision-making and processes.[32]

The *Respect@Work Report* of the Australian Human Rights Commission ('AHRC') found that the key benefit of a positive duty would be to shift the burden of enforcement off individuals, and onto employers, requiring them to take proactive and preventative action to address sexual harassment at work. Positive duties are ongoing (not complaints-based) and proactive (not reactive). The Report therefore recommended that the SDA be amended to introduce a positive duty for all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible (Recommendation 17).

ADLEG therefore **recommends** the adoption of positive duties across all attributes.

Additionally, an individual complainant should be able to make a complaint for breach of the positive duty by a duty holder.

In Victoria, the positive duties in the EOA 2010 (Vic) and *Gender Equality Act 2020* (Vic) are not subject to individual enforcement. With minimal enforcement, it appears that the Victorian duty in the EOA 2010 (Vic) is having limited impact on employers' behaviour. ADLEG therefore **recommends** that individual complaints be available, as in the UK. However, these complaints should be addressed in the same way as existing complaints under the Qld ADA (ie, by complaint to the QHRC, and/or direct access to hearing by QCAT). This structure avoids the problems seen in the UK with using judicial review proceedings to enforce the public sector equality duty. The QCAT should have the power to hear an application for breach of the positive duty by a duty holder. The QHRC should also be granted a complaint-handling function, allowing complaints to be resolved using the existing discrimination conciliation model.[33]

While individual complaints are important, positive duties are largely aimed at structural change. Individuals may therefore not have a sufficient interest in such matters to take the lead on enforcement. The QHRC should therefore be given strong powers to monitor and enforce

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30 Anne Davies, *Perspectives on Labour Law* (2009, 2nd ed., CUP) p. 135.

31 Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (2012) 60 *American Journal of Comparative Law* 265.

32 Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) *Law in Context* 98

33 Helen Watchirs and Gabrielle McKinnon, 'Five years' experience of the *Human Rights Act 2004* (ACT): Insights for human rights protection in Australia' (2010) 33 *UNSW Law Journal* 136.

the positive duty, including: to issue compliance notices for a failure to publish or to make progress; accept written enforceable undertakings; recommend ministerial action; publicly name the entity; or apply to the QCAT r an order directing compliance. These powers have been given to the Victorian Public Sector Gender Equality Commissioner to secure compliance with the *Gender Equality Act 2020* (Vic); they also closely map the powers of the UK Equality and Human Rights Commission to enforce the public sector equality duty.

It is not always possible for statutory equality agencies, with limited budgets and staffing, to monitor the behaviour of every organisation which is subject to a duty. A requirement to **consult or engage with key stakeholders** as part of the positive duty is therefore an important enforcement mechanism.

The **publishing of information** to demonstrate compliance is also critical to the success of positive duties. However, the publishing of information is not enough: positive duties need to create an 'action cycle' of disclosure,[34] where:

a) information users perceive and understand disclosed information; and therefore
b) choose more equality-advancing options;
c) information disclosers perceive and understand users' changed choices; and therefore
d) improve their practices; that in turn
e) reduce the risks of inequality.

To do this, positive duties must require:

1. mandated public disclosure
2. by private or public organisations
3. of standardised, comparable, and disaggregated information
4. regarding specific (equality) practices
5. to further the pursuit of equality.[35]

The Victorian *Gender Equality Act 2020* (Vic) offers an example of the information duty holders might be required to publish, and how this action cycle might be created. Duty holders are public sector organisations, universities and local councils with more than 50 employees ('defined entities'). The Act requires defined entities to

- gather data (through workplace audits), including on intersectional disadvantage;
- set data-informed goals, action plans and strategies in consultation with key stakeholders;
- publish data on progress in an accessible way.

ADLEG **recommends** that the Qld ADA embed a requirement on all private and public organisations to publish on a specified timetable standardised, comparable and disaggregated

[34] Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) *Law in Context* 98.
[35] Ibid.

information regarding fulfilment of positive duties through specific equality practices, across all protected attributes. This should require organisations to draw on intersectional data in developing goals and assessing progress.

Q21 Should a positive duty cover all forms of prohibited conduct including discrimination, sexual harassment, and victimisation? Why, or why not?

Yes. The positive duty should apply in respect of all grounds and prohibitions, as is the case in Victoria and the UK.

Q21 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?

Yes. The positive duty should apply in respect of all grounds and prohibitions, as is the case in Victoria and the UK.

Should a positive duty apply to all entities that currently hold obligations under the Anti-Discrimination Act?

Yes. The positive duty should apply in respect of all entities, as is the case in Victoria.

What matters should be considered in determining whether a measure is reasonable and proportionate?

Positive duties aim to mainstream equality; that is, to integrate equality into organisational decision-making and processes.

A positive duty is already in place in Victoria: those who have a duty not to discriminate under the EOA 2010 (Vic) (including employers) 'must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.' What is 'reasonable and proportionate' depends on:

- the size of the business;
- the nature and circumstances of the business;
- available resources;
- business and operational priorities; and
- practicability and the cost of the measures.

The Victorian *Gender Equality Act 2020* (Vic) imposes further duties to promote gender equality on public sector organisations, requiring them to:

a) consider and promote gender equality; and
b) take necessary and proportionate action towards achieving gender equality

in developing policies and programs and delivering public services.[36]

36 *Gender Equality Act 2020* (Vic) s 7.

Positive duties have also been in place in the UK for a number of years. In Great Britain, the public sector equality duty[37] requires a public authority or those exercising public functions to:

> … in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under [the *Equality Act 2010* (UK)];
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The general public sector equality duty is complemented by specific duties, which are designed to facilitate compliance with the general duty. These specific duties differ across England, Wales, and Scotland.

ADLEG **recommends** that Qld adopt a positive duty similar to that in the *Gender Equality Act 2020* (Vic), but which applies to all grounds.

To be effective, positive duties need to be supported by four interlocking mechanisms: self-regulation by organisations; consultation and engagement; central scrutiny; and individual enforcement.[38] Positive duties should:[39]

- apply to both the public and private sectors in their role as employers;
- require both proper consideration and proportionate action to eliminate discrimination and advance equality of opportunity;
- require consultation and engagement, and include general principles for how engagement processes should be conducted;
- be enforceable by a direct cause of action to the relevant tribunal, with the possibility of damages, in a similar jurisdiction to that established under discrimination laws;
- give equality agencies statutory powers to receive and conciliate complaints relating to positive duties.

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37 *Equality Act 2010* (UK) s 149.

38 Alysia Blackham, *Addressing Age Discrimination in Employment: A report on the findings of Australian Research Council Project DE170100228* (Research Report, University of Melbourne, November 2021) <https://doi.org/10.46580/124368>.

39 Ibid.

8. Role of the Queensland Human Rights Commission

Q22 Should the statutory framework be changed to incorporate a role in regulating compliance with the Anti-Discrimination Act and eliminating discrimination?

If so, do you consider that the Commission should undertake this regulatory role, or is there a more appropriate entity? What are the strengths and limitations of the Commission undertaking a regulatory role?

What should be the core components of the regulatory model, and what mechanisms and powers should it include

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?

If you recommend an expansion of the Commission's functions and powers, what is the justification for this expansion?

Given earlier responses in respect of positive duties, etc, ADLEG **supports** the statutory framework requiring the QHRC to play a greater role in monitoring and dealing with non-compliances with discrimination law and supporting obligation bearers to avoid discrimination.

We agree that the Qld ADA should confer a broad regulatory compliance monitoring and enforcement function upon the QHRC. Discrimination laws rely on the individual complainant for enforcement. There is currently no scope for the QHRC or another statutory agency to take action on behalf of an individual complainant or the community. Nor can the QHRC assist the individual financially or otherwise if they take their claim to court. The individual complaints system is complex and costly, and after three decades, it has not adequately addressed discrimination.

ADLEG recommends that the QHRC be given the power to enforce the Qld ADA by initiating complaints on behalf of individuals and groups. It is not anticipated that the QHRC would fund all actions that were pursued to the Tribunal, but it would be expected to take a strategic approach to its litigation work and support cases that would clarify and develop the law, address systemic issues, and have an impact on particularly marginalised members of the community. **ADLEG further recommends** that the QHRC be given the power to seek the imposition of preventative or corrective orders and civil penalties on non-compliant organisations (in addition to seeking remedies for the individual/s). The QHRC should be empowered to work with respondents to resolve matters using enforceable undertakings.

This model has already been used successfully by the Fair Work Ombudsman to address many forms of unlawful conduct in the workplace and could be replicated to address breaches (particularly systemic ones) of discrimination laws. Finally, **ADLEG recommends** that the QHRC receive additional resources so that it can perform this new, important function effectively.

9. Role of QCAT and QIRC

Q23 Should there be a specialist list for the tribunals?

If so, what would the appropriate qualifications be for a tribunal decision-maker?

Discrimination law is a highly specialised area of law and, as such, **ADLEG recommends** that decision making in discrimination cases should be undertaken by specialists with relevant expertise in both discrimination law and the experience of discrimination and prejudice in impacted communities.

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

Yes. It is important that all decisions, not just substantive decisions be published. The rationale for this is that the QHRC in its administrative decision-making is bound to follow the decisions of the relevant tribunal. Out of fairness to the parties, the decisions upon which the QHRC has relied or referred should be publicly available so that the parties can properly consider the Commission's interpretation of those decisions. Without this, a party can't properly consider the prospects of success in any application for a review of your appeal against such a decision.

To do otherwise is to undermine access to justice and the principle of open justice.

ADLEG **recommends** that the tribunals be required to publish all decisions made in respect of matters under the Qld ADA.

Could data sharing be permitted and encouraged between Commission and tribunals to form a better overall picture?

Yes. It is noted that this would require express legislative permission.

On what basis should the Commission be permitted to intervene in proceedings under the Anti-Discrimination Act. Should leave of the court or tribunal be required? Why or why not?

The QHRC should be permitted to intervene in any proceedings under the Qld ADA as of right. The high level of unrepresented litigants in discrimination proceedings in Australia indicates a need for courts and tribunals to be informed by legal experts about matters pertaining to law, including its purpose, interpretation and relevant case law.

10. Attributes Protected Under the Act

Q25 Should the attribute of impairment be replaced with disability?

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

Should the law be clarified about whether it is intended to cover people who experience addiction?

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*?*

Noting the preponderance of the use of the term 'disability' in Australian discrimination law, ADLEG **does not urge** the replacement of the current term 'impairment' with 'disability' in the Qld ADA.

The use of the term 'impairment' in discrimination law is arguably more consistent with the social model as it refers to the personal characteristics rather than the barriers experienced by the person with impairments. Discrimination is a 'disabling' process experienced by people with impairments.

ADLEG supports the use of a definition consistent with the DDA. To the extent that it would be helpful to ensure that people understand the definition to include people with mental illnesses or psychosocial 'disabilities', this would be best dealt with in a note to the definition.

Again, **ADLEG recommends** that the definition be consistent with the DDA, and a note used to indicate coverage of addictions as a recognised form of mental illness.

The protections in the Act should include reliance on assistance animals as defined in the DDA. It is ADLEG's **recommendation** that it is more useful to bring the Queensland protection in relation to assistance animals in line with the federal approach. Where it is intended that similar protections are to be enacted, the use of an approach consistent with the protection found in the federal law eases the compliance burden on obligation holders.

It is noted, however, that Queensland leads Australia in enacting the *Guide, Hearing and Assistance Dogs Act 2009* (Qld) and it would be beneficial for the relevant provisions of the Qld ADA to refer to accreditation under that Act where the assistance animal is a dog assisting a person who is resident in Queensland.

As noted above, the definition of impairment in the Qld ADA should largely mirror the definition found in the DDA. This is the most appropriate approach as it ensures greater consistency with federal law. The use of the approach adopted in the DDA ensures that conduct

based on prejudiced attitudes to a person, no matter how misconceived, could be dealt with, particularly in respect of the inclusion of future and future imputed impairments.

Relevantly, ADLEG (as noted above) also **supports** the inclusion of protection against discrimination on the ground of medical record in the Qld ADA. ADLEG **proposes** that this protection be achieved through the inclusion of 'medical record, including any record relating to workplace injury and compensation for such injury under worker's compensation insurance'.

This would result in the protection in the Qld ADA being amended to read as follows:

> ***impairment*** in relation to a person, means one or more of the following conditions —
>
> (a) total or partial loss of the person's bodily or mental functions; or
>
> (b) total or partial loss of a part of the body; or
>
> (c) the presence in the body of organisms causing disease or illness; or
>
> (d) the presence in the body of organisms capable of causing disease or illness; or
>
> (e) any defect or disturbance in the normal structure or functioning the malfunction, malformation or disfigurement of a person's body; or
>
> (f) any defect or disturbance in the normal structure of functioning of a person's brain a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
>
> (g) any disorder, illness, disease or condition that affects which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour,
>
> whether arising from a condition subsisting at birth or from an illness or injury or any other circumstance, and includes a disability that:
>
> (h) presently exists; or
>
> (i) existed in the past but has now ceased to exist; or
>
> (j) may exist in the future (including because of a genetic predisposition to that disability); or
>
> (k) which is imputed to the person;
>
> To avoid doubt:
>
> (l) an impairment that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.
>
> (m) an impairment that is otherwise covered by this definition includes a medical record relating to such an impairment, including any record relating to workplace injury and compensation for such injury under worker's compensation insurance.

Q26 Should there be a new definition of gender identity, and if so, what definition should be included in the Act?

As highlighted in the Discussion Paper, the current definition of gender identity in the Qld ADA reflects a gender-binary position and conflates trans and gender diverse people and people born with variations of sex characteristics. The ACT, the Commonwealth, South Australia, Tasmania and Victoria all protect transgender, gender-diverse and non-binary people from discrimination, while the Northern Territory, New South Wales and Queensland protect transgender people but not gender-diverse or non-binary people. This is because these three jurisdictions protect only people who identify as a member of the 'opposite sex', for instance a person assigned female at birth but whose gender identity is male. Many gender-diverse and non-binary people have gender identities that do not fit within this purported gender 'binary'. In a 2017 survey of more than 12,000 LGBTIQA+ teenagers, more respondents identified as non-binary or genderqueer/gender non-conforming (n = 2,570) than as being transgender (n = 2,129).[40]

Victoria provides best practice in prohibiting discrimination on the basis of gender identity. In recent amendments which took effect in October 2021, gender identity is now defined as:

> a person's gender-related identity, which may or may not correspond with their designated sex at birth, and includes the personal sense of the body (whether this involves medical intervention or not) and other expressions of gender, including dress, speech, mannerisms, names and personal references.[41]

This would protect not only people who identify as transgender, but also those who identify as gender-diverse or non-binary. In doing so, it would recognise and reflect the gender diversity of the broader LGBTIQA+ community. This definition is substantively similar to that contained in the *Public Health Act 2005* (Qld) at section 213G. ADLEG **recommends** that the Qld ADA should adopt this definition.

Q27 Should there be a new definition of sexuality, and if so, what definition should be included in the Act?

The definition of 'sexuality' in the Dictionary of the Qld ADA is outdated and narrow. It includes only 'heterosexuality, homosexuality, or bisexuality'. Sexuality is far more diverse than these three orientations. For instance, pansexuality, where a person feels sexual attraction towards persons regardless of their sexual orientation, and asexuality, where a person feels little to no sexual attraction to any persons, are not protected under this ground.[42] People identifying as pansexual or asexual, or a more fluid sexuality such as 'queer', are left with no protection under the Qld ADA.

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40 Human Rights Campaign, LGBTQ Youth Report (2018) <https://www.hrc.org/resources/2018-lgbtq-youth-report> 24.

41 *Equal Opportunity Act 2010* (Vic) s 4.

42 Liam Elphick, 'Sexual Orientation and "Gay Wedding Cake" Cases Under Australian Anti-Discrimination Legislation' (2017) 38 *Adelaide Law Review* 149, 180–4.

Victoria now provides best practice in prohibiting discrimination on the basis of sexual orientation. In recent amendments which took effect in October 2021, sexual orientation is now defined as 'a person's emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender'.[43] ADLEG **recommends** that the Qld ADA should adopt this definition, which as the Discussion Paper notes, is already the definition provided for in the *Public Health Act 2005* (Qld) in section 213E.

Q28 Should there be a new definition of lawful sexual activity, and if so, what definition should be included in the Act? Should the name of the attribute be changed, and if so, what should it be?

ADLEG **recommends** that the attribute of lawful sexual activity should remain in the Qld ADA but that the attribute should be left undefined to allow for greater protection of individuals on the basis of lawful sexual activity. Sex workers are a group within society who are highly stigmatised and experience discrimination.[44] One effect of stigma is to drive people to hide that aspect of their lives. This is well understood across a range of personal characteristics including homosexuality, mental illness, and substance use. The fear of disclosing this aspect of their lives in turn results in people avoiding seeking help, including medical and related health care, and treatment supports. A benefit of including lawful sexual activity as a ground is the impact this legislative recognition can have, over time, of de-stigmatising the characteristic.

While this is the primary concern in respect of stigma, others engaged in lawful sexual activity are subjected to prejudiced attitudes. For example, some members of our communities are intolerant of young people who are legally permitted to engage in consensual sexual activity, of people who have multiple sexual partners, or who have sex outside marriage. While personal views are, in and of themselves, outside the scope of discrimination laws, decisions and actions against people in relation to, for example, suspension of students from education, termination of employment, or exclusion from rental accommodation, on the basis of those views are decisions based on irrelevant characteristics and, as such, potentially discriminatory.

In relation to the question of whether or not a definition is required, the Tasmanian experience of not defining the meaning indicates there are benefits to this approach. Under the Tasmanian law, it has been possible to deal with complaints from people engaged in lawful sex work, people who have been engaged in lawful consensual sexual conduct, for example 17-year-olds, unmarried couples, and people involved with multiple sexual partners, but who have experienced discrimination from people who consider that sexual conduct to be inappropriate or somehow deviant. It is on this basis that ADLEG **recommends** that 'lawful sexual activity' not be limited by the inclusion of a definition.

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43 *Equal Opportunity Act 2010* (Vic) s 4.

44 See, for example, Cecilia Benoit, S Mikael Jansson, Michaela Smith & Jackson Flagg, 'Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers' (2018) 55(4–5) *The Journal of Sex Research* 457.

ADLEG **recommends** the removal of a definition of lawful sexual activity as an attribute in the Qld ADA.

Q29 Does the terminology used to describe any existing attributes need to be changed?

For attributes that have a legislative definition in the Act, do those definitions need to change?

In respect of attribute definitions, the following potential amendments could usefully be considered:

- ***family responsibilities*** should be extended to ensure it encompasses kinship caring responsibilities
- ***relation*** should be extended to ensure it encompasses kinship

Should the Act separately prohibit discrimination because a person with a disability requires adjustments for their care, assistance animal, or disability aid?

The Qld ADA does not expressly include within the meaning of discrimination or other unlawful conduct a failure to make a reasonable adjustment for a person with impairment. To avoid any uncertainty ADLEG supports the inclusion of a positive obligation to make reasonable *adjustments for persons with impairment. ADLEG notes the decision of the Full Federal Court in Sklavos v Australian College of Dermatologists* [2017] FCAFC 128 (16 August 2017) ('the *Sklavos* case') and its interpretation of the positive duty found in sections 5 and 6 of the DDA. ADLEG is, along with key disability and human rights groups, seeking amendment to the DDA to address that interpretation, which limits the scope of the protection to situations where the reason for refusing to make an adjustment is the person's disability.

ADLEG supports the positive obligation being a stand-alone obligation that, in and of itself, can found a claim of unlawful discrimination. In respect of the DDA, the proposed amendment is to add a new section 6A. Using the proposed framing of that new section, ADLEG recommends that the Qld ADA include the following stand-alone positive duty:

A Discrimination by failing to provide reasonable adjustments

(1) For the purpose of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of an impairment of the aggrieved person if:

(a) because of the impairment, the aggrieved person requires adjustments; and

(b) the discriminator does not make, or proposes not to make, reasonable adjustments for the person.

For the avoidance of doubt, it is not necessary for there to be a causal connection between the failure or proposal not to make reasonable adjustments and the impairment of the aggrieved person.

(2) For the purpose of this Act, an adjustment to be made by a person is a reasonable adjustment, unless making the adjustment would impose an unjustifiable hardship on the person.

Having addressed the need for a positive stand-alone duty to make reasonable adjustments, ADLEG recommends that consideration be given to establishing a broader obligation to make adjustments to accommodate needs that arise because of any protected attribute under the Qld ADA. An example of this approach is found in section 24 of the ADA (NT). One potential benefit of extending the obligation is that it allows an effective process to be embedded broadly into processes and practices of organisations that will, over time, help organisations to identify systemic barriers being experienced by people with particular attributes or different attributes. So, for example, flexibility around starting and finishing times for work are an adjustment commonly made by employers to enable people with parental responsibilities or other caring responsibilities to meet those responsibilities while maintaining full-time employment. Flexible work hours do not, however, only benefit these groups. They may also benefit people with disability who, for example, may need to get to work later because they continue to face barriers to accessing public transport, or because they require personal care support in order to prepare for work and have limited control over the time that the care support is available, or because of effects on medication on alertness in the morning.

Another benefit is that such an obligation would normalise the process of asking for adjustments. At present, it is common to hear of situations where people with disability are reluctant to identify they require an adjustment because of their impairment. That reluctance arising from negative experiences of making such requests and a desire not to be seen as different and requiring additional expenditure.

As such, ADLEG recommends consider be given to including the following provision, based on section 24 of the ADA (NT):

BFailure to accommodate need arising as a result of an attribute

(1) In addition to the obligations under section Z [Discrimination by failing to provide reasonable adjustments for people with impairments], for the purposes of the Act a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of an attribute if:

(a) because of the attribute, the aggrieved person requires adjustments; and

(b) the discriminator does not make, or proposes not to make, reasonable adjustments for the person.

For the avoidance of doubt, it is not necessary for there to be a causal connection between the failure or proposal not to make reasonable adjustments and the attribute of the aggrieved person.

(2) For the purposes of subsection (1):

(a) a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and

(b) a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute.

(3) Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to:

(a) the nature of the special need; and

(b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged; and

(c) the financial circumstances of the person; and

(d) the disruption that accommodating the special need may cause;

(e) the nature of any benefit or detriment to all persons concerned; and

(f) the important public purpose of eliminating discrimination.

Provisions should make it clear that it is unlawful discrimination to refuse access to, impose additional burdens (including costs) on or fail to accommodate a person's need to be assisted by or accompanied by a person, an assistance animal or particular technology.

Q30 Is there a need to cover discrimination on the grounds of irrelevant criminal record, spent criminal record, or expunged homosexual conviction?

How should any further attribute(s) be framed? Should they apply to all areas?

What are some examples of how people who have had interactions with law enforcement experience discrimination, including by whom and in what settings?

How would the inclusion of these attributes interact with the working with children checks (Blue Cards)?

ADLEG notes the discussion in respect of existing legislative protections in other parts of Australia and the need to ensure appropriate protections for the community. ADLEG **supports** the inclusion of 'criminal record' in the Qld ADA. The experience in Tasmania demonstrates that consideration should be given to protection on the ground of 'criminal record' rather than 'irrelevant criminal record', where the question of 'relevance' is dealt with as part of the definition of criminal record. The following proposed definition is based on the definition of 'irrelevant criminal record' found in the ADA (Tas).

> ***criminal record***, in relation to a person, means a record relating to arrest, interrogation or criminal proceedings where –

(a) further action was not taken in relation to the arrest, interrogation or charge of the person; or

(b) a charge has not been laid; or

(c) the charge was dismissed; or

(d) the prosecution was withdrawn; or

(e) the person was discharged, whether or not on conviction; or

(f) the person was found not guilty; or

(g) the person's conviction was quashed or set aside or is a spent conviction for the purposes of the *Criminal Law (Rehabilitation of Offenders) Act 1986*; or

(h) the person was granted a pardon; or

(i) the circumstances relating to the offence for which the person was convicted are not directly relevant to the situation in which the discrimination arises; or

(j) the person's charge or conviction was expunged under the *Criminal Law (Historical Homosexual Convictions Expungement) Act 2017*

and includes:

(k) the imputation of a record relating to arrest, interrogation or criminal proceedings of any sort;

(l) a record relating to arrest, interrogation, criminal proceedings or criminal conviction of an associate of the person.

The reason for excluding the word 'irrelevant' is that protection against discrimination on the basis of an imputed record becomes convoluted if it is to be argued that what is imputed is an irrelevant record. This very issue was the subject of a review of the (then) Tasmanian Anti-Discrimination Tribunal of a decision to reject a complaint alleging discrimination on the basis of an imputed irrelevant criminal record: *S v M* [2012] TASADT 11 (29 March 2012). In that case, the criminality imputed to the complainant was of a serious nature. It was found that in the circumstances of travel on public transport, such a criminal record would be caught by clause (i) of the definition. The inclusion of proposed clause (k) above addresses the problem of people being discriminated against on the basis that they are imputed to have a criminal record.

The Tasmanian experience also includes complaints of discrimination against individuals on the basis of their family relationship, ie, 'association', with a person with a criminal record. As noted in the Discussion Paper without specifically addressing this in the definition, it is arguable that such discrimination does not fall within the scope of protection. As such, clause (l) is proposed.

The scope of the definition deals explicitly with the need to protect the public. With the exception of clause (i) of the definition, all of the types of records that are encompassed within the ground are records for criminal conduct that have either been not pursued, dismissed or otherwise discharged by the courts or the person has been pardoned. None of these records should be considered to give rise to a risk to the public. Clause (i) expressly allows for consideration of a criminal conviction, for example, where it is relevant to the circumstances. So, for example, if a person had a criminal conviction for dangerous driving, a decision relating to employing the person as a driver would not fall foul of the prohibition.

ADLEG notes the exception provided in section 50 of the ADA (Tas) in respect of criminal records but does not recommend adoption of this approach as it provides no great protection than the existing clause (i).

Q31 Is there a need for the Act to cover discrimination on the grounds of irrelevant medical record?

ADLEG also **supports** the inclusion of protection against discrimination on the ground of medical record in the Qld ADA. As with the 'irrelevant criminal record' discussion above, ADLEG urges that this protection be on the ground of medical record, with medical record defined. ADLEG **proposes** that this protection be achieved through the inclusion of a definition of the attribute which is as follows:

> ***medical record*** including any record relating to workplace injury and compensation for such injury under worker's compensation insurance.

Q32 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'?

ADLEG **supports** the inclusion of protection against discrimination on the ground of immigration status within the protection provided on the ground of race. ADLEG notes that the two approaches taken in discrimination laws in Australia. The ADA (NT) and the ADA (Tas) both include immigration status, or status of being a migrant in their definitions of 'race'.[45] The *Discrimination Act 1991* (ACT) ('DA (ACT)') provides protection against discrimination on the ground of 'immigration status' as a separate attribute.[46] Similarly, section 5 of the *Racial Discrimination Act 1975* (Cth) treats it as a separate attribute and extends the operation of the specific discrimination provisions in ss 11-15 to include discrimination 'by reason that that person is or has been an immigrant.'

It is arguably more accurate to adopt the latter approach, as immigration status and race are quite different categories, in that a person could be a member of a majority racial group while being a migrant. ADLEG notes, however, that the current definition of 'race' in the Dictionary of the Qld ADA (and therefore the protected groups within that attribute) includes 'nationality

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45 *Anti-Discrimination Act 1991* (NT) s 4 (definition of 'race'); *Anti-Discrimination Act 1998* (Tas) s 4 (definition of 'race').

46 *Discrimination Act 1991* (ACT) s 7(1)(i).

and national origin'. These categories are likely to overlap with the category of 'immigration status'. As such, it would be appropriate to include 'immigration status' within the definition of 'race' in the Qld ADA.

Q34 Is there a need for the Act to cover discrimination on the grounds of physical features?

There is growing understanding about and concern in respect of discrimination against people on the basis of their physical appearance. Prejudice and discriminatory behaviour resulting from the stigma attaching to people who are considered overweight, or who have facial or other physical characteristics that can draw attention, such as being of short stature, are no less harmful than those attaching to people with attributes that are already clearly within the scope of the protections in the Queensland legislation. While some physical features may, through legal argumentation, be brought within the scope of the definition of 'impairment' (as it is proposed to be amended), this creates a requirement that a person who is targeted because of their physical features must characterise themselves as having an impairment in order to benefit from the protections within the Act. Given the well-understood barriers to individuals alleging discrimination, creating this additional cognitive barrier should be avoided.

ADLEG **supports** the inclusion of physical features as a ground in the Qld ADA and commends the approach taken by the ACT Human Rights Commission. For the sake of certainty, the approach proposed by the ACT Human Rights Commission of providing an 'extensive definition'[47] is also **supported**.

Q36 Should an additional attribute of sex characteristics be introduced? Should it be defined, and if so, how?

Intersex people in Queensland must be granted their own protection against discrimination under the Qld ADA, not folded into the gender identity protection. A new protected attribute of 'sex characteristics' should be added, as called for by intersex people and advocacy organisations in the *Darlington Statement*[48] made in March 2017 and as found in the *Yogyakarta Principles plus 10*.[49]

The ACT, and Victoria now provide best practice in prohibiting discrimination on the basis of sex characteristics. This is the preferred terminology by intersex people and advocacy organisations, rather than 'intersex status'.

Intersex Human Rights Australia has submitted to your inquiry that the following definition be adopted in protecting 'sex characteristics':[50]

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47 Discussion Paper, above n 1, 118.

48 *Darlington Statement* (10 March 2017) <https://darlington.org.au/statement/>.

49 *Yogyakarta Principles plus 10* (10 November 2017) The Yogyakarta Principles <https://yogyakartaprinciples.org/principles-en/yp10/>.

50 Intersex Human Rights Australia, *Submission on reform of the Anti-Discrimination Act 1991*, February 2022, < https://ihra.org.au/wp-content/uploads/2022/02/IHRA-20220221-QHRC-response.pdf, 27.

sex characteristics means a person's physical features relating to sex, and includes:

(a) the person's genitalia and other sexual and reproductive parts of the person's anatomy; and

(b) the person's chromosomes; and

(c) the person's hormones; and

(d) secondary features emerging as a result of puberty.

ADLEG **recommends** that the Qld ADA adopt this definition.

Q37 Should an additional attribute of subjection to domestic violence be introduced? Should it be defined, and if so, how?

The CEDAW requires governments to take appropriate measures to eliminate discrimination against women (which includes violence against women) in all areas of life including in employment, and to ensure that women have access to safe and healthy working conditions.[51]

Domestic and family violence in Australia is, unfortunately, much more common than it should be. The news coverage of horrendous acts of domestic violence is regular, and is backed up by statistical data. For example, in a 2011 survey on domestic and family violence and the workplace, 30% of respondents reported they had experienced violence, and 5% of those respondents had experienced violence in the last 12 months.[52]

Domestic and family violence is not just a private or personal issue. When an employee is subjected to domestic and family violence, that violence impacts their mental and physical health and, in many instances, affects their capacity to work. For example, violence may affect a victim's capacity to attend work or their performance at work. The extent of this problem is significant, as well as personally profound and economically detrimental. The Australian Bureau of Statistics estimates that the vast majority (55–70%) who have experienced domestic violence are currently in the workforce.[53] From data such as this we know that a significant number of workplaces in Queensland will be impacted by domestic and family violence experienced by their employees.

Victims and survivors of domestic and family violence can face a number of challenges in the workplace, including discrimination. They may experience discrimination, for example, because assumptions or stereotyping about them (direct discrimination) or because apparently neutral rules disadvantage them in a way that is not reasonable. This could include rules about performance or about leave that are inflexibly applied, without consideration of their experience. Their experience of violence might necessitate taking time off work, or temporarily

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51 CEDAW, above n 5.

52 Ludo McFarran, *National Domestic Violence and the Workplace Survey* (2011).

53 Australian Bureau of Statistics, *Personal Safety*, Australia, 2005 (Reissue), Cat. No. 4906.0, 35. <https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4906.0Main+Features12005%20(Reissue)?OpenDocument>.

affect their productivity. Or they may be denied access to periods of leave which would allow them to attend to violence related matters, such as fleeing violence or attending police or court appointments related to the violence they have experienced. Discrimination based on experience of family or domestic violence can retraumatise victims and compound the harms caused by the original violence. Retaining employment can be critical to enabling economic independence.

Introducing domestic or family violence as a protected attribute within the Qld ADA would respond to these challenges. It would constitute legislative recognition that those who are or have experienced domestic and family violence should not be subjected to discrimination as a result of that experience, and offer protections which are currently not available.

In introducing protection on the basis of this attribute, Queensland would be following the advice of numerous bodies. In 2012 the AHRC recommended that 'domestic violence' be recognised as a protected attribute, in federal anti-discrimination laws as well as in the FWA.[54] The Australian Law Reform Commission has also made similar recommendations[55] as has the Senate Legal and Constitutional Affairs Committee.[56]

ADLEG **recommends** that being subject to domestic or family violence be included as an attribute.

Q38 Should an additional attribute of accommodation status be introduced? Should it be defined, and if so, how?

The 2008 review of the (then) *Equal Opportunity Act 1995* (Vic) recommended the inclusion of 'homelessness' as a ground in Victorian discrimination law.[57] Similarly, the ACT Law Reform Advisory Committee recommended the inclusion of 'homelessness' as a ground in the ACT discrimination law.[58] In both cases, the reports provide examples of the experiences of people who are homeless or experience housing disadvantage along with sound rationales for the protection of people experiencing housing disadvantage, particularly homelessness.

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54 See, for example: Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination Law – domestic and family violence*, (2012) <https://humanrights.gov.au/our-work/legal/consolidation-commonwealth-discrimination-law-domestic-and-family-violence>.

55 Australian Law Reform Commission, *Family Violence and Commonwealth Laws – Improving Legal Frameworks Final Report* (2011), ALRC Report 117, Recommendation 16–8 <https://www.alrc.gov.au/publication/family-violence-and-commonwealth-laws-improving-legal-frameworks-alrc-report-117/>.

56 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013), Recommendation 3 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/report/index>.

57 Julian Gardner, *An Equal Opportunity Act for a Fairer Victoria: Equal Opportunity Review Final Report* (2008, Department of Justice, Victoria) [5.81]–[5.107] & rec 46.

58 ACT Law Reform Advisory Committee, *Review of the* Discrimination Act 1991 *(ACT): Final report* (2015) 78–79.

There are several aspects of 'accommodation status' that suggest that protection should be extended in respect of discrimination and other related conduct. Firstly, people who are homeless experience a range of structural disadvantages, including being denied employment, missing out on housing opportunities due to time limits imposed by housing authorities on responding to potential opportunities, as well as stigma and prejudice attaching to their status. A second form on accommodation-related prejudice and discrimination impacts on people who live in certain types of housing, such as public housing, and in certain areas including areas known for their low or lower social economic status, or as rural towns. Equal Opportunity Tasmania has received reports in education workshops of people from poorer areas leasing post boxes in city post offices to avoid what they referred to as 'postcode' discrimination, where employment candidates were disadvantaged if their address included a postcode from a lower social economic status area. ADLEG also notes the work undertaken by the (then) Human Rights and Equal Opportunity Commission in 1996 on the discrimination and other disadvantages in respect of human rights experienced by people living in rural Australia.

In regards to both housing type and location it is strongly arguable that the stigma and prejudice that people are experiencing relies on these housing-related factors as indicia or proxies for the person's social origin or status. As such, ADLEG recommends that the Qld ADA include protection against discrimination on the ground of social origin or status and include within this accommodation status as defined in the ACT, and location. The following draft definition is provided for consideration:

> ***accommodation status*** includes being—
>
> (a) a tenant, including a tenant within the meaning of the Residential Tenancies and Rooming Accommodation Act 2008; and
>
> (b) in receipt of, or waiting to receive, financial or housing assistance from the Housing Authority under *Housing Act 2003*; and
>
> (c) homeless or without stable housing.

Q39 Should any additional attributes be included in the Act?

- *If so, what evidence can you provide for why these attributes should be protected?*
- *How should they be defined?*
- *How would inclusion of the attribute promote the rights to equality and non-discrimination?*

ADLEG supports the inclusion in the Qld ADA of 'social origin or status' as a ground, with it being defined to include accommodation status and employment status.

Social Origin

Australian jurisdictions generally do not include social origin as a proscribed ground in anti-discrimination legislation. However, the *Human Rights Act 2004* (ACT) ('HRA (ACT)'), in section 8 on 'Recognition and equality before the law', includes social origin within the list of grounds given as examples of discrimination. The 2017 amendments to the DA (ACT) relating to accommodation status (defined to include homelessness) and employment status are in some ways akin to social origin, however no state or territory discrimination legislation includes social origin as an operable ground. Australia has ratified a number of UN treaties, including the *International Covenant on Civil and Political Rights*[59] ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'),[60] as well as International Labor Organization ('ILO') *Discrimination (Employment and Occupation) Convention 111* ('ILO No 111'),[61] all of which include the ground of social origin.

Social origin, social status, poverty, and socio-economic status are gaining recognition as grounds of discrimination elsewhere in the world. A recent decision of the South African equality court found that 'poverty' should be recognised as a ground of discrimination in terms of the legislative provision that allows courts to add new 'unlisted' grounds.[62]

In accordance with its international obligations, Australia has implemented legislation, albeit of a modest nature. The AHRCA includes social origin as a ground for the lodgement of complaints, although binding orders cannot be made. Complaints can be investigated and conciliated with the possibility of an inquiry and a report to the Attorney-General, although no inquiry has yet been conducted on this ground. The annual reports of the Commission reveal that very few complaints are in fact lodged in respect of social origin.

The *Fair Work Act 2009* (Cth) ('FWA') also prohibits 'adverse action'[63] and termination of employment[64] on this ground. There are a handful of unsuccessful reported decisions in which social origin appears to have been raised as a defence in conjunction with other grounds in response to a detriment, such as termination.[65]

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59 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI), 999 UNTS 171; Australian Treaty Series 1980 No 23, UN Doc A6316 (1966) (entered into force 23 March 1976, entered into force for Australia 13 November 1980, except article 41 which entered into force on 28 January 1993) ('ICCPR')

60 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, GA Res 2200A (XXI), 993 UNTS 3, Australian Treaty Series 1976 No 5, UN Doc A/6316 (1966) (entered into force 3 January 1976, entered into force for Australia 10 March 1976) ('ICESCR')

61 *ILO No. 111*, above n 4.

62 *Social Justice Coalition and Others v Minister of Police and Others* [2018] ZAWCHC 181, [65].

63 *Fair Work Act 2009* (Cth) s 351.

64 *Fair Work Act 2009* (Cth) s 772.

65 *Moussalli v Western Power (No 3)* [2010] FMCA 389 (4 June 2010); *McDonald v Civic Disabilities Services Ltd* [2014] FCCA 1464 (10 July 2014); *Campbell v Aero & Military Products Pty Ltd* [2015] FCCA 2310 (7 September 2015).

Australia is becoming an increasingly unequal society, above the OECD average.[66] There has been a growing concentration of wealth at the top of the economic scale, and a growing gap in disposable income due to income inequality.

> The lowest 40% income group comprises households whose main income is social security or low full-time or part-time earnings. Their average disposable income is … less than one tenth of that of the highest 1%.[67]

While it is recognised that distributive justice is more properly the prerogative of government, anti-discrimination legislation has an important role to play, as class discrimination is fostered by wealth, snobbery and prejudice arising from where people live, what employment they are engaged in—if employed—and the place and extent of their education. Working class and poor people may be looked down upon by those with wealth and social capital. Private schools are a notable means of transmitting social capital.

As poor people are disproportionately affected by socioeconomic discrimination, it has been suggested that the preferred model should be asymmetrical. That is, the right to complain should be limited to the less well off. This would prevent those who are better off from challenging programmes designed for the less well off.[68] Indeed, some Canadian courts have refused standing to professionals, such as accountants, in interpreting social condition. However, we suggest that the asymmetrical model is too restrictive and could confuse distributive justice initiatives with the non-discrimination principle. (In this regard, we note and commend the suggested inclusion of 'accommodation status' as a discrete protected attribute, particularly as it is intended to include homelessness).

In the employment context, social origin discrimination might occur where a person from a working class background, place of residence, education or accent, having applied for a professional position, is then refused. The decision maker's assumption is that the working class person would not 'fit in' to the workplace, regardless of their qualifications. Capuano recounts how qualified law graduates were rejected by a Melbourne law firm because they had attended public rather than private schools.[69] It was apparently assumed that those who attended private schools would carry more economic and social capital with them, which would enable them to attract business to the firm. This type of discrimination should be challengeable despite the relative privilege of the affected person.

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66 Australian Council of Social Service and University of New South Wales (2018) *Inequality in Australia 2018* <https://www.acoss.org.au/wp-content/uploads/2018/07/Inequality-in-Australia-2018.pdf> 31.

67 Ibid 30.

68 See, eg, Sandra Fredman, 'Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda' (2010) 3 *European Human Rights Law Review* 290, 291.

69 Angelo Capuano, 'Giving meaning to 'social origin' in International Labour Organisation ('ILO') Conventions, the *Fair Work Act 2009* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth): "Class" discrimination and its relevance to the Australian context' (2016) 39 *UNSW Law Journal* 84.

Access to goods and services may also involve discrimination on the basis of socioeconomic status, such as declining to carry out work on the assumption that the customer could not afford to pay, or refusing to perform work in a working class neighbourhood.

As Australia becomes less egalitarian, the gap between rich and poor increases and the proscription of discrimination on the ground of social origin becomes more pressing. The evidence reveals that poverty disproportionately affects Indigenous people, women, refugees, the elderly, and those on welfare. We submit that the inclusion of social origin as an operable ground would mean that its intersection with race, sex, age and disability would enhance the efficacy of the Act.[70]

Social origin discrimination can also be termed social status discrimination since it relates not just to a person's historical position in society but to their relative wealth or class status which may be recently acquired, for example where a person becomes unemployed or homeless, moves into social housing or a 'poor' neighbourhood. It is thus connected to accommodation status, a ground of discrimination in the ACT legislation (see below for the discussion of accommodation status discrimination).

ADLEG **recommends** that the Act be amended to include an attribute of 'social origin and social status'.

Social origin is related to 'profession, trade, occupation or calling' since it concerns stereotypes and stigma attaching to someone's place in society based on their class position which may correspond to the types of work they do in some instances, also often a marker of class. It relates also to employment status (see above) which can lead to discrimination against people who are unemployed and/or in receipt of social security, underemployed or in irregular employment which may overlap with class, poverty and socio-economic disadvantage. Certain professions, such as sex work, may be stigmatised due to prurience or misunderstanding. (See above for the discussion of lawful sexual activity).

ADLEG **recommends** that the ground of 'social origin and social status' can operate as a catch-all to include discrimination based on one's profession, trade, occupation or calling, employment status, and accommodation status. Should the Qld ADA not include this broad ground, then the position taken in the ACT legislation should be followed with the inclusion of the three grounds of 'employment status', 'accommodation status' and 'profession, trade, occupation or calling'.

70 See Margaret Thornton, 'Social Status: The Last Bastion of Discrimination' (2018) 1 *Anti-Discrimination Law Review* 5–26. For a comparative discussion, see Geraldine Van Bueren, 'Inclusivity and the law: do we need to prohibit class discrimination?' (2021) 3 *European Human Rights Law Review* 274.

11. Exemptions

In considering the approach to exemptions in discrimination law, there are two aspects that ADLEG urges be given consideration. The use of the language of 'exemptions' and 'exceptions' in discrimination law in Australia adds to confusion about what is permitted and what is a valid defence to a claim of discrimination. Reforms to the Qld ADA could begin the work of making these distinctions clearer with 'exemptions' being renamed as 'defences'. It is also important that a lay person (including an organisation with obligations under the Act) understand what the 'exemptions' mean in terms of a claim of discrimination. Usefully, some legislation in Australia, for example, the ADA (Tas) includes a provision that specifies the onus of proof in respect of exceptions. Unfortunately, that provision is not found in the part of the Act that deals with exceptions but much later in the Act.

ADLEG **recommends** that the Qld ADA use the term 'defences' rather than 'exemptions', that it frames the provisions on the basis that 'it is a defence to a complaint of …', and include, as the first provision in the Part setting out the defences a provision that states:

> **Part 5 Defences**
>
> A defence referred to in this Part is a defence to a complaint, and the person who relies on a defence must prove it on the balance of probabilities.

Q41–44 Should the scope of the religious bodies' exemption be retained or changed?

- *In what areas should exemptions for religious bodies apply, and in relation to which attributes?*
- *Should religious bodies 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?*
- *Should religious bodies be permitted to discriminate when providing accommodation on a commercial basis including holiday, residential and business premises?*
- *Should the religious educational institutions and other bodies exemption be retained, changed, or repealed?*
- *If retained, how should the exemption be framed, and should further attributes be removed from the scope (currently it does not apply to age, race, or impairment)?*

The questions in the Discussion Paper pertaining to religious body and religious educational institution exemptions are best dealt with together.

Religious body and religious educational institution exemptions in discrimination laws can undermine the right to equality. They should only be permitted where they can be justified when balanced with the fundamental rights and freedoms of others. International human rights law requires that discriminatory conduct not be permitted unless there is a legitimate purpose for the discriminatory conduct, and the means by which that purpose is achieved is proportionate.

Recent reforms in Victoria adopt the preferred international human rights law approach and are a best practice approach in Australia.[71] These reforms limit or remove existing general religious body exceptions, and instead provide for the following exceptions:

- Allow religious schools to discriminate on the ground of the religion of the prospective student in the admission of students, but not at any later stage - consistent with the approach already adopted in the Qld ADA.
- Allow religious bodies to discriminate on the ground of religion in employment, but only where religious practice or observance is an inherent requirement of the role (for instance a religious education teacher, but not a maths teacher or gardener) (again, on the ground of the religion of the employee or staff member).
- Allow the government-funded provision of goods and/or services by religious bodies to discriminate on the ground of religion (of the person seeking goods or services).
- Allow the non-government-funded provision of goods and/or services by religious bodies to discriminate on multiple grounds, including sexual orientation and gender identity (of the person seeking goods or services).
- Require that all conduct permitted by these exceptions be reasonable and proportionate.

The reasonable and proportionate test provides an objective basis to assess whether the action proposed to be taken is just or unjust and includes consideration of the consequences to the person who is being discriminated against and the rights of the religious body. This in turn allows discrimination law to strike an appropriate balance between the right to equality and the right to religious belief.

Tasmanian provisions provide another example of best practice. They permit discrimination in employment only on the basis of religion where it is a genuine occupational requirement of the role,[72] while students at religious schools can only be discriminated against on the basis of religion at the time of admission,[73] that is at the first point of entry to the school, and not in relation to ongoing enrolment. The former limitation focuses on the religious educational institution's continued right to hire staff of the same religious faith where the role requires religious observance. This appears to be a more limited interpretation of a 'genuine occupational requirement' than the Qld ADA applies. The example in the Qld ADA appears to indicate that all employment in religious institutions could be captured by the exemption rather

71 *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

72 *Anti-Discrimination Act 1998* (Tas) s 51.

73 *Anti-Discrimination Act 1998* (Tas) s 51A.

than the specific role. The latter limitation focuses on the religious educational institution's continued right to build a community of faith through the admission of its students. Tasmania's lack of distinction as to government funding for goods and services is preferable to the Victorian approach. There is no justified reason why, for instance, LGBTIQA+ people should be discriminated against in the provision of certain goods and services but not others. The principled position should be that such discrimination is not permitted regardless of whether the provision of those goods and service is government-funded or not.

Queensland has the opportunity to take these reforms even further, by combining the most effective and principled parts of the respective Victorian and Tasmanian approaches and thereby become the new best practice jurisdiction on religious body defences to unlawful conduct allegations. In doing so, the Qld ADA can appropriately reflect international human rights law, and adopt targeted defences allowing religious organisations to discriminate on the basis of religion (but no other grounds) where religion is inherent to the conduct in question and the conduct is both reasonable and proportionate.

ADLEG recommends that the religious body and religious educational institution defences (exemptions) in the Qld ADA:

- require that conduct be reasonable and proportionate in order to be permitted under religious body and religious educational authority exemptions;
- require that discrimination only be permitted on the ground of religious belief or activity of the employee or service user under religious body and religious educational authority exemptions, and not on the basis of any other grounds;
- require that employment discrimination only be permitted under religious body and religious educational authority defences where conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the role and the person cannot meet those inherent requirements because of the person's religious belief or activity; and
- only permit religious educational authorities to discriminate against students on the basis of the student's religion at the point of admission, and not at any later stage (as is currently the case).

ADLEG does not support the current approach adopted in the *Equal Opportunity Act 1984* (SA). ADLEG does not support allowing discrimination by religious educational organisations or other religious bodies so long as they maintain a publicly available policy outlining their position in relation to the employment of staff. ADLEG maintains that having a publicly available policy accepting and advocating for discrimination on any basis has the capacity to further exacerbate stigma of individuals based on attributes they hold by indicating that discrimination on that basis is legitimate and justifiable. As has been outlined earlier in this submission, one of the primary aims of discrimination law is to lessen the stigma of persons on the basis of attributes they hold. Explicitly providing that individuals with certain attributes cannot obtain employment in an organisation does not lessen stigma or ameliorate other harms

that individuals will face as a consequence of a religious educational organisation or other religious bodies' refusal to employ persons on the basis of an attribute.

Q45 Are there reasons why the work with children exemption should not be repealed?

ADLEG **recommends** that the 'work with children' exemption be repealed. ADLEG agrees with the Discussion Paper that the provision perpetuates offensive and harmful stereotypes about people with diverse gender identities and sex characteristics. As the Discussion Paper emphasises, there are appropriate risk-management systems in place for working with children (the 'blue card system') which do not employ harmful and demeaning stereotypes about people.

Q46 Are there reasons why the Act should not apply to provision of assisted reproductive technology services?

ADLEG **recommends** that the Qld ADA should apply to the provision of assisted reproductive technology services. ADLEG submits that no discrimination should be lawful based on any protected attributes in the provision of assisted reproductive technology services. There is no justified basis for allowing discrimination on the basis of relationship status or sexuality or any other ground.

Additionally, such exemptions may be inoperable to extent of inconsistency with the *Sex Discrimination Act 1984* (Cth). This was the case in *EHT18 v Melbourne IVF* (2018) 263 FCR 376 (21 September 2018), in which provisions of the *Assisted Reproductive Treatment Act 2008* (Vic) were found to be inconsistent with the *Sex Discrimination Act 1984* (Cth) where the Act drew a distinction between clients on the basis of marital status.

Q47 Should the sex worker accommodation exemption be retained, changed or repealed?

ADLEG **recommends** that the sex worker accommodation exemption should be repealed. The exemption places a vulnerable group in an even more vulnerable position with the capacity for a person to be removed from their accommodation on the mere suspicion or 'reasonable belief' that they are using the accommodation for sex work without needing to provide any evidence that the person is *in fact* using the accommodation for sex work.

Q48 Should the Corrective Services Act modifications be retained, changed or repealed?

ADLEG **recommends** that the modifications to the Qld ADA contained in Part 12A of the *Corrective Services Act 2006* (Qld) be removed. The modifications do not appropriately balance the 'financial and other restraints' of the state and the dignity of offenders.

The provisions inappropriately limit the rights of prisoners by amending the definition of direct discrimination by incorporating a 'reasonableness' requirement and by specifying the matters that must be taken into account when considering the reasonableness of a requirement or rule

in indirect discrimination claims. A reasonableness requirement does not apply to any other direct discrimination claim by a complainant. The listing of factors that must be taken into account to determine reasonableness for both direct and indirect discrimination are unduly limited, restrictive and do not provide tribunals with sufficient flexibility to determine matters in accordance with the facts of the claim. The capacity for the interaction between the Qld ADA and the *Corrective Services Act 2006* (Qld) to become unduly burdensome and complex is demonstrated in the case of *Queensland v Tafao* [2021] QCA 056 (26 March 2021) ('*Tafao*'). In the case of *Tafao*, the Queensland Court of Appeal adopted a relatively strict interpretation of s 319H of the *Corrective Services Act 2006* (Qld) which prevented a fulsome consideration of whether the decision to refer to a prisoner by pronouns based on their biological sex rather than gender identity was discriminatory. While there is a general acceptance that discrimination laws should be interpretated 'purposively' with an eye to their overarching purpose, this is not the case with respect to the *Corrective Services Act 2006* (Qld) which could lead to an unduly narrow and restrictive interpretation of non-discrimination rights when applied to prisoners.

As highlighted by the Discussion Paper, the additional requirements are complex and make it significantly more challenging for prisoners to make a complaint. As such they should be removed.

Q49 Should the citizenship/visa status exemption be retained, changed, or repealed? Are there certain groups in Queensland that are being unreasonably disadvantaged by this exemption?

ADLEG **recommends** that the exemption on the basis of citizenship and visa status is removed. While ADLEG accepts that 'public resources are finite and that limits must be placed on who is eligible for government funded assistance', ADLEG does not accept that blanket exemptions which allow for discrimination in all cases of the administration of state laws and programs such as section 106B are justifiable. ADLEG instead recommends that a modified approach like that adopted in the *Discrimination Act 1991* (ACT) be utilised in the Qld ADA. The *Discrimination Act 1991* (ACT) allows for discrimination on the grounds of citizenship and visa status where such discrimination is justified at section 57P. ADLEG recommends adopting a justification exemption but additionally requiring that exclusion on the ground of citizenship or visa status is proportionate.

Q50 Should the insurance and superannuation exemptions be retained or changed?

The exemptions for insurance and superannuation providers should be limited to circumstances in which the discrimination is based on actuarial or statistical data from a reliable source and on which it is reasonable to rely, and the discrimination should be shown to be reasonable having regard to that data and any other factors. An example of such an exemption is found in section 34 of the *Anti-Discrimination Act 1998* (Tas) (the ADA (Tas)):[74]

[74] Similarly worded exceptions are found in the ADA (Tas) in respect of gender, marital status and relationships status: section 30; superannuation and age: section 33; and disability: section 44.

(1) A person may discriminate against another person on the ground of age in the provision of services relating to any annuity, insurance, loans, credit or finance if the discrimination –

(a) is based on actuarial, statistical or other data from a reliable source; and

(b) is reasonable having regard to that data and any other relevant factors.

(2) Sub-section (1) only applies if a person discloses to the Tribunal, when required to do so

(a) the sources on which the data are based; and

(b) the relevant factors on which the discrimination is based.

For insurers and superannuation providers to rely on such exemptions, they must base the decision to discriminate upon reasonable and reliable data. The use of the expression 'is based on' indicates that such data must exist and the insurer must use it in making its decision to discriminate. The decision of the Federal Court on appeal in *QBE Travel Insurance v Bassanelli* [2004] FCA 396 provides guidance on how this requirement is to be interpreted.[75] The Federal Court in that case was considering section 46(1)(f) of the DDA which is similarly worded to section 34 of the ADA (Tas). The court interpreted the words 'based upon actuarial or statistical data' to mean 'that the discriminator actually based its decision upon certain actuarial or statistical data'.[76] Other cases provide useful judicial guidance as to what actuarial, statistical or other data can be used to justify discrimination in the provision of insurance services. Such guidance could usefully be included in either the text of the exemption provision or in notes to that provision. This judicial material indicates that the data:

- must be contemporarily relevant;[77]
- must state that the condition of the person seeking insurance is an unacceptable risk;[78] and
- should come from an Australian source or, if there is no Australian source for the data, the insurance provider should provide further materials as to the local relevance and applicability of data from overseas and an explanation as to why there is no Australian data upon which to rely.[79]

ADLEG recommends that the Qld ADA exemptions for superannuation and insurance be limited to circumstances in which the discrimination is based on actuarial or statistical data from a reliable source and on which it is reasonable to rely, and the discrimination should be shown to be reasonable having regard to that data and any other factors.

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75 *QBE Travel Insurance v Bassanelli* [2004] FCA 396 (7 April 2004) [30].
76 Ibid.
77 *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 (6 April 2001) [17].
78 *Opinion re: Elizabeth Kors and AMP Society* [1998] QADT 23 (24 November 1998).
79 Ibid.

ADLEG recommends that guidance be included in the provision or as a note to the provision on what actuarial and statistical data can be used.

ADLEG recommends that the Discrimination Act provision go further in requiring the providers of insurance and superannuation to provide consumers with the data on which decisions about them are based and a meaningful explanation of that data. This has the positive potential to ensure that potential complainants can get advice on the prospects of success of the respondent if it relies on such data. In doing so, it may prevent unnecessary complaints and will ensure that the evidence relied on in the defence is available at an early stage and cannot be used to ambush the complainant.

12. Areas of Activity

ADLEG **recommends** that the areas of activity in which discrimination is prohibited in the Discrimination Act be listed in a single provision and expressly include coverage of any activity that is not in private.

This is the approach is consistent with the international human rights law obligations to prevent discrimination across broad areas of life activity.

To further ensure the scope of protection reflects obligations under international law to prevent discrimination, the provision listing the areas of activity specify coverage of any prohibiting discrimination and other related conduct (such as sexual and other harassment and vilification) 'by or against a person or a group of people in connection with an area of activity'.

This latter approach reflects the wording of the areas of activity provision of the ADA (Tas): section 22.

In his decision considering the scope of section 22 of the ADA (Tas), Chief Justice Blow of the Tasmanian Supreme Court stated:

> [20] … However it is clear that Parliament has limited the scope of Pt5 [(then) 'Discrimination and prohibited conduct'] to certain areas of activity by reference to victims, rather than to offenders. If Pt5 had been intended to apply only to offenders engaged in certain classes of activities, s22(1) could have been worded differently. Because it has been worded by reference to the activities of victims, I think its purpose was the protection of victims, regardless of the role or status of offenders. Having regard to the classes of activity referred to in s22(1), it would seem that it was intended to protect individuals undertaking the basic activities of everyday life, such as employment and education.

ADLEG **recommends** that there be express prohibition against discrimination and other related conduct 'by or against a person in connection with an area of activity' however defined in the Discrimination Act.

Q52 Should the definition of goods and services that excludes non-profit goods and service providers be retained or changed?

Goods and services should be defined as inclusive of all providers of goods and services, whether for a fee or not and whether for profit or not.

Should any goods and services providers be exempt from discrimination, and if so, what should the appropriate threshold be?

There should be no specific exemptions for any particular goods and services providers.

Q53 How should the Act define a 'club'?

The Qld ADA currently defines 'club' as follows:

> a ***club*** means an association that—
>
> (a) is established for social, literary, cultural, political, sporting, athletic, recreational, community service or any other similar lawful purposes; and
>
> (b) carries out its purposes for the purpose of making a profit.

Paragraph (b) of this definition sets the Qld ADA apart from many other discrimination laws in Australia which include non-profit organisations within the definition of 'club'. We note the comment in the Discussion Paper at page 125 that 'only Tasmania and Queensland permit discrimination by all entities that do not "carry out their purposes for the purpose of making a profit".' This is not the case. The Tasmanian Act applies to organisations whether for profit or otherwise and there are a number of cases that demonstrate this application. As such, it is only Queensland that provides this protection for non-profit organisations from claims of discrimination.

There appears to be no valid rationale for allowing some organisations to operate outside the law, while others are obliged to comply with it. There are sufficient protections in framing of discrimination and in exemptions to a claim of discrimination that ensure that organisations that are non-profit have an opportunity to justify any alleged discrimination, while still being bound by the act.

ADLEG **recommends** that the Qld ADA be amended to ensure that clubs, whether for profit or otherwise, and whether incorporated or otherwise, are obliged to comply with the act in all regards.