



# Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

*Systems and Individual Advocacy for vulnerable People with Disability*

## Priorities for Federal Discrimination Law Reform

### Submission by Queensland Advocacy Incorporated

### Australian Human Rights Commission

**19 November 2019**

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QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

## About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (**QAI**) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for almost a decade, highly in-demand individual advocacy through our individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program and more recently the National Disability Insurance Scheme Appeals Support Program and Decision Support Pilot Program.

## Summary of QAI's recommendations

1. QAI supports the summary of proposed priorities for federal discrimination law reform.
2. QAI considers that the Federal Government should undertake structural and substantive reform of the current discrimination laws, consolidating the separate discrimination statutes into a single Act that is comprehensive, consistent and extends reasonable adjustments to impose a specific positive duty across all protected attributes in all protected areas of life.
3. QAI submits that existing protected attributes should be extended to include carer's responsibility, volunteers and interns, accommodation status and subjection to domestic and family violence.
4. The legislation should reflect and incorporate the obligations Australia has assumed at international law.
5. Gaps in coverage for carer's responsibility, volunteers and interns, accommodation status and domestic and family violence must be addressed.
6. All permanent exemptions should be reviewed not only in light of the overall purpose of discrimination law to promote equality and fair treatment, but also having regard to the purpose and intent of the CRPD.
7. Current compliance mechanisms administered by the Commission are necessary and helpful and QAI supports their continuation. We note the significant problems with the temporary exemptions available under the DDA and consider that the granting of exemptions can undermine the strength and power of discrimination law.
8. QAI strongly supports the Commission's position that there is a need for greater awareness-raising activities and possibly industry support to promote compliance, as well as robust review processes to measure the effectiveness of the Disability Standards. QAI considers that the introduction of voluntary audits, a general inquiry function and positive duties would be of significant value.
9. QAI strongly supports the introduction of a positive duty for public entities to proactively take measures to eliminate unlawful discrimination and harassment and advance equality.
10. QAI agrees that complaints processes must be available and accessible for all people.
11. QAI notes that the nature of confidential conciliations reduces the likelihood that matters will

resolve and places the complainant in the position of having to proceed to a less accessible and available forum, which is a significant limitation of discrimination law.

12. QAI proposes extending the timeframe to 12 months, with extensions available, to cover complex disputes and circumstances where vulnerable complainants have been unable or unwilling to take action earlier.
13. QAI strongly supports the provision of greater clarity about the ability for representative actions to be brought and agrees this would enable a greater focus on systemic discrimination issues and reduce the pressure on individual complainants.
14. QAI submits that there should be no costs orders made against a complainant, except in very exceptional cases where there has been a clear demonstration of a deliberate and vexatious misuse of process. Strong safeguards should be in place regarding legal representation.
15. QAI considers that there must be measures introduced to address the particular vulnerability of persons experiencing intersectional discrimination that includes harassment and vilification. Protections for vilification under federal discrimination law should be at least equivalent to the protections offered by state law and should attract both civil and criminal penalties in appropriate cases.
16. Discrimination should not remain the sole remedy under Commonwealth law for a vulnerable person who has experienced an unlawful breach of their human rights. It is time to enact a federal Human Rights Act or Charter, which translates the international human rights Australia has agreed to respect and protect into binding domestic law.

## Response to Questions in Discussion Paper

QAI thanks the Australian Human Rights Commission (AHRC) for initiating this important conversation and for the opportunity to make this submission.

As a disability advocacy organisation, we have confined our submission to a consideration of the laws that are of particular relevance for people with disability. Accordingly, our submissions are predominantly directed to the *Disability Discrimination Act 1992* (Cth) (DDA).

### 1. Do you agree that the above principles should guide discrimination law reform? Are there other principles that should be identified?

QAI supports the Commission's overarching view that discrimination laws, as a major component of human rights protection in Australia, should positively contribute to a reduction of discrimination in society and the greater realisation of equality on a continual basis.<sup>1</sup>

QAI agrees with the Commission's proposal that federal discrimination law should be:

- *Clear* – QAI emphasises that this is particularly important given the disproportionate representation of people with intellectual and cognitive disability who experience discrimination;
- *Consistent* – QAI considers that consistency will be assisted by the consolidation of the separate statutes, as discussed below;
- *Comprehensive* – cover both individuals and communities, in addition to covering all relevant spheres in which a person can experience discrimination;

<sup>1</sup> Australian Human Rights Commission. *Discussion Paper: Priorities for Federal Discrimination Law Reform*, October 2019, 6.

- *Intersectional* – with consistent tests;
- *Remedial* – as noted below, the lack of effective and proportionate remedies has been a core weakness of discrimination law that must be addressed to ensure that the damage experienced by those who experience discrimination is adequately addressed and the laws have a deterrent effect, discouraging further breaches;
- *Accessible* – QAI considers this particularly given the vulnerability and disempowerment of many complainants in this jurisdiction and the inherent power balance that normally exists between a claimant and respondent;
- *Preventative* – QAI agrees that the laws must be preventative, but submits that they must also be 'proactive and equitable'. A proactive law enables equitable results. It is directed to substantive equality or to equality of outcome and not only to formal equality. A proactive law recognises that in order to treat some persons equally we must treat them differently. At present, our discrimination laws are one-dimensional, placing a heavy onus on the aggrieved to initiate and pursue a resolution.

Another principle to include is that the laws should be 'instructive' in two different senses:

- They will make provision for guidance to providers/deliverers of services/employers etc about, for example, what constitutes reasonable adjustments, or about minimum standards as established already in education, access to premises, transport; and
- From individual complaints they will promote learnings that lead to systemic benefits for people with protected attributes.

**2. What are the key factors relevant to the need for federal discrimination law reform? Please provide any comments on the Commission's observations in the six dot points above.**

QAI supports the Commission's observation that there is an overreliance on discrimination laws to protect human rights and that the discrimination framework established by the legislation is a dispute-focused model that is remedial rather than proactive.

QAI also notes inconsistencies between the discrimination framework at a state and federal level.

At a federal level, QAI does not consider it appropriate that discrimination law is divided into four separate types of discrimination, each with its own Act.<sup>2</sup> This is a different approach to that taken in Queensland, where a single Act (the ADA) addresses discriminatory treatment on the basis of a range of different attributes.

The 2010/2011 review of this patchwork enforcement framework for Commonwealth discrimination laws, which considered, among other things, proposed consolidation of the disparate discrimination

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<sup>2</sup>The *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

laws,<sup>3</sup> unfortunately stalled for the purported reason that the draft laws failed to strike the desired balance.<sup>4</sup> QAI considers that this proposal should be reconsidered.

### ***Key limitations of discrimination law***

QAI considers that the main problems with the discrimination laws we have are:

#### *a) The individualist approach taken*

Discrimination law requires individuals aggrieved by discriminatory treatment to take action to assert the violation of their rights and pursue an appropriate remedy. Both state and federal systems have adopted an individual complaints process, where receipt of a complaint alleging discriminatory treatment leads to investigation of the complaint by the relevant Commission. Traditionally, only victims have had standing to lodge a claim alleging discriminatory treatment.<sup>5</sup>

This model is far from satisfactory. In contrast to other areas of law, where the parties are often on a level playing field in terms of their access to and ability to pay for legal advice, etc. there is usually a significant disparity between the resources and bargaining power of the parties (which are usually the aggrieved person and a company) in a discrimination claim. Sadly, these factors all work to further oppress and marginalise people from vulnerable groups.

These issues have been acknowledged and addressed to some degree. Parliament attempted to minimise the power imbalance by making the first step in the determination of a claim a compulsory, confidential conciliation. The availability of this compulsory first step is why the discrimination complaint process is often described as being informal and accessible. However, the requirements to identify and articulate the relevant breaches of the legislation, lodge a claim in the approved form to the appropriate body and adequately represent their case when face-to-face with their alleged perpetrator in a formal bureaucratic setting is highly threatening to many lay people, particularly disempowered persons not familiar with the law and legal system. The power balance between the parties also casts a significant shadow over conciliation negotiations.

The majority of aggrieved persons have been significantly marginalized and, as the legislation explicitly acknowledges, are members of traditionally disempowered groups who are highly vulnerable thus less equipped than most to initiate and pursue a claim.

QAI submits that as discriminatory practices, by their very definition, only affect persons because of their membership of a particular class or group, a key requirement of any discrimination system should be that claims are understood in a collective light. While the ability to lodge an individual complaint is central to protecting individual rights to equality and non-discriminatory treatment, it is

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<sup>3</sup> This was proposed in April 2010 as a key part of the Australian Human Rights Framework. In September 2011, a Consolidation Discussion Paper was released to initiate the formal process for consultation and law reform: see <http://www.ag.gov.au/antidiscrimination>; Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011 (Commonwealth of Australia). At present, there are no clear indications of the likely changes that will result from the review.

<sup>4</sup> See: <http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx> for more information.

<sup>5</sup> Note that the Fair Work Ombudsman is now empowered to inquire into, investigate and initiate enforcement action for workplace discrimination complaints where it considers it is in the public interest.

also important that the collective vulnerability of certain groups in our society is properly understood.

*b) The way discrimination is identified – use of the ‘comparator’ test*

Framing discrimination laws around the notion that individual differences are to be treated as irrelevant is also inherently problematic. This approach can entrench the significance of difference, rather than generating respect for individual difference, which a more substantive conception of equality may create.<sup>6</sup>

The use of the comparator test is particularly problematic and further marginalizes disempowered groups. Essentially, the comparator test involves comparing likes with unlikes. Thornton’s explanation remains relevant:<sup>7</sup>

*The benchmark figure is likely to be a white, Anglo-Celtic, heterosexual male who falls within acceptable parameters of physical and intellectual normalcy, who supports, at least nominally, mainstream Christian beliefs, and who fits within the middle-to-the-right of the political spectrum.*

The High Court decision in *Purvis*<sup>8</sup> exemplifies difficulties with the use of the comparator test. In that case, the High Court found that the exclusion of a student with an acquired brain injury from school did not contravene discrimination legislation on the basis that his less favourable treatment was not due to his disability but his behaviour (failing to concede the causative impact of his disability on his behaviour). The comparator was held to be a student exhibiting like behaviour, rather than a child exhibiting like behaviour as a result of his disability. This case remains the leading Australian authority on the comparator test, although recent decisions have qualified it to some extent in some states including Queensland.<sup>9</sup>

*c) The focus on formal, rather than substantive equality*

As Thornton explains in her comprehensive review of Australian discrimination law, discrimination law has proved, at best, a mediocre mechanism for putting equality on the agenda and, at worst, a façade masking the significant abyss between the rhetoric of equality and substantive equality.<sup>10</sup> The approach that the Government has taken through this legislation is blunt, ineffective, costly, unpredictable, expensive and inept in the face of complex problems such as systemic discrimination.

Formal equality can actually promote substantive inequality.<sup>11</sup> Gaze agrees, arguing that while overt or explicit sex discrimination has significantly diminished as a result of the introduction of the Sex

<sup>6</sup> Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work*. 2<sup>nd</sup> edition (Oxford University Press, 2011), 397.

<sup>7</sup> Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990), 1-2.

<sup>8</sup> *Purvis v New South Wales* (2003) 217 CLR 92.

<sup>9</sup> See for example *Woodforth v State of Queensland* [2017] QCA 100, [53-57]. *Purvis* was decided using a restrictive jurisprudence has not been altered simply because fifteen years have passed. See for example:

[https://law.unimelb.edu.au/\\_\\_data/assets/pdf\\_file/0007/1708108/28\\_2\\_9.pdf](https://law.unimelb.edu.au/__data/assets/pdf_file/0007/1708108/28_2_9.pdf)

<sup>10</sup> Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990), 14.

<sup>11</sup> Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990), 15, 22. While this work is now dated, the stagnancy of anti-discrimination law supports the continuing relevance of this work.

*Discrimination Act 1984* (Cth), it has been replaced by more ‘covert and subtle forms of discrimination which are more difficult to prove’.<sup>12</sup> Structural and systemic inequality has blossomed in the absence of a commitment to eradicate substantive inequality. An example of this is that gender-based wage inequality continues, notwithstanding that we have formally adopted the principle of equal pay for work of equal value.<sup>13</sup>

d) *The focus on negative, rather than positive or affirmative, action*

Discrimination laws are primarily negative – this is a further reason why they fail to recognize and address systemic discrimination. There is no general, positive duty to promote equity. QAI submits that to achieve choice and equity for vulnerable members of our society, negative freedom and minimalist welfare support is not sufficient – proactive measures designed to level the playing field and to support autonomous choice are needed. The onus should not be on vulnerable people to defend their human rights; rather, there must be widespread understanding that anyone thinking of breaching the human rights of another does so at risk to themselves.

e) *The lack of effective remedies or sanctions*

A further problem with Australian discrimination legislation is the lack of appropriate penalties or sanctions to enforce compliance with the law, deter breaches and compensate victims. Aside from limited examples, such as the recent empowering of the Fair Work Ombudsman to initiate and prosecute discrimination claims on behalf of individual complainants, there has been no ‘big stick’. This is mainly because we require vulnerable individuals to initiate a claim against their perpetrator, and have not established an enforcement agency tasked with doing this work.

(e) *The exceptions, exclusions and exemptions narrow the scope of discrimination law*

The many exceptions, exclusions and exemptions contained in discrimination law also narrows its scope. Discrimination law is often considered a blunt tool to help people who have experienced discrimination.

In the context of this understanding of the limits of discrimination law, it is perhaps unsurprising that discrimination law has not been coveted as providing an effective remedy for the use of Restrictive Practices (RPs), despite the arguable case that the use of RPs breaches discrimination law. This is particularly so in the context of an understanding of the vulnerability and disempowerment inherent in the experience of an intellectual or cognitive disability, both for the person and their family.

Discrimination laws have had a mild normative effect in influencing the general social acceptance of overt discrimination – a ‘consciousness raising effect’<sup>14</sup> – and have provided some individuals with a means of redressing grievances that flow from discriminatory treatment. However, overall, discrimination laws have proved ineffective at challenging systemic and ingrained discrimination.

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<sup>12</sup> Beth Gaze, ‘Twenty Years of the Sex Discrimination Act: Assessing its Achievements’, (2005) 30(1) *Alternative Law Journal* 3, 4-5.

<sup>13</sup> *National Wage and Equal Pay Cases* (1972) 147 CAR 172. See also: <https://www.wgea.gov.au/data/factsheets/australias-gender-pay-gap-statistics>

<sup>14</sup> Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (Ashgate, 2003), 76.

### 3. Are there other major challenges that exist with federal discrimination law that require reform?

Courts have struggled to consistently interpret and apply concepts such as reasonable adjustment and unjustifiable hardship. The recent Federal Court decision in *Sklavos*<sup>15</sup> has created challenges for people with disability seeking to prove discrimination given the Federal Court's interpretation of 'reasonable adjustments'. In that case, the Federal Court found that not only must a person with disability show that they are disadvantaged by a failure to provide a reasonable adjustment, they must also show that the failure to provide the adjustment was caused by the person's disability. This creates a very high bar for complainants to meet. The Disability Discrimination Standards made under the legislation offer some assistance, but do not resolve many of the significant issues.

Discrimination law should be consolidated federally, and a consolidated law should extend reasonable adjustments to impose a specific positive duty across all protected attributes in all protected areas of life. A consolidated law should include express guidance on the meaning of these concepts. It should define a reasonable adjustment as the provision of additional or specialised assistance, the modification of existing measures, the flexible application of existing measures, and the removal of a barrier or obstacle, which does not constitute an unjustifiable hardship. QAI also considers that the siloing of attributes across separate pieces of legislation is problematic, particularly given our increasing understanding of the vulnerability of those experiencing intersectional disadvantage.

The respondent should carry the burden of establishing that an adjustment constitutes an unjustifiable hardship and the definition of unjustifiable hardship in the consolidation bill should refer to an adjustment that is not reasonable to provide because of an unavoidable or inherent limitation, or the financial capacity of the respondent.

#### Case study

QAI's Human Rights Legal Service assisted a young woman with a visual impairment in relation to a disability discrimination matter involving her enrolment in a final exam for a tertiary primary teaching course. The issue was the format of the final exam, which was computer-based only. This created a practical difficulty for the client because she is unable to adjust her eyes to see the computer screen and the testing materials. We contacted the young woman's doctor who provided an opinion as to the need for adjustment. This gave us information to convince the examination body of the need for adjustment given the young woman's disability. We facilitated a meeting between the young woman and the examination body to determine whether an amicable solution could be reached. We were able to negotiate further adjustments to circumvent the barriers the young woman experienced in previous attempts at the exam.

It is hoped with the adjustment that the young woman will be able to finish her degree and pursue her chosen career as a primary school teacher.

<sup>15</sup> *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128; 256 FCR 247; 347 ALR 78. This was applied in *Sing v Minister for Immigration and Border Protection* [2019] FCA 781, 791.

#### 4. What, if any, changes to existing protected attributes are required?

The DDA was enacted in 1992, 14 years prior to the adoption of the UN Convention on the Rights of Persons with Disabilities (**CRPD**). The development in our collective understanding and approach to disability rights progressed significantly during that period and the DDA should be amended to properly reflect the obligations Australia has assumed by signing and ratifying the CRPD. By way of example, we note the definition of 'disability' in the DDA, which is consistent with the medical model, defining 'disability' as:<sup>16</sup>

- (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) *the malfunction, malformation or disfigurement of a part of the person's body; or*
  - (f) *a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*
  - (g) *a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;*
- and includes a disability that:*
- (h) *presently exists; or*
  - (i) *previously existed but no longer exists; or*
  - (j) *may exist in the future (including because of a genetic predisposition to that disability); or*
  - (k) *is imputed to a person.*

*To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.*

In contrast, the CRPD does not contain a comprehensive definition of 'disability', but provides that:<sup>17</sup>

*Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*

QAI submits that the DDA should be amended to reflect this social model of disability.

The CRPD also expansively defines 'discrimination on the basis of disability' to mean:<sup>18</sup>

*any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;*

Other key obligations established by the CRPD, such as the obligation to consult with and actively involve people with disability in the development and implementation of legislation and policies to

<sup>16</sup> Section 4 DDA.

<sup>17</sup> CRPD, Article 1.

<sup>18</sup> CRPD, Article 2.

implement the CRPD and in other decision-making processes concerning issues relating to people with disability, should also be reflected in the DDA.

### 5. What, if any, new protected attributes should be prioritised?

QAI agrees that there are currently gaps in coverage for **carer's responsibility** that must be addressed.

QAI also submits that the gaps in discrimination law pertaining to **volunteers and interns** must be addressed. We note that, partly in response to the very low rates of employment of people with disability within the Australian workforce, many people with disability work in voluntary roles. Volunteer work can potentially be an effective means by which people with disability can make a valuable contribution to the workplace, demonstrate their capabilities and simultaneously develop skills that are valuable to the workplace. Yet it is also in this capacity that people with disability can experience discrimination, not only in their treatment within the workplace but also by the exploitation of these volunteers by workplaces which keep them engaged in a voluntary capacity where their role could, but ultimately does not, lead to paid employment.

Employment discrimination makes it significantly harder for Australians with disability to gain employment, particularly meaningful employment that is commensurate with their skills, abilities and interests and is part of a career trajectory chosen by them. Employment discrimination makes it significantly harder for Australians with disability to keep employment, as they are often subjected to stigma, ill treatment, lack of support and disproportionate bureaucratic requirements. It is vital that discrimination against volunteers and interns is specifically covered by the legislation.

QAI also agrees that the legislation should be extended to also prohibit discrimination on the basis of **accommodation status**. Many people with disability experience significant discrimination in terms of their accommodation and are therefore forced to accept living arrangements that are outside their choice and control. This can lead to a second level of discrimination, where they are treated less favourably due to their accommodation.

QAI submits that the legislation should extend to include **domestic or family violence** as a protected attribute. This is consistent with the overarching intent of the legislation and is consistent with approach taken in other legislation<sup>19</sup> but many people experiencing domestic or family are also experiencing other vulnerabilities, such as disability or mental illness.

### 6. What are your views about the Commission's proposed process for reviewing all permanent exemptions under federal discrimination law?

QAI agrees with the need to review all permanent exemptions and submits that they should be reviewed not only in light of the overall purpose of discrimination law to promote equality and fair treatment, but also having regard to the purpose and intent of the CRPD.

QAI is concerned by the proposal to consider including a general clause for 'justifiable conduct'. As noted above, the exemptions already existing have substantially narrowed and weakened the scope of discrimination law. Particularly in the absence of a strong legislative guarantee of fundamental human rights, any exemptions should be carefully and narrowly drafted.

### 7. Are there particular permanent exemptions that warrant particular scrutiny?

QAI does not consider that any of the permanent exemptions in the DDA warrant particular scrutiny.

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<sup>19</sup> See for example *Discrimination Act 1991* (ACT).

## **8. How can existing compliance measures under federal discrimination law be improved?**

QAI considers the current compliance mechanisms administered by the Commission necessary and helpful and supports their continuation.

We do note, however, problems with the temporary exemptions available under the DDA. The granting of exemptions can undermine the strength and power of discrimination law. The granting by the Commission of rolling exemptions to the Commonwealth government to continue the use of the Business Services Wage Assessment Tool (**BSWAT**), which determines reduced rates of pay for persons with an intellectual or cognitive disability, is an excellent example of this.

QAI is very strongly of the view that the use of the BSWAT constituted discriminatory treatment that disadvantages and causes significant harm to the vulnerable people with disability to whom it is applied. This was consistent with the finding of the Full Federal Court in *Nojgin v Commonwealth*,<sup>20</sup> and we consider that support for this view is evidenced by the High Court's refusal to grant the Commonwealth special leave to appeal the decision of the Full Federal Court.

The exemption granted by the Commission on 29 April 2014 made it clear that the exemption was granted for pragmatic reasons, as a transitional arrangement pending implementation of a new wage setting approach. In granting the exemption for the 12 month period, the Commission rejected a request by the Commonwealth to grant an exemption for a three year period and authorised the shorter period as a means for the Commonwealth and ADEs to transition to a new tool whilst ensuring the discriminatory impacts on workers subjected to BSWAT were minimised. Yet ultimately the exemption was extended on a rolling basis, essentially undermining the decision by the Full Federal Court that the use of BSWAT on people with disability constitutes unlawful discrimination, and permitting the practice of discriminatory treatment of people with disability, many of whom have faced a lifetime of disadvantage and disempowerment, to continue. We also note that the exemption contravened Article 27 of the CRPD, which recognises the right of people with disabilities to work on an equal basis with others and to enjoy just and favourable working conditions, Article 16, which assures freedom from exploitation, violence and abuse and Article 17, which protects the mental integrity of the person.

## **9. What additional compliance measures would assist in providing greater certainty and compliance with federal discrimination law?**

QAI strongly supports the Commission's position that there is a need for greater awareness-raising activities and possibly industry support to promote compliance, as well as robust review processes to measure the effectiveness of the Disability Standards. QAI considers that the introduction of voluntary audits, a general inquiry function and positive duties would be of significant value.

## **10. What form should a positive duty take under federal discrimination law and to whom should it apply?**

QAI strongly supports the introduction of a positive duty for public entities to proactively take measures to eliminate unlawful discrimination and harassment and advance equality. In the absence of a federal Human Rights Act, this is of particular importance as it shifts the focus from negative, responsive protections to a proactive, rights-based approach. This is imperative to bringing about cultural change.

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<sup>20</sup> *Nojgin v Commonwealth of Australia* [2012] FCAFC 192. This case was cited with approval in *Watts v Australian Postal Corp* (2014) 222 FCR 220, 250 and cited neutrally in *James v WorkPower Inc* [2018] FCA 2083, 2088.

We note the introduction of affirmative quotas as a means of addressing embedded, inter-generational and historical disadvantage and marginalisation. For example, QAI supports a commitment to introduce seven percent employment target for persons with disabilities in the Commonwealth public service.

### **11. What, if any, reforms should be introduced to the complaint handling process to ensure access to justice?**

QAI agrees that complaints processes must be available and accessible for all people. We commend the Commission for its work in this regard as it is an accessible and inexpensive jurisdiction.

We note that the nature of confidential conciliations reduces the likelihood that matters will resolve and places the complainant in the position of having to proceed to a less accessible and available forum, which is a significant limitation of discrimination law.

QAI proposes extending the timeframe to 12 months, with extensions available, to cover complex disputes and circumstances where vulnerable complainants have been unable or unwilling to take action earlier.

QAI strongly supports the provision of greater clarity about the ability for representative actions to be brought and agrees this would enable a greater focus on systemic discrimination issues and reduce the pressure on individual complainants. As noted above, as discriminatory practices, by their very definition, only affect persons because of their membership of a particular class or group, a key requirement of any discrimination system should be that claims can be understood and actioned collectively. In other jurisdictions, class action has proved a vital means of challenging embedded or institutional discrimination, however the sole collective right contained in the legislation (the right to make a representative complaint) is not designed in a user-friendly way and so is not utilised.

### **12. What, if any, reforms should be introduced to ensure access to justice at the court stage of the complaints process?**

The potential for an adverse costs order has been a significant deterrent to complainants pursuing discrimination matters beyond the conciliation stage. QAI submits that there should be no costs orders made against a complainant, except in very exceptional cases where there has been a clear demonstration of a deliberate and vexatious misuse of process.

Litigation is very expensive – the cost places it well out of the reach of many people (particularly disempowered people) – and discrimination complaints can be complex and lengthy to resolve. Awareness of this is enough to deter any people from making a complaint in the first place. To ensure the innate power imbalance that necessarily exists between a complainant and organisational respondent is not aggravated, strong safeguards should be in place regarding legal representation.

Discrimination law places a strong focus on settling complaints by conciliation, and the vast majority of complaints are resolved in private conciliations, with the outcome confidential. While this does have its merits in some circumstances, it means that its impact is limited – it is unhelpful as a deterrent, as a driver for altering social behavioural norms, as an impetus for the development or reform of laws or as a means by which policies and practices that create healthier, more productive

communities can be developed.

Where a matter does proceed to arbitration, the usual remedy is the award of monetary compensation (damages) to the individual complainant. The amount awarded is usually quite low, and is often eroded by the legal costs incurred in reaching this point. There is no exemplary or punitive component to the damages routinely ordered. There has been little attention paid to developing remedies that may have class-wide implications. This means that, despite its stated objectives, the aim of the discrimination legislation appears to be the private resolution of interpersonal disputes and compensation of individual victims. The fact that appeals from the Tribunal are directed to a court is also unhelpful as courts are traditionally very formal and conservative. This has certainly been true for discrimination cases, where judges usually take a limited and conservative approach.<sup>21</sup> Our most superior court, the High Court, has modelled this approach, restrictively interpreting the scope of direct discrimination.<sup>22</sup> Former High Court Justice Michael Kirby noted (in a dissenting judgment) in 2006 that the High Court has been increasingly reluctant to provide relief to claimants in the discrimination jurisdiction, with no successful High Court claims in the preceding decade.<sup>23</sup>

### **13. Is there a need to expand protections relating to harassment and vilification on the basis of any protected attributes?**

QAI considers that the particular vulnerability of persons experiencing intersectional discrimination that includes harassment and vilification must be addressed. Protections for vilification under federal discrimination law should be at least equivalent to the protections offered by state law and should attract both civil and criminal penalties in appropriate cases.

### **14. Are there other issues that you consider should be a priority for discrimination law reform? If so, please describe the issue and your thoughts on proposed solutions.**

As noted above, we consider consolidation of the separate discrimination statutes vital, particularly given the increasing understanding of the importance of addressing intersectional disadvantage.

## **Conclusion**

QAI thanks the Commission for the opportunity to make this submission. We would welcome the opportunity to provide further input into this inquiry.

QAI agrees that discrimination law alone is inadequate to address the significant, systemic and ingrained marginalisation and disempowerment experienced by vulnerable Australians on a daily basis. Discrimination law must be supplemented by other protections and mechanisms to promote equality and respect for human rights, such as a federal human rights instrument. QAI agrees with the Commission's statement that the absence of additional measures at present places additional burdens on the operation of discrimination laws (as the primary legislative mechanism to resolve human rights issues).

<sup>21</sup> See for example *Waters v Public Transport Corp* (1991) 173 CLR 349 at 372; *Purvis* (2003) 217 CLR 92 at [202] – [203]. Note that tribunals have on occasion developed remedies designed to prevent further discrimination (eg *Bellamy v McTavish & Pine Rivers Shire Council* [2003] QADT 15; *Simpson v Boyson & Belli Park Stud Pty Ltd* [2003] QADT 19) yet this is rare.

<sup>22</sup> *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92.

<sup>23</sup> *New South Wales v Amery* (2006) 230 CLR 174, [86] – [88], discussed by Creighton and Stewart, above n 22, 556-7.